Environmental Defenders Office

Submission to the Productivity Commission National Water Reform 2024 - Call for submissions

21 February 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

www.edo.org.au

Submitted to:
National Water Reform 2024
Productivity Commission
Attention: Commissioner Joanne Chong and Associate Commissioner Anne Poelina

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Acknowledgement of Country

EDO recognises and pays respect to the First Nations peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations cultural heritage through both First and Western laws. We recognise that First Nations Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as a person's right to freely determine their own political status and freely pursue their economic, social and cultural development. EDO respects all First Nations' right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws that existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human and environmental needs to ensure the environment and ecosystems that nurture, support, and sustain human life are also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the land.

A note on language

EDO is a non-Indigenous community legal centre that works alongside First Nations peoples around Australia and the Torres Strait Islands in their efforts to protect their Countries and cultural heritage from damage and destruction. In making our submission, we note that EDO represents First Nations peoples across Australia. Our clients have vastly different Country and waters, and they experience water laws in different ways across jurisdictions.

Out of respect for First Nations self-determination, EDO has provided high-level recommendations for western law reform to empower First Nations to protect their Countries and cultural heritage. These high-level recommendations comply with Australia's obligations under international law and provide respectful and effective protection of First Nations' Countries and cultural heritage.

We acknowledge there is a legacy of writing about First Nations peoples without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. For the purpose of this submission, we have chosen to use the term First Nations. We acknowledge that not all First Nations people will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

First Laws is a term used to describe the laws that exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherit and immeasurable worth. EDO recognises there are many different terms used throughout First Nations for what is understood in the Western world as First Laws.

Contents

Introduction

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide a submission to the inquiry into the reform progress of Australian governments towards achieving the objectives and outcomes of the 2004 *Intergovernmental Agreement on a National Water Initiative* (**NWI**).

Water is vital for life. It plays a critical role in the health of our communities, economy, and ecosystems. Australia is the driest inhabited continent on Earth,[1] and our limited water resources are in demand from competing interests including agriculture, extractive industry, urban and domestic water needs, the needs of the environment (e.g. to maintain and improve ecosystem function) and customary needs (e.g. cultural flows to maintain and improve spiritual, cultural, environmental, social and economic health and wellbeing for First Nations). These challenges will become more difficult as the population grows and climate change impacts increase.

The management of water resources in Australia is an increasingly complex issue. The environment, First Nations communities, the broader community and industry all rely on access to finite water resources. Demand for water is increasing as industry expands while future supply is subject to the risks and uncertainties of climate change. Meanwhile, the disparity between access to safe drinking water in urban centers and regional communities is a persistent issue requiring urgent attention.

The NWI is the key intergovernmental agreement underpinning water reform and regulation in Australia. The Federal Government and all Australian States and Territories have signed on to the agreement. Under the agreement, Australian governments have committed to:

- prepare water plans with provisions for environmental water;
- achieve sustainable water use in over-allocated or stressed water systems;
- introduce registers of water rights and standards for water accounting;
- expand trade in water rights;
- improve pricing for water storage and delivery; and
- better manage urban water demands, including the provisions of healthy, safe and reliable water supplies.

The *Water Act 2007* (Cth) requires regular assessment of progress towards implementing the NWI. The Productivity Commission conducted two of the previous inquiries; and has now called for submissions as it begins its third inquiry.

Importantly, we note that:

- The previous 2020 inquiry led the Productivity Commission to issue recommendations and advice for renewal of the NWI (**renewal advice**).[2]
- The Australian government has committed to reviewing and modernising the NWI.

[1] Shahbaz Khan, 'Managing climate risks in Australia: options for water policy and irrigation management' (2008) 48(3) *Australian Journal of Experimental Agriculture* 265-273, accessible here.
[2] Productivity Commission, Australian Government, *National Water Reform 2020: Findings, recommendations and renewal advice* (Recommendations report No 96, 28 May 2021) 1 ('**NWI Recommendations report**') <https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/>.

As noted in the *National Water Reform 2024 - Call for submissions* (**Call for submissions**), the "*findings and recommendations from the 2020 inquiry, and the NWI renewal advice, remain relevant, as the Australian Government has committed to renew and modernise the NWI and is in the process of doing so*".

In response to the Call for submissions, this submission addresses the following key areas for feedback:

1. Jurisdictional progress towards implementing the NWI with a focus on the Northern Territory and Western Australia's progress in relation to the following key issues:
    - Water allocation planning
    - First Nations water access, management and ownership
    - Community involvement/consultation

2. The Productivity Commission's 2020 recommendations and advice for renewal of the NWI including the following areas for inclusion:
    - First Nations water access, management and ownership
    - Incorporating climate change and extreme weather events into water planning
    - Access to safe and secure drinking water
    - Transparency and access to information

3. Conclusion and summary of recommendations

This inquiry process provides a key opportunity for the Productivity Commission to strengthen and update its NWI renewal advice and to reset ambition when it comes to water regulation in Australia. It is particularly timely as the Australian Government begins work on its commitment to renew and modernise the NWI.

1. Jurisdictional progress towards implementing the NWI

Introduction

The EDO provided extensive feedback on the implementation of the NWI and areas for inclusion in a new NWI, most recently in the Productivity Commission's 2020 Inquiry into National Water Initiative Implementation Progress. We acknowledge and continue to endorse our recommendations in the 2020 and 2021 submissions made to that inquiry, which are included in this submission at **Appendix A**.[3]

In this submission, we seek to draw the Productivity Commission's particular attention to jurisdictional progress and areas of concern in meeting the NWI in the Northern Territory (**NT**) and Western Australia (**WA**).

[3] Environmental Defenders Office, *Submission to the Productivity Commission on the National Water Reform Inquiry* (21 August 2020) (**2020 Submission**) available here; Environmental Defenders Office, *Submission on the Productivity Commission Draft Report: National Water Reform 2020* (1 April 2021) (**2021 Submission**), available here.

The time for urgent reform to protect and maintain our water resources in these regions, and the environmental and cultural values which depend on them, has never been more pressing. The NT and WA contain some of Australia's last pristine free-flowing rivers, including the Martuwarra Fitzroy River in the Kimberley and the Roper and Daly Rivers in the Top End of the NT.

Surface and groundwater resources across both jurisdictions are under increasing pressure from development, including hydraulic fracturing, intensive irrigated agriculture, and mining. In addition, climate change will have substantial effects on water resources. The Central Australian region across NT and WA is projected to experience greater warming than coastal regions.[4] Northern Australia is likely to see impacts to water availability, including increased frequency of extreme rainfall events, yet projected average rainfall remains unclear.[5] Southern WA is particular likely to see reduced rainfall and increased frequency of droughts.[6] First Nations people living on Country in regional and remote communities in these regions are likely to experience disproportionate impacts caused by climate change.[7]

Despite these pressures on water resources, there are significant deficiencies in water laws in each of these jurisdictions. In our view, water laws in the NT and WA are the weakest in the country.[8] Not surprisingly, the Productivity Commission's Assessment of National Water Initiative implementation progress report (2017–2020) (**NWI Implementation Report**)[9] raised a number of concerns with the implementation of the NWI in WA and the NT including, for example, the failure to enact legislation required to create secure, NWI-consistent water access entitlements for consumptive uses.[10]

An analysis of each jurisdiction's compliance and progress with the NWI is beyond the scope of this submission in the time allowed. Instead, this submission will focus on the following key issues in WA and NT:

- water allocation planning;
- First Nations access, management and ownership over water; and
- community involvement and consultation.

In our view, there is much more to be done in WA and the NT to bring those regimes in line with the NWI. This inquiry by the Productivity Commission is an opportunity to further highlight key deficiencies that must be remedied, including through ongoing reform in those jurisdictions.

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[4] IPCC, 2021: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (Regional Fact Sheet- Australasia) 2 available here.
[5] Ibid.
[6] Ibid.
[7] Natalie Teasdale and Peter Panegyres, 'Climate change in Western Australia and its impacts on human health' (2023) 12 *The Journal of Climate Change and Health* 6.
[8] Environmental Defenders Office, *October 2022 Update: Deficiencies in the existing water law and governance framework in the Northern Territory* (24 October 2022), available here.
[9] Productivity Commission, Australian Government, *Assessment of the National Water Initiative implementation progress (2017-2020)* (Implementation report No 96, 28 May 2021) (**NWI Implementation Report**).
[10] NWI Implementation Report, 3.

The forthcoming renewal of the NWI will also provide a crucial opportunity to direct the future ambition for water management and protection in Australia, including with regard to the specific needs of the NT and WA. We deal with what EDO would like to see in this renewal process in **Part 2** of this submission and summarise our recommendations in **Part 3.**

Overview – Northern Territory

In the NWI Implementation Report, the Commission found the NT had not implemented the agreed NWI commitments, and, in particular, was deficient in the following areas:

- failure to enact legislation to create secure, NWI-consistent water access entitlements;[11]
- overallocation of the Katherine Tindall Limestone Aquifer and several groundwater resources in the Darwin Rural area;[12]
- substantial declines in recent years in representation of Aboriginal people in water planning processes in the Territory;[13]
- use of a 'use it or lose it' policy which acts as a trade barrier;[14]
- failure to adopt trade approval service standards;[15]
- inadequate independent economic regulation;[16]
- issues relating to water quality regulation in regional and remote areas;[17]
- lack of drinking water standards set in NT legislation;[18] and
- inadequate and ineffective consultation and engagement.[19]

Since the NWI Implementation Report was published, EDO has also identified numerous shortfalls in the NT's implementation of the NWI and raised concerns with its water regulation and management more generally. These are referred to throughout this submission.

In October 2022, as part of the *Draft Territory Water Plan*, the NT government announced plans to reform the Territory's water legislation, promising to introduce standalone safe drinking water legislation by 2024 and replace the *Water Act 1992* (NT) (**NT *Water Act***) with new legislation by 2026.[20] These commitments were retained within the final *Territory Water Plan*, which the NT Government describes as the first whole-of-government strategic plan for water security.[21]

In October 2023, the NT Government published a report it had commissioned from the Badu Advisory Group assessing the NT Government's compliance with the NWI (**Badu Report**).[22] The Badu Report concluded that overall, the NT Government's planning processes were consistent

[11] NWI Implementation Report, 11.
[12] Ibid 33.
[13] Ibid 42.
[14] Ibid 58.
[15] Ibid 66.
[16] Ibid 1, 76-77, 89.
[17] Ibid 174.
[18] Ibid 174.
[19] Ibid 200.
[20] NT Government, *Draft Territory Water Plan* (October 2022) available here.
[21] NT Government, *Territory Water Plan* (June 2023) available here, 5, 24, 34.
[22] Badu Advisory, *Review of the NT's implementation of the National Water Initiative in relation to water planning* (13 July 2023) available here.

with the provisions of the NWI and subsequent guideline documents.[23] At the same time, the Badu Report's authors noted that it constituted "*high-level strategic advice*" and did not provide legal advice.[24] It expressly considered as outside of the scope of the review:[25]

- commenting on the merits or otherwise of principles, strategies, rules etc. contained within, or the outcomes associated with, the specific provisions contained within WAPs, policies or guidelines;
- consideration of non-water planning related elements of the NWI (e.g. water pricing and urban water reform); and
- undertaking consultations beyond the NT Department of Environment, Parks and Water Security (**DEPWS**) water planning team.

In our view, these limitations and methodological constraints mean the Badu Report cannot be understood as a complete assessment of whether the NT is compliant with the NWI. EDO commissioned an independent report from water law expert Alex Gardner evaluating the Badu Advisory Report (**Gardner Report**).[26] The Gardner Report is **attached** at **Appendix B** to this submission. It analyses the NT's water laws, policies and planning documents against the NWI and identifies areas of non-compliance and areas for improvement.

Overview – Western Australia

In the NWI Implementation Report, the Commission found WA had not implemented the agreed NWI commitments and, in particular, was deficient in areas including:

- failure to enact legislation to create secure, NWI-consistent water access entitlements;[27]
- failure to create statutory water allocation plans;[28]
- clearly established risk assignment frameworks for changes in allocation;[29]
- independent economic regulation of urban and rural water;[30]
- identification of cultural objectives in statutory water allocation plans;[31]
- lack of publication of the location or timelines of enforcement actions;[32]
- issues relating to water quality regulation in regional and remote areas;[33] and
- lack of progress regarding community partnerships.[34]

[23] Ibid 2.
[24] Ibid 1.
[25] Ibid 7.
[26] Professor Alex Gardner, *Evaluation of the Badu Advisory Report: Review of the NT's implementation of the National Water Initiative in relation to water planning* (12 February 2024).
[27] NWI Implementation Report, 11, 14, 16.
[28] Ibid 12, 30.
[29] Ibid 12.
[30] Ibid 70, 77.
[31] Ibid 43.
[32] Ibid 166.
[33] Ibid 173.
[34] Ibid 200.

In many of its findings about WA, the Productivity Commission noted that WA was "*considering draft legislation*" to strengthen deficiencies in its compliance with the NWI.[35]

The WA government first announced plans to reform the State's water legislation in 2006. This announcement was followed by a position paper released in 2013, 'Securing Western Australia's water future' (**Position Paper**), providing the public with an opportunity to comment on the proposed future of water resource management in WA.

The Position Paper was followed by a public comment period within which multiple stakeholders made submissions on the need for reform.

Despite continued engagement for the past 10 years regarding this reform process, unexpectedly on 21 December 2023, the Minister for Water announced that plans to consolidate the State's six water regulation Acts[36] would not proceed "*following stakeholder feedback*" that "*many of the existing and long-standing arrangements are suitable*".[37] In the context of the NWI Implementation Report findings and broader issues with WA's water regulation, this unexpected retreat from a long-term commitment towards water reform is nonsensical.

Some of the issues with WA's current water framework are detailed below. The absence of statutory water allocation plans, lack of allocation for environmental water, and the need for increased First Nations participation in water governance, demonstrate a lack of progress with compliance with the NWI and are just some of the reasons why water reform should be put back on the Government's agenda.

a. Water allocation planning

Overview

One of the objectives of the NWI is the "*statutory provision for environmental and other public benefit outcomes, and improved environmental practices*".[38] States and Territories agreed to identify these outcomes "*with as much specificity as possible.*"[39] The NWI requires that water that is for environmental and other public benefit outcomes be given statutory recognition and have at least the same degree of security as water access entitlements for consumptive use and be fully accounted for.[40] In 2021, the Commission found that this requirement has been "*largely achieved*", other than in WA.[41]

[35] See for example NWI Implementation Report, 30.
[36] *Rights in Water and Irrigation Act 1914*; *Water Agencies (Powers) Act 1984*; *Metropolitan Arterial Drainage Act 1982*; *Metropolitan Water Supply, Sewerage, and Drainage Act 1909 or Country Areas Water Supply Act 1947*.
[37] Minister for Water, 'Water priorities reset to focus on practical measures' (Media statement, 21 December 2023) available here.
[38] Intergovernmental Agreement on the National Water Initiative (25 June 2004) available here (**NWI**), [23](iii).
[39] NWI [78].
[40] NWI [35].
[41] NWI Implementation Report, 30.

A key mechanism to provide for the protection and maintenance of environmental and public benefit outcomes is through the enactment of statutory water plans, defined in the NWI as:[42]

> *statutory plans for surface and/or ground water systems […] developed in consultation with all relevant stakeholders on the basis of best scientific and socio-economic assessment, to provide secure ecological outcomes and resource security for users.*

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. 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.[43]

Governments have committed under the NWI to, amongst other things:

- providing a statutory basis for environmental and other public benefit outcomes in surface and groundwater systems to protect water sources and their dependent ecosystems;[44]
- ensuring water plans have a binding legal effect on the management of water resources;[45]
- achieving sustainable water use in over-allocated or stressed water systems;[46]
- the application of the best available scientific knowledge and use of socio-economic analysis in the water planning process;[47] and
- consulting with stakeholders within or downstream of plan areas,[48] and ensuring the 'inclusion of indigenous representation in water planning wherever possible'.[49]

Northern Territory

Water allocation plans

The Productivity Commission previously noted in its NWI Implementation Report that overall, jurisdictions other than WA had largely achieved their NWI commitments regarding water for environmental and public benefit outcomes, explaining that environmental water had at least the same level of security as water for consumptive uses, and referring to the ongoing monitoring of water plan areas in the NT.[50] However, as outlined in the Gardner Report, this evaluation is focused on whether water allocation plans are made under statutory provisions generally but did not consider the adequacy of the provisions of the NT *Water Act*.[51]

[42] NWI, Schedule B(i).
[43] NWI [39] notes that water plans are to prepared *"along the lines of the characteristics and components*" stipulated in Schedule E to the NWI.
[44] NWI [25(ii)].
[45] NWI [29]; Alex Gardner, Richard Bartlett, Janice Gray and Rebecca Nelson, *Water Resources Law*, (2018; 2nd edition), at [14.39].
[46] NWI [41].
[47] NWI [6(ii)].
[48] NWI [6(i)].
[49] NWI [52(i)].
[50] NWI Implementation Report, pp 31, 140, discussed in Gardner Report, 18.
[51] Gardner Report, 18.

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.*"[52] 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.[53] However, since "estimated sustainable yield" is not defined in the NT *Water Act*, it is left entirely up to individual Water Allocation Plans (**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.

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. EDO has previously noted that, unlike 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, such that they are arguably incapable of facilitating sustainable and equitable management of a vital, contested and increasingly constrained resource.[54]

Concerningly, there have been no improvements since the Productivity Commission's review concluded in 2021. In fact, since late 2022, the NT has taken steps to strip out more of the already limited content from the statutory plan document and place it in supporting documents. This has been done for the Georgina Wiso Water Allocation Plan (declared in November 2023), the draft Western Davenport Water Allocation Plan (released in draft in April 2023, and yet to be declared). We understand that the Mataranka Water Allocation Plan due to be released shortly will also follow the same format. Minutes from meetings of the Western Davenport Water Allocation Plan in October 2022 indicate that the new structure was developed, amongst other things, due to "*legal advice which indicated the Department [DEPWS] needed to be specific regarding any material contained within the WAP*"[55] and "*to prevent further opportunities for litigation*".[56]

Irrespective of the reasons for the change, the January 2024 decision of the NT Supreme Court in *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4 (**Singleton Station Case**), argued in September 2022, serves to highlight the deficiencies in the NT's water planning frameworks. That decision includes a finding that section 22B(4) of the NT *Water Act*, which states that "*water resource management in a water control district is to be in accordance with any water allocation plan declared in respect of the district*", does **not** require that water licences in a WAP area be consistent with the terms of a

[52] Kate Stoeckal, Romany Webb and Amy Hankinson, *Australian Water Law*, Lawbook Co 2012, 501.
[53] *Water Act 1992* (NT), s 22B.
[54] Environmental Defenders Office, *Deficiencies in the existing water law and governance framework in the Northern Territory* (August 2021); and see Environmental Defenders Office, *October 2022 Update: Deficiencies in the existing water law and governance framework in the Northern Territory* (24 October 2022).
[55] Western Davenport and Ti Tree Water Advisory Committee, DRAFT Minutes 26 October 2022, available here, 4.
[56] Western Davenport Ti Tree Water Advisory Committee, Minutes – Meeting #6, 3 October 2022 available here, 6.

declared WAP.[57] Rather, the plan is just one of many factors which the Controller of Water Resources is required to consider or "*take into account*", if relevant, when determining a water licence application.[58]

The NT is clearly not meeting its requirements under the NWI in circumstances where its water plans, already comparatively weak, have been found not to impose binding rules on the granting of water extraction licences. Paragraph [29] of the NWI expressly requires the allocation of water to a water access entitlement to be consistent with a water plan. If the decision in the Singleton Station Case is applied, not only are the plans not binding, but WAPs appear not to meet characteristics and components in Schedule E of the NWI in material respects, whilst deferring key aspects of decision-making to the water licensing assessment process.[59] These deficiencies affirm the need for an overhaul of the NT *Water Act*, to meet both its NWI commitments and the requirements of a renewed NWI as it is finalised in the coming years.

While the declaration of the Georgina Wiso WAP in November 2023 significantly increases the amount of the NT covered by WAPs, the decision in the Singleton Station Case undermines the effectiveness of WAPs in regulating water extraction. We are also concerned that the NT government's approach to the Georgina Wiso WAP – which covers over 11% of the NT's land mass and multiple regions – does not differentiate its application across the area it covers, increasing the risk of unsustainable over-extraction in one region of the WAP area. Without water levels being monitored and triggers being embedded in the WAP there is a risk that large areas within a WAP will allow the extraction of water that is inconsistent with the NWI (see paragraphs [36]-[40]).

Non-statutory planning processes

While deficiencies in water plans have already been highlighted above, there are also considerable issues with the legally unenforceable, non-statutory planning documents which apply outside of WAP areas. In some cases, these policy documents are also used to inform the preparation and application of WAPs.

The majority of the Northern Territory is not covered by a WAP. Prior to the recent declaration of the Georgina Wiso WAP in November 2023, which covers 11.55% of the Territory, it was estimated that approximately 5% of the Territory fell within a WAP area.[60] The Productivity Commission's Assessment of the National Water Initiative in February 2021, found that only 28% of the NT's licensed water entitlements fell within areas subject to a WAP.[61]

NT Water Allocation Planning *Framework*

[57] Singleton Station Case [58]-[59].
[58] Singleton Station Case [44]-[47].
[59] See, for example, discussion of the recent Georgina Wiso Water Allocation Plan in the Gardner Report, 27-28.
[60] William Nikolakis & R Quentin Grafton, 'Law versus justice: the Strategic Aboriginal Water Reserve in the Northern Territory, Australia' (2022) 38(1) *International Journal of Water Resources Development*, 11-29, DOI:10.1080/07900627.2021.1882406; Northern Territory Government, 'Georgina Wiso water allocation plan' (Web Page, 2024).
[61] NWI Implementation Report, 18.

Outside the WAP areas, the setting of the consumptive pool is governed by a non-statutory policy document known as the 'Northern Territory Water Allocation Planning Framework' (**Framework**). The Framework is a two-page document, which was approved in 2000 and has not been amended since, other than minor formatting changes. It sets out that scientific research will be applied when allocating non-consumptive uses, but where scientific research is not available, there are a set of contingent rules which will apply.[62] The NT is divided into two main zones: the Top End and the Arid Zone,[63] with a separate set of contingent rules for each zone, set out **below**:[64]

- For the Top End zone, referred to in that Policy as the "*northern one third of the Northern Territory*", at least 80% of both river flow and annual aquifer recharge is allocated to environmental and other public benefit use.[65]
- For the Arid Zone, referred to as the "*southern two thirds of the Northern Territory*", at least 95% of river flow, and at least 20% of annual aquifer storage (calculated at the start of extraction) is allocated to environmental and other public benefit use.[66] The contingent rule for Arid Zone aquifers contain a qualifier that '*[t]here will be no deleterious change in groundwater discharges to dependent ecosystems*'.[67]

EDO has considerable concerns with the application of the NT Water Allocation Planning Framework as a means of allocating water. These include that:

- It is unclear whether the allocations provided for the Top End and Arid Zone under the Framework are based on scientific research about the sustainability of such takes in the circumstances of each zone.
- The use of aquifer storage to quantify allowable water take is inappropriate and constitutes water mining. This was raised in the Final Report from the the Scientific Inquiry into Hydraulic Fracturing in the NT, which found that the Arid Zone Rule – if applied to fracking – "*would again essentially permit 'mining' of the groundwater resource, and would be ecologically unsustainable, since the recharge rate of the groundwater in this southern part of the Cambrian Limestone Aquifer system is very slow*". [68] Professor Matthew Currell, Sue Jackson and Dr Christopher Ndehedehe echoed these concerns in a 2024 paper, stating that safe extraction should be based on water flows to and from aquifers, along with considering the water cycle and its dependent values, rather than storage.[69]

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[62] Department of Environment, Parks and Water Security, 'Northern Territory Water Allocation Planning Framework', available here, 1 (**Framework**).
[63] Ibid 1.
[64] Northern Territory Government, 'Water allocation framework' (Web Page, 2024); Department of Environment, Parks and Water Security, 'Classification of the Top End and Arid Zone for Northern Territory water resources: Water Resources Division Technical Report 55/2020', available here.
[65] Framework, 2.1.
[66] Ibid, 2.2.
[67] Ibid, 2.2.2.
[68] Justice Rachel Pepper, *Scientific Inquiry into Hydraulic Fracturing in the NT*, Final Report, Water (17 March 2017), available here, 137.
[69] Professor Matthew Currell, Sue Jackson and Dr Christopher Ndehedehe, Risks In The Current Groundwater Regulation Approach in the Beetaloo Region, Northern Territory, Australia [2024] *Australian Journal Of Water Resources* 1 , available here, 11-12.

On 15 February 2024, the NT Government finalised its 'Surface water take – wet season flow policy' (**WSF Policy**).[70] This non-statutory policy provides rules for determining the volume of water that may be taken from rivers in the Top End of the Territory during the wet season. The stated purpose of the WSF Policy is to "*set the rules for quantifying wet season water flow volumes available for consumptive use from a river basin*".[71] Under the policy, the volume of water available from wet season water flows to consumptive uses will be "*five per cent of the 25th percentile of total flows for the three highest flow months of the year based on the previous 50 years flow or modelled rainfall data of the river basin (five per cent of the 25th percentile)*". [72] While calculation of consumptive pool is based on the three wettest months of the wet season, water extraction will not be restricted to that period.

The WSF Policy provides further principles which also apply in determining water availability from wet season water flows, including that:

- total flows will be determined "*using the historical data (typically 50 years) from relevant department gauging stations. If there is insufficient data, the total flows will be calculated using the department's surface water models*";[73] and
- the proportion of the total wet season consumptive flow available to take under a licence will be calculated "*as a proportion of total catchment flow… [g]enerally… the further downstream the point of take, the greater the portion of the wet season consumptive pool for the river basin that would be available*".[74]

The WSF Policy allows for the determination of the consumptive pool *without* a NWI compliant (or indeed any form of) water plan in place. The WSF Policy does not appropriately explain the process by which the consumptive pool will be determined, noting that the total flows could be identified by reference to either the last 50 years of rainfall data or the "*modelled rainfall data of the river basin*", and that the Department (DEPWS) will calculate flow using its own surface water models if there is insufficient data. Nor does it articulate how a proportion of total catchment flow will be arrived upon to set limits around surface water take licences. To the extent historical data (or modelling based on that data) is relied upon to determine the consumptive pool, there is no acknowledgement of changing climatic conditions and the impact of rising temperatures and more extreme weather events on catchment conditions.

The WSF Policy also claims that taking water will stop when specified minimum flow thresholds cannot be met in the river basin or point of take, being conditions which are location specific, "*greater than transitional flows*" and which "*use river height as a surrogate measure for flow*".[75] There is no further information about how flow rate conditions are to be set, such as by reference to a determination of environmental and cultural water requirements and what is required to

[70] Department of Environment, Parks and Water Security, *Northern Territory Government* (Web Page), available here (24 January 2024) ('**WSF Policy**'). This was released along with the final Interference with a Waterway Guideline', which we do not comment on in this submission.
[71] WSF Policy, 5.
[72] WSF Policy, 5.
[73] WSF Policy, 5.
[74] WSF Policy, 5
[75] WSF Policy, 7.

protect and maintain those values. Determination of these conditions (and indeed, the appropriateness of surface water take more broadly for any given catchment), should take place through an NWI-compliant statutory planning process. Flow-rate conditions should then be incorporated within a binding and enforceable statutory water plan.

When the Draft WSF policy was released in late 2022, EDO submitted that there was a concerning lack of transparency and detail in that policy, and that it had the potential to lock in perverse environmental, social and economic outcomes.[76] Whilst the final policy revises the principles for calculating the consumptive pool, many of EDO's concerns have not been mitigated.

Notwithstanding these numerous concerns, and despite the WSF Policy remaining in draft at the relevant time, the NT recently directed a water extraction licence applicant to re-submit its licence application with consideration of the Draft WSF Policy. The licence applicant, Australian Ilmenite Resources, seeks to capture surface water run-off from the catchment area of the Roper River, severely diminishing the flows to a number of the river's tributaries.[77] Whilst that application has not yet been determined by the NT's Controller of Water Resources, EDO is deeply concerned by the potential application of the WSF Policy to the catchment area of the Roper River, the second largest river in the Territory, and one of the last free-flowing tropical rivers in the country.

The NT should move away from non-statutory policies in water planning

We acknowledge that the current NWI leaves considerable discretion to States and Territories to determine whether a plan is prepared, the area it should cover, the level of detail required and so forth based on an "*assessment of the level of development of* water systems*, projected future consumptive demand and the risks of not having a detailed plan*".[78] However, we also note Professor Gardner's consideration of the *2010 NWI Policy Guidelines for Water Planning and Management*, in which he observes that it is "*not consistent with the 2010 guideline to think that a WAP is not needed until there are high levels of water resource development*".[79]

We submit that the NT is over-reliant on non-statutory policies to set consumptive pools and make water licence determinations, especially in areas with significant ecological and cultural values. This includes decisions relating to the Territory's free-flowing tropical rivers. The consumptive pool should be determined through NWI compliant statutory water plans that are transparent, subject to regular independent review and public consultation, apply the best available scientific knowledge and socioeconomic analysis, and promote the concept of ecologically sustainable development. Without appropriate NWI compliant water planning processes in place, which take into account the cumulative impacts of proposals, the NT risks locking in unsustainable levels of extraction and destroying its precious ecological and cultural values.

[76] See Environment Defenders Office, 'EDO Briefing Note: Northern Territory Surface Water Take Wet Season Flow Policy and Draft Interference with a Waterway Guideline' (16 December 2022) available here.
[77] Application for surface water extraction licence, Australian Ilmenite Resources Pty Ltd, as advertised for public comment on 12 January 2024.
[78] NWI [38].
[79] Gardner Report, 36.

Western Australia

WAPs in WA – a neglected statutory framework

The *Rights in Water and Irrigation Act 1914* (WA) (**RIWI Act**) is the primary piece of water legislation in WA and provides for the creation of regional, sub-regional, or local area management plans – in other words, statutory WAPs.[80] Plans may relate to more than one area.[81] However, a statutory WAP cannot be approved without:

- review and advice from the Water Resources Council;[82] and
- consultation with the relevant water resources management committee (if one exists for the region, sub-region or area to which the plan relates).[83]

Statutory WAPs cannot be approved in WA because the Water Resources Council has not been formed. As a result, the statutory provisions for WAPs under the RIWI Act have not been used since they were introduced over 20 years ago.[84]

Even if the Minister for Water had established the Water Resources Council and statutory WAPs were created under the RIWI Act, the statutory framework itself has significant deficiencies.

While the RIWI Act provides that the 'purpose' of each plan is to set out 'matters that are to guide the management […] of water resources' in the area where the plan applies,[85] this language appears non-binding and unlikely to impose mandatory considerations on the Minister for Water or alternative decision maker.

For example, the purpose of:

- a regional management plan is to set out general matters such as the definition of water resource values, including environmental values, and the protection of those values, the use of water resources, and the integration of water resources planning and management with land use planning and management;[86]
- a sub-regional management plan is to set out particular matters such as how rights in respect of water are to be allocated to meet various needs, including the needs of the environment, matters to be taken into account in considering licensing applications, the Minister's assessment of the capacity of water sources to provide water at sustainable levels of use and the environmental impact of developing those sources;[87] and
- a local management plan is to set out particular matters such as how rights in respect of water are to be allocated, and water may be taken and used, to meet various needs

[80] RIWI Act s 26GV(1).
[81] RIWI Act s 26GV(2).
[82] RIWI Act s 26GZE. The Water Resources Council is established under s 16 of the *Water Agencies (Powers) Act* 1984 (WA).
[83] RIWI Act s 26GZ.
[84] Alex Gardner, Richard Bartlett, Janice Gray and Rebecca Nelson, *Water Resources Law*, (Lexis Nexis Butterworths, 2nd ed,2018) ch [15.2].
[85] RIWI Act s 26GW(2), 26GX(2), 2GGY(2).
[86] RIWI Act s 26GW(2).
[87] RIWI Act s 26GX(2).

including the needs of the environment, and matters to be taken into account in considering licensing applications.[88]

All plans must specify the monitoring and reporting that must be undertaken to ensure, "*as far as practicable*" that the objects of Part 3 are achieved in the implementation of the plan. Those objects begin:[89]

> (a) to provide for the management of water resources, and in particular —
>
> > (i) for their sustainable use and development[90] to meet the needs of current and future users; and
> >
> > (ii) for the protection of their ecosystems and the environment in which water resources are situated, including by the regulation of activities detrimental to them.

The objects of Part 3 also include:

> (c) to foster consultation with members of local communities in the local administration of this Part, and to enable them to participate in that administration; and
>
> (d) to assist the integration of the management of water resources with the management of other natural resources.

While the objects of Part 3 look good on paper, they only need to be achieved "*as far as practicable*".[91] Clear and mandatory considerations are needed.

Non-statutory WAPs

In the absence of statutory WAPs, WA uses non-statutory WAPs prepared by the Department of Water and Environmental Regulation (**DWER**) in accordance with its 'Water allocation planning in Western Australia' guide (**WA WAP Guide**).[92]

Water extraction in WA is managed through issuing licenses under the RIWI Act[93]. Licence decisions are guided by WAPs. As explained in the WA WAP Guide, "[WAPs] set out how much water can be licensed for abstraction and how much water is left in the system … An allocation plan details allocation limits, water for the environment and our approach to managing water resources within a defined plan area."[94] The WA WAP Guide makes no reference to a precautionary approach and does not require that the starting point for assessment be the identification of environmental and other public benefit outcomes in the relevant plan area.

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[88] RIWI Act s 26GY(2).
[89] RIWI Act s 4.
[90] The reference to 'use and development' includes use and development for domestic, commercial, recreational, cultural and navigational purposes: RIWI Act s 4(2).
[91] See RIWI Act, ss 26GW(3), 26GX(3) and 26GY(3).
[92] Department of Water, 'Water allocation planning in Western Australia - A guide to our process' (2011) accessible here.
[93] RIWI Act ss 5C and 26D.
[94] WA WAP Guide, p 7.

DWER says the planning processes and the components of a non-statutory WAP reflect the RIWI Act and 'closely align' with water reform taking place under the NWI.[95] However, the WA WAP Guide is exactly that – a guide that does not mandate DWER's licensing decisions. The absence of statutory WAPs means that water allocation limits are not binding or legally enforceable. Further, water allocation limits and statutory allocation plans are often only set where there is a risk to a water resource, other users or the environment, or where water resources are approaching or have approached full allocation.

DWER prepares non-statutory water allocation plans prioritising those which are:[96]

- at or approaching full allocation or with rapidly increasing water demand;
- strategic priorities for WA or Australia;
- the subject of commitments (i.e. government commitments or where a plan review is triggered or due).

There are 23 non-statutory WAPs or water management plans currently used by DWER with an additional five plans in various stages of preparation. The existing plans cover around 17% of WA's land mass, or 418,000km.[2] More than two thirds are more than 10 years old, with the oldest being the 1999 Exmouth WAP, and with many of those including more recent addendum.[97]

These non-statutory WAPs are all structured slightly differently, but generally include a purpose or objects, allocation limits according to aquifer based on availability, water policy for the relevant area, a monitoring program and plan for implementing and evaluating the plan, and hydrogeological data about the region. The plans do not include an expiration date and instead provide a date of review – which has often been the trigger for the addendums.

For three areas – Skuthorpe, Serpentine River and North Dandalup – DWER has prepared a Water Allocation Statement. For Skuthorpe, this statement does not include allocation limits, but is instead a guide for those seeking to extract water about the steps they need to take to apply for a water licence. Both the Serpentine River and North Dandalup statements include information about how water will be released from the Serpentine River and the North Dandalup Dam, with defined triggers depending on the inflow into each system over a year.

The absence of statutory WAPs also has implications for the assessment of water licences. Under the RIWI Act, when assessing whether to grant a water licence, DWER is required to consider various factors, including whether the proposed taking and use of water are "*in keeping with a plan approved under Part III Division 3D Subdivision 2*" (i.e. a statutory WAP].[98] Although the Department says that it bases its licensing decisions on the limits and policies that are set out in a (non-statutory) WAP,[99] there is no legislative obligation for the Department to do so under the RIWI Act, given that there are no "*plans approved under Part III Division 3D Subdivision 2*".

[95] Ibid 5.
[96] Ibid 10.
[97] See, eg, Department of Water Government of Western Australia, The Carnarvon Artesian Basin Water Management Plan (December 2018) available here.
[98] RIWI Act Sch 1, cl 7(1)(g)(iii).
[99] Department of Water, 'Water Allocation Planning in Western Australia - A guide To Our Process' (2011) 5.

The WA framework is also deficient from an enforcement perspective. In addition to WAPs being non-statutory and therefore non-binding and unenforceable, community members have little to no opportunity to engage with decisions about water extraction that is allegedly guided by WAPs. This is because water licence applications, determined by DWER, cannot be reviewed by third parties[100] and there is no merits review process available under the RIWI Act. Third parties are therefore left with only judicial review as a method of intervention – made more difficult by the absence of the publication of licence applications and decisions, discussed further below.

EDO recommends that WA should not only commit to using the statutory WAP mechanisms in the RIWI Act, but ensure that the first step in statutory planning is the identification of what the environmental and other public benefit outcomes are for any particular surface or groundwater management unit or area. Those outcomes should be developed by proper application of the precautionary principle. Any determination of allocation limits or plans must proceed from that starting point and always provide sufficient confidence for the achievement of those outcomes.

Failure to statutorily recognise environmental water

WA is the only jurisdiction that has not achieved statutory recognition of environmental water.[101] Non-statutory WAPs determine allocation limits for consumptive uses only and do not include allocations for non-consumptive uses like groundwater dependent ecosystems or cultural values.

The WA WAP Guide explains DWER determines how much water can be abstracted from a water resource by first assessing how much water the environment needs.[102] The Guide further explains that "*environmental water may be defined within the plan as an annual volume or as a regime*."[103]

WA policy suggests allocations for consumptive use are determined after consideration of environmental water needs. This process is not NWI compliant.

WAPs should require allocations for both consumptive and non-consumptive uses and, in particular, allocate water to the environment to support ecosystems and sustain ecological values as well as providing the same level of security of water for consumptive uses.

In an article from 2017, authors Jensen and Gardner noted that:

- WA has prioritised water supply for consumptive use under pressure from a growing population. Urban areas draw a significant amount of water from outside urban regions to the detriment of the natural environment.[104]
- In WA, there is no legal duty to provide environmental water provisions, to make them at a certain level, or to make them in priority to the allocation and delivery of water to

[100] Instead, review rights are limited to licence applicants, a who is entitled to have the licence transferred to them, or a person who is a 'third-party agreement holder' – someone who has entered an agreement with the licence holder for the taking of water under the licence for a limited period: RIWI Act Sch 7 cl 30(1).
[101] Productivity Commission (2021) National Water Reform 2020, Productivity Commission Inquiry Report. No 96, 28 May 2021, 100.
[102] WA WAP Guide, 18.
[103] WA WAP Guide, 19.
[104] Jeanette Jensen and Alex Gardner, 'Legal Duties for Environmental Water Provisions in Western Australia' (2017) 42 *University of Western Australia Law Review* 206, 207.

consumptive purposes. Nor is there a duty to restore or rehabilitate degraded waterways and wetlands affected by water development projects.[105]

In the NWI Implementation Report, the Productivity Commission noted that WA was "*considering draft legislation*" that would provide statutory recognition of water for environmental and public benefit outcomes.[106] Given the WA Government's recent announcement to not proceed with legislative reform, and the absence of any update to the contrary, we no longer believe WA is looking to provide statutory protection to water for environmental and public benefit outcomes. We are therefore unable to see how WA will satisfy its commitment.

b. First Nations water access, management and ownership

Overview

- **Providing for First Nations people's interests and engagement in water**

In 2017, the Productivity Commission found that most States and Territories had "*maintained or improved arrangements for engaging Aboriginal and Torres Strait Islander people in water planning*" and in 2021 found that partnerships had been further progressed and developed.[107] Notwithstanding this, the Productivity Commission also found that progress towards NWI commitments relating to consultation with Traditional Owners about water planning and inclusion of "*social, spiritual and customary objectives*" in water plans has been slow, and those objectives had not been fully achieved.[108]

We agree with the Commission's findings that much more needs to be done to include First Nations people's interests in water in jurisdictional planning and the management of water.[109]

This inquiry provides a further opportunity to provide recommendations on actions States and Territories can take to address the ongoing dispossession of First Nations people from making decisions about water on Country and lack of representation (formally in legislative processes, and in practice) in water decision-making.

First Nations communities hold a deep cultural, customary and spiritual connection to water (both surface water and groundwater), a relationship that is unique from the Anglo-Australian paradigm of water ownership and extraction.[110] This spiritual significance extends to conferring rights, responsibilities, and obligations in accordance with customary laws, traditions and protocols.

[105] Jeanette Jensen and Alex Gardner, 'Legal Duties for Environmental Water Provisions in Western Australia' (2017) 42 *University of Western Australia Law Review* 206, 241.
[106] NWI Implementation Report, 30.
[107] NWI Implementation Report, 35.
[108] NWI Inquiry Report, 122.
[109] NWI Recommendations Report, 15.
[110] Tony McAvoy, 'Water - Fluid Perceptions' (2006) 1(2) *Transforming Cultures eJournal* 97, 97-98 <https://doi.org/10.5130/tfc.v1i2.262>.

These include to protect, conserve and maintain the environment and ecosystems so as to ensure the sustainability of the whole environment.[111]

While the NWI has, to date, identified the need for First Nations water access, it has failed to provide the foundation for substantial reforms. First Nations people are leading the conversation about First Nations water rights policy in Australia,[112] including through various statements and initiatives of their own.

In 2017, leading academics published a key article titled "Australian Indigenous Water Policy and the impacts of the ever-changing political cycle". The article provides a detailed analysis of contemporary Aboriginal water policy and initiatives. Key reflections from this analysis include:

- Water policy amongst First Nations in Australia is not homogenous,[113] meaning views and priorities may be different amongst First Nations peoples.
- First Nations' water policies are underrepresented in the Australian water management literature, due to the largely oral traditions of First Nations knowledge transfer.[114]
- It is important to look at First Nations' water policy because:
    - issues that concern First Nations peoples should be addressed by First Nations peoples, as a matter of principle; [115]
    - First Nations peoples' perspectives as Traditional Owners and long-term land managers can provide unique insight into national water management policy development;
    - a substantial proportion of land is managed by First Nations peoples and communities; and
    - First Nations' water policy is cutting edge, highly cognisant of colonial biases, and grounded in the contemporary context.[116]

Additionally, First Nations' water policies are underrepresented in the Australian water management literature due to the prioritisation of western science over First Nations' knowledge and perspectives, and inequities in the ability of first Nations peoples to pursue educational opportunities that allow the publication of knowledge in written literature.

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[111] North Australian Indigenous Land and Sea Management Alliance, *The Mary River Statement* (28 January 2020) <https://nailsma.org.au/resource-library/mary-river-statement>.
[112] Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, 'Australian Indigenous Water Policy and the impacts of the ever-changing political cycle' (2016) 20(2) *Australasian Journal of Water Resources* 132.
[113] Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, 'Australian Indigenous Water Policy and the impacts of the ever-changing political cycle' (2016) 20(2) *Australasian Journal of Water Resources* 132.
[114] Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, 'Australian Indigenous Water Policy and the impacts of the ever-changing political cycle' (2016) 20(2) *Australasian Journal of Water Resources* 133, 134.
[115] See also, National Agreement on Closing the Gap (July 2020), clause 19(a): Aboriginal and Torres Strait Islander people have been saying for a long time that they need to have a much greater say in how programs and services are delivered to their people, in their own places and on their own country.
[116] Katherine Selena Taylor, Bradley J Moggridge and Anne Poelina, 'Australian Indigenous Water Policy and the impacts of the ever-changing political cycle' (2016) 20(2) *Australasian Journal of Water Resources* 134.

Ultimately, First Nations peoples should lead ongoing discussions about First Nations water policy.[117]

The NWI Recommendations Report suggests that the renewed NWI include a new co-designed element dedicated to First Nations peoples' access to water and the involvement and participation of First Nations people in water management, as well as improved cultural outcomes using existing frameworks.

We agree with this advice but note that it can be strengthened, including by incorporating scope to – in circumstances as deemed appropriate by First Nations people) – acknowledge and develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being). This includes support, resourcing and prioritisation of First Nations-led and co-governance models of water resources.

This advice can also be strengthened through the incorporation of the principle of Free, Prior and Informed Consent (**FPIC**) of First Nations peoples in water management frameworks.

We also note that resourcing is a particularly important consideration. The renewal advice should include consideration of funding and resourcing to achieve objectives relating to First Nations involvement. Consultation with First Nations people should be comprehensive and include the views of communities. Our full set of recommendations in relation to the Renewal Advice are summarised in **Part 3 of this Submission**.

Northern Territory

The Northern Territory has the highest proportion of First Nations people of any Australian jurisdiction with 26.3 per cent (about 61,000 people) of Territorians being Aboriginal as at the 2021 Census. It is also unique in that the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) has facilitated greater rights to land for Aboriginal Territorians than exist under the rights enshrined by the *Native Title Act 1993* (Cth). ALRA has enabled Aboriginal people across the Territory to gain inalienable freehold title to their land, enabling them to have control over traditional lands and veto mineral and exploration projects on their land. Over 50% of land in the Territory is held under ALRA, whilst the *Native Title Act* applies to further large swathes of the Territory.

Unfortunately, these Commonwealth protections for Aboriginal land have not translated to strong rights to water for Aboriginal people in the Northern Territory. Under the NT *Water Act*, ownership and control over water vests in the Crown.[118] The Act provides limited opportunities for Aboriginal people to be involved, let alone to lead, decision-making around water allocation and management, and fails to facilitate the principles of FPIC. Deficiencies in water laws and governance and a failure to prioritise First Nations voices has a direct impact on First Nations' ability to manage and care for Country.

[117] See Anne Poelina, *Lawful but Awful, and A Declaration for Peace* (2022) Submission to the United Nations Special Rapporteur on the Rights of Indigenous Peoples.
[118] NT *Water Act*, s 9.

The NWI Implementation report identifies that the NT has made progress through amendments to the NT Water Act which require that allocations in a WAP must include an allocation to the Aboriginal Water Reserve.[119] The Aboriginal Water Reserve (**AWR**) is defined in s 4(1) of the Water Act to mean "*a reserve of water allocated in a water allocation plan for Aboriginal economic development in respect of eligible land designated under section 22C*".

The Minister must consult with the relevant Aboriginal Land Council before declaring a WAP that designates land as eligible land.[120] Section 71BA of the Water Act further provides that the Water Controller must not grant a water extraction licence in relation to an AWR unless Aboriginal persons of a class prescribed by regulation have given consent. However, no such regulations have been made under the NT *Water Regulations* to date. In other words, rights that Aboriginal persons have to access the AWR within WAPs have no practical effect because no licences can be granted. Outside a WAP area, there is no legal framework in relation to water allocations for future Aboriginal economic development.

We also note that the land which is determined to be "eligible land" for the purposes of an AWR under s 4B does not extend to land where Aboriginal people have non-exclusive possession native title (e.g., rights which co-exist with pastoral landholders) or those that do not have specific tenure rights over land altogether. The eligibility rules have been criticised, for example, by the Northern Land Council as being far too restrictive, given that most native title land in the NT is held under non-exclusive title.[121] The narrow focus of AWRs on economic development has also been critiqued more broadly as not doing enough to deliver water justice for First Nations communities.[122]

Western Australia

In the NWI Implementation Report, the Productivity Commission noted that WA had:

- established the Aboriginal Water and Environmental Advisory Group in 2018 to advise the WA Government on matters of water and environmental policy, legislation and programs, including consultation for water allocation plans; [123] and
- executed the Yamatji Nation Indigenous Land Use Agreement, which included a Strategic Aboriginal Water Reserve.[124]

The Commission also stated that if passed, "*Western Australia's Water Resources Management Bill will provide for an explicit power to incorporate cultural objectives into water allocation plans.*"[125]

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[119] NT *Water Act* s 22B(7); NWI Implementation Report, 41.
[120] NT *Water Act* s 22C(2).
[121] 2020 Submission (above n 3), 15.
[122] Kat Taylor, Anne Poelina and Quention Grafton, 'The lie of aqua nullius, 'nobody's water', prevails in Australia. Indigenous water reserves are not enough to deliver justice' *The Conversation* (online, 23 December 2022) accessible here.
[123] NWI Implementation Report, 37.
[124] Yamatji Nation Indigenous Land Use Agreement (executed February 2020).
[125] Ibid 38-39.

Unfortunately, given reform is now off the table, this no longer seems to be a possibility and is a significant missed opportunity.

The Productivity Commission notes that the WA Government had engaged Traditional Owners during the development of WAPs and scientific investigations to inform water plans in a number of locations, including Derby. Following consultation with Traditional Owners, DWER noted that a revised draft Derby plan was needed.[126]

In some jurisdictions, AWRs have been implemented as a mechanism to allow First Nations involvement in the management of water resources – see NT above. The WA WAP Guide does not make reference to AWRs. As noted above, in some cases, AWRs have been seen as limiting due to their narrow scope, with their purpose being to provide economic opportunities for First Nations.[127]

First Nations have proposed various models and initiatives for the management of water resources, including the incorporation of AWRs into land use agreements (due to their nature as negotiated settlements rather than a 'one size fits all' approach)[128] and the establishment of authorities for specific water resources.[129]

For example, the Martuwarra Fitzroy River Council has called for the establishment of a statutory authority to manage the Martuwarra River.[130] In 2019 article 'Martuwarra Fitzroy River Watershed: One society, one river law' the authors stated that "*there is a real opportunity for new sustainable economies and new ways of doing business with Indigenous people on Indigenous lands: Indigenous aspirations for alternative types of development, such as hybrid economies, life projects, and cultural actions, take into account economic, social, cultural and health considerations*".[131]

It is imperative that the WA Government acknowledge the individual perspectives of First Nations peoples and engage in genuine and ongoing consultation with First Nations in relation to water management.

c. Community involvement/consultation

Overview

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*

[126] Department of Water and Environmental Regulation, *Water planning in the Fitzroy* (Web page, updated 24 October 2023) accessible here.
[127] Kat Taylor, Anne Poelina and Quention Grafton, 'The lie of aqua nullius, 'nobody's water', prevails in Australia. Indigenous water reserves are not enough to deliver justice' *The Conversation* (online, 23 December 2022) accessible here.
[128] Ibid.
[129] Anne Poelina, Kathrine S. Taylor & Ian Perdrisat, 'Martuwarra Fitzroy River Council: an Indigenous cultural approach to collaborative water governance' (2019) 26(3) *Australasian Journal of Environmental Management* 236.
[130] Ibid.
[131] Martuwarra, RiverOfLife et al, 'Martuwarra Fitzroy River Watershed: One society, one river law' (2023) 2(9) *Public Library of Science (PLOS) Water* (online) accessible here.

security of water access entitlements or the sustainability of water use."[132] 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*".[133]

Schedule E of the NWI specifically requires water planning processes to include:

- "*consultation with stakeholders including those within or downstream*" of a plan area; and
- "*adequate opportunity for consumptive use, environmental, cultural and other public benefit issues to be identified and considered in an open and transparent way*".[134]

As noted in the Gardner Report, the NWI provisions for water planning express "*more generally applicable principles of open, transparent, well-informed community consultation in water allocation planning*".[135]

Northern Territory

The Gardner Report observes that there is a complete lack of guidance on the water resource planning process under the NT *Water Act*, other than the Minister's discretionary power to appoint Water Advisory Committees (**WACs**), discussed further **below**. He further notes that:

> *"The NWI conceives of water allocation planning as a statutory process. All other Australian jurisdictions' legislation includes legal guidance on the planning process; the Water Act (NT) is alone in not doing so" (citations omitted).*[136]

Water Advisory Committees

Although the NT *Water Act* provides for the creation of "*water advisory committees*", there are several issues with the relevant legislative provisions.

First, there is no requirement that WACs actually be established. Even in relation to the development of a new WAP the creation of these committees is entirely discretionary, with the *Water Act* only stating that the Minister "*may*" establish them.[137]

Second, 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.

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[132] NWI [95].
[133] NWI, Schedule A.
[134] NWI, Schedule E, cl 6.
[135] Gardner Report, 8.
[136] Professor Gardner also observes, at fn 88, that the statutory provisions for water allocation planning in the WA legislation have not been used in more than twenty years.
[137] NT *Water Act*, s 23.

Third, there are no requirements that set out fundamental issues such as the:

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

A further issue is that while WACs are established by the Minister, there is no legislative mechanism by which the WAC is actually required to brief or report to the Minister. Instead, the NT *Water Act* only requires that the WAC provides advice to the Water Controller.[138] Once a WAP is declared in the NT, the relevant WAC 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 WACs should include the assessment of WAPs after their implementation.[139]

It is therefore not surprising that in the NWI Implementation Report, the Productivity Commission noted in relation to the NT that "*[w]hile water plans remain under development, community concern around the level of water extraction and the lack of community engagement is increasing.*"[140] It pointed out that since 2017 there has been a decline in the number of WACs, with some committees ceasing as WAPs are declared, and others, such as the Howard Water Advisory Committee ceasing despite a WAP never being finalised.[141]

This concerning trend has continued since the Productivity Commission's last assessment:

- The three Aboriginal representatives on the Mataranka Water Advisory Committee resigned in September 2023 and were not replaced, meaning that Aboriginal water interests are not represented in ongoing discussions about that plan.[142]
- There was no WAC appointed in relation to the development of the Georgina Wiso Water Allocation Plan, despite the plan area representing nearly 12% of the Territory, including significant tranches of land held by Aboriginal people under ALRA and the *Native Title Act 1993* (Cth).

Additionally, while WACs can have a role to play, they should not be seen as a complete replacement for broader, genuine community consultation, as envisaged by the NWI.

Western Australia

In 2016, a group of leading water academics noted that in the context of NWI reforms, "*the focus of public participation in water governance has been either via water markets or through non-binding*

[138] NT *Water Act*, ss 23(1B)(a) & (3).
[139] NT *Water Act*, s 23(1B)(a).
[140] NWI Implementation Report, p 27.
[141] NWI Implementation Report, p 37.
[142] Mataranka Tindall Water Advisory Committee: Meeting 15 Minutes (28 September 2023) 2,11.

techniques of consultation undertaken by decision-makers. The extent of influence and genuine engagement by the broad range of interests and stakeholders in the governance of water resources has been at best uneven".[143] This is certainly the case in WA.

This inequity is exemplified where consultation committees are either not established in the ways prescribed by legislation which provide for diversity of opinion, or at all. Even where legislation prescribes membership of a committee, there are significant gaps which should be addressed by reform. While management committees and advisory committees can have a role to play, they should not be seen as a complete replacement for broader, genuine community consultation, as envisaged by the NWI.

Water resources management committees

The RIWI Act provides for the establishment of water resource management committees to:

- provide the Minister with assistance and advice "*to the extent that the Minister asks the committee to do so*";[144]
- make submissions to the Minister on by-laws relating to water;[145]
- consult on regional, sub-regional or local area management plans (i.e. statutory WAPs, noting that none exist in WA);[146]
- ensure the Minister is informed of, and has access to, community views on matters relating to water resources;[147] and
- assist the Minister in the resolution of disputes about the use of water resources involving persons having rights under this Act or persons affected by the exercise of those rights.[148]

The membership of these committees is also prescribed in the RIWI Act and includes residents, employees or business owners in the locality or area,[149] representatives of local government, and people who "*have knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities*".[150]

While the ability to create water resources management committees is a positive aspect of the RIWI Act, the regulatory framework remains insufficient noting:

- These committees are not mandatory. The Minister holds discretion as to whether a committee is established, and also whether to ask for "*assistance and advice*".
- The requirement that a committee include a person "*who has knowledge and experience relating to the water needs and practices of local communities, including Aboriginal communities*" is inadequate. The committee should include a First Nations representative from the area.

[143] Carmody et al, 'The Future Of Water Reform in Australia —Starting A Conversation' (2016) *Australian Environment Review* 132, 134.
[144] RIWI Act s 26GM(1)(a).
[145] RIWI Act s 26N.
[146] RIWI Act s 26GZ.
[147] RIWI Act s 26GM(1)(d).
[148] RIWI Act s 26GM(1)(e).
[149] RIWI Act s 26GL(1)(a).
[150] RIWI Act s 26GL(1)(b).

- Historically, advisory bodies have been established outside the legislative framework, and therefore the membership of the bodies are not as broadly representative as that prescribed under the RIWI Act. In the Carnarvon Artesian Basin Water Management Plan, DWER noted that notwithstanding the provisions of the RIWI Act, there was no committee for general licensing or management advice in the Gascoyne Groundwater Area.[151] Instead, DWER established the 'Carnarvon Artesian Basin Rehabilitation Group' which included three pastoralists, one resource user (mining, horticulture or tourism), one community representative and officers from the Department of Water and the Department of Agriculture and Food.[152] There is no express mention of whether First Nations' interests are represented by this body.
- There is no easily accessible list or database of existing committees. While the Minister is required to publish the creation of a committee in the *Gazette*,[153] this is an inaccessible record of information that hinders transparency and accountability in the water management system. Reforms should require recordings of meetings and publication of membership lists, minutes, and recommendations.

Water advisory committees

Additionally, the Minister can "*establish committees for the purpose of advising the Minister on any aspect of the administration of [the Powers Act] or a relevant Act*".[154] The Minister therefore can establish advisory committees in relation to WA's non-statutory WAPs and for other purposes. This general function is in addition to the power to establish water resources management committees under the RIWI Act.[155]

Unfortunately, there is no mandatory requirement for the creation of advisory committees in WA's water legislation. The terms of reference and the terms and conditions applicable to a person appointed to a committee fall entirely within the discretion of the Minister.[156]

The Warren Donnelly Water Advisory Committee is established under the Powers Act to provide advice and input to DWER in regard to surface water management and allocation within the Warren and Donnelly river catchments.[157] The Committee is an advisory body only – it can make recommendations to DWER but has no delegations or decision making powers.[158] There are 10 positions on the Committee. Six are for community or industry representatives and there are 4 positions for a representative from the Department of Primary Industries and Regional Development, Warren Catchments Council, Manjimup Shire, and the Department.

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[151] Department of Water, Carnarvon Artesian Basin Water Management Plan (December 2007) 28, accessible here.
[152] Ibid.
[153] RIWI Act s 26GK(6).
[154] Powers Act s 109(1). A 'relevant Act' is the RIWI Act, *Metropolitan Arterial Drainage Act 1982*; *Metropolitan Water Supply, Sewerage, and Drainage Act 1909* or *Country Areas Water Supply Act 1947*: Powers Act s 5.
[155] Water Resources Management (Administration) Bill 2003 Explanatory Notes, accessible here.
[156] Powers Act s 109(1), (3).
[157] Warren Donnelly Water Advisory Committee Terms of Reference, 18 August 2022, accessible here.
[158] Warren Donnelly Water Advisory Committee Terms of Reference, cl 4.

The current framework does not provide a sufficient ability for the community to engage with the decision-making process on water resources regulation. WA's laws fall short of the NWI standards and do not recognise the extensive knowledge and potential contributions of First Nations peoples and communities. Further, more transparency in the role and functions of advisory committees to restore faith in the system is required.

2. The Productivity Commission's 2020 recommendations and advice for renewal of the NWI

In general, EDO supports the NWI renewal advice delivered in the Productivity Commission's National Water Reform 2020 Inquiry Report (**NWI Inquiry Report**). In particular, we welcome the Commission's conclusion that while the overarching goal of the NWI remains sound it "*should be modernized through reference to adaptation to climate change and recognition of the importance of water in the lives of Aboriginal and Torres Strait Islander People*".[159]

We also highlight as important, the Productivity Commission's earlier recognition of different challenges in water management across Australia's various regions. Currently, the NWI focusses on "*returning*" water extraction to sustainable levels. This has resulted in a predominant focus on water management in the south-east of Australia.[160] The water resource management issues facing other jurisdictions, including large portions of the NT and WA, are fundamentally different. WA Ministers have stressed this point, noting that the prescriptive measures in the NWI "*do not provide the tools required to meet the unique water management challenges in Western Australia.*"[161]

Relevantly, the Productivity Commission has made recommendations that distinguish between "*undeveloped*", "*developing*" and "*fully developed*" systems with a degree of nuance not evident in the NWI.[162] It notes that in undeveloped and developing water systems, there is an opportunity to set consumptive and environmental shares in ways that manage the risk of future resource

[159] Productivity Commission, Australian Government, *National Water Reform 2020: Findings, recommendations and renewal advice* (Recommendations report No 96, 28 May 2021) 1 ('NWI Recommendations report') <https://www.pc.gov.au/inquiries/completed/water-reform-2020/report/>.
[160] This point is evident from a reading of the NWI and is also made in; Barry Hart, Erin O'Donnell and Avril Horne 'Sustainable water resources development in northern Australia: the need for coordination, integration and representation (2020) 36(5) *International Journal of Water Resources Development* 777, 783.
[161] Honourable Dave Kelly, Minister for Water, Submission made to the National Water Reform Inquiry, 25 August 2020 (see NWI Inquiry Report at 62).
[162] In its NWI Recommendation Report, the Productivity Commission describes these as:

- Relatively undeveloped systems have low demand for water resources and low risks to ecosystems.
- Developing systems show increasing demand for their water resources and may include sites with proposed development potential.
- Fully developed systems are characterised by water resources being fully allocated between consumptive users and the environment, with effective sharing arrangements, market rules and system operating rules.

reductions as a result of climate change.[163] However, in fully developed systems it stresses the need to "*rebalance*" environmental and consumptive uses as a result of climate change.[164]

a. First Nations water access, management and ownership

As stated in Part 1 above, we agree with the inclusion of a co-designed element dedicated to First Nations people's access to water and the involvement and participation of First Nations people in water management, as well as improved cultural outcomes using existing frameworks.

The Productivity Commission's advice can be strengthened through:

- including scope to – in circumstances as deemed appropriate by First Nations peoples – acknowledge and develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being). This includes support, resourcing and prioritisation of First Nations-led and co-governance models of water resources;
- ensuring resourcing is considered and funding is allocated prior to the making of commitments;
- genuine and comprehensive consultation with First Nations, including those in regional areas;
- accepting that in some circumstances, existing frameworks will not be sufficient to further achieve First Nations water justice, so new frameworks must include cultural outcomes and be co-designed;
- the incorporation of the principle of FPIC of First Nations in all water management frameworks.

b. Incorporating climate change and extreme weather events into water planning

We agree with the renewal advice in the NWI Recommendations Report, that processes to better account for climate change are required.[165]

Climate change is impacting and will continue to impact on water resources in Australia. Climate change will lead to greater frequency of severe droughts, more intense extreme rainfall events, a continuing decrease in cool-season rainfall and an increase in the time spent in drought.[166] Climate change will also affect the quality of water, for example, increases in the severity of floods and droughts will change sediment loading, chemical composition, total organic carbon and microbial quality of drinking water.[167]

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[163] NWI Recommendations report (n 36) 9.
[164] NWI Recommendations report (n 36) 9.
[165] NWI Recommendations Report, 8.
[166] Steffen W, Vertessy R, Dean A, Hughes L, Bambrick H, Gegis J & Rice M (2018). Deluge and drought: Australia's water security in a changing climate, Climate Council of Australia, Sydney.
[167] State of the Environment Report 2021 (https://soe.dcceew.gov.au/inland-water/pressures/climate-change), citing WHO (World Health Organization) (2011). Guidelines for drinking-water quality, 4th edn, WHO Press, Geneva.

The 2021 State of the Environment[168] report found:

- The past 5 years have demonstrated that Australia's inland water is being impacted by climate change and emphasised the need to include climate change in water resources management.
- In light of the increased variability of Australia's water resources, it is essential that water resource managers adopt an agile, risk-based approach, by considering cultural and environmental impacts that respond to the prevailing and predicted future hydroclimatic conditions.

There is a pressing need for the water management regimes to incorporate climate change projections into decision-making and to ensure fundamental ecosystem health through environmental flows.

Examples of specific opportunities to better embed climate considerations into water management include to:

- establish adaptive water allocation schemes with an embedded climate projection signal;
- in regulated river systems, manage public storages on the basis of climate projections, not historic climate data;
- introduce legislative provisions that require climate change to be considered in the preparation of plans, regulations and in the exercise of relevant functions by decision-makers including the granting of licences;
- an evidence-based cap on extractions at catchment and basin scales which is informed by climate projections;
- the inclusion of clear duties to, for example, act on the basis of best-available evidence and protect water resources from over-extraction.

The renewal advice states there should be development of a process for rebalancing between environmental and consumptive uses as a result of climate change where "*there is sufficient evidence that the expected benefits will outweigh the likely costs*". A precautionary approach to assessment should be implemented. In particular, proper adaptive management and trigger values must be built in to prioritise environmental uses and maintain ecosystems and cultural values before the systems become over-extracted.

Conversations about the interaction between climate change and environmental water (and all water management) should be informed by First Nations perspectives and voices. As stated in a recent article:[169]

> *Climate change impacts are already happening due to [the Martuwarra's] geographic location and vulnerable environment. From an Indigenous perspective, the climate change space and discussions are currently highly dominated by Western science and politics. Unfortunately, the progress in understanding Indigenous culture and cultural needs has not advanced to a point*

[169] Martuwarra, RiverOfLife et al, 'Martuwarra Fitzroy River Watershed: One society, one river law' (2023) 2(9) Public Library of Science (PLOS) Water (online) 13.

where socio-ecological knowledge and primacy in ontological theory or rationale have been injected into the debate. Now more than ever, it is time to listen to the voices and wisdom of Indigenous people for the paradigm shift.

The principles outlined below provide a useful guide for assessing the climate-readiness of water legislation. EDO recommends best practice water law should include these important elements.

Key elements of climate-ready water laws:[170]

- an evidence-based cap on extractions at catchment and basin scales which is informed by climate projections;
- an adaptive water allocation scheme with an embedded climate projection signal;
- protecting environmental flows from extraction;
- protecting different components of the flow regime (from no flows to overbank flows), each of which is required to maintain ecosystem function;
- promotion of longitudinal and latitudinal connectivity. To clarify, this requires catchment-based legal instruments to speak to one another;
- in regulated river systems, managing public storages on the basis of climate projections, not historic climate data;
- accurately measuring and reporting water extractions (noting the difficulty of enforcing the law at the licence holder and catchment levels in the absence of reliable evidence);
- fulsome monitoring of groundwater resources, and appropriate limits on extractions which take into account connectivity with surface water, as well as the tendency to shift to consumption from aquifers during periods of water scarcity;
- accurate water accounting which, takes into account return flows, water theft and floodplain harvesting;
- appropriate governance arrangements for subsidised irrigation modernisation projects, including a requirement to demonstrate that they are actually saving water;
- a requirement to ensure modelling for compliance purposes is based on latest levels of development and its assumptions are transparent and communicable;
- the inclusion of clear duties to, for example, act on the basis of best-available evidence and protect water resources from over-extraction;
- appropriately drafted civil and criminal offence provisions supported by an independent regulator, such as the NSW Natural Resources Access Regulator;
- third party standing (this is particularly important given the virtual impossibility of obtaining a writ of mandamus compelling the government to enforce its own laws); and
- more generally, provisions that are justiciable. While there is a clear need to furnish Ministers and their delegates with some discretion, broadly drafted powers can make it all but impossible for clients to seek judicial review of environmentally foolish decisions, which is deeply problematic. In short, hydrodenialism should give rise to the possibility of legal action.

[170] Environmental Defenders Office, Submission to the Productivity Commission on the National Water Reform Inquiry (21 August 2020) 15 accessible here.

c. Access to safe and secure drinking water

The right to water is one of the most fundamental conditions for survival.[171] Adequate and appropriately managed water services reduce exposure to preventable health risks.[172]

Although a basic human right, many Australians do not have access to safe drinking water.[173] Recent research undertaken by ANU found that Australians in more than 400 remote or regional communities lack access to good-quality drinking water and 40% of all locations with reported health-based non-compliances were remote Indigenous communities.[174]

Under the NWI, governments have committed to urban water reform, including to provide healthy, safe and reliable water supplies. However, the "Objectives" and "Key Elements" of the NWI do not explicitly mention water quality, and more generally water quality tends to be separated out from other water planning and land use legislation.

The NWI Implementation Report noted that issues with drinking water quality remain in some regional and remote communities. The report found:[175]

> *Safe and reliable drinking water can be more challenging and costly to supply to regional and remote communities than to major cities. Drought, bushfires and COVID-19 have brought service delivery issues into sharp relief, including water security challenges in regional New South Wales and Queensland, and drinking water quality issues in some remote communities.*

The NWI Inquiry Report suggested new objectives for the NWI that explicitly include access to safe and reliable drinking water.[176] It also recommended that a renewed NWI should ensure that State and Territory Governments commit to defining and ensuring access to a basic level of service, based on safe and reliable drinking water. Funding to local government-owned providers should be targeted at ensuring this basic level of service in high-cost areas where such service provision would otherwise be considered unaffordable.[177]

The Productivity Commission acknowledged that a definition of "safe" water should align with existing health guidelines under the Australian Drinking Water Guidelines (**ADWG**).[178] The ADWG provide guidance to water regulators and suppliers on monitoring and managing drinking water

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[171] Office of the Commissioner for Human Rights General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant) at par 3. Retrieved from https://www.refworld.org/pdfid/4538838d11.pdf
[172] World Health Organisation (2023) *Drinking-water.* Retrieved from https://www.who.int/news-room/fact-sheets/detail/drinking-water#:~:text=Water%20and%20health,individuals%20to%20preventable%20health%20risks.
[173] ANU (2022) Remote Australians lack access to quality drinking water Retrieved from https://www.anu.edu.au/news/all-news/remote-australians-lack-access-to-quality-drinking-water.
[174] Ibid.
[175] NWI Implementation Report, 159.
[176] NWI Inquiry Report, 7.
[177] NWI Implementation Report, 159.
[178] NWI Inquiry Report, 172.

quality, including listing recommended maximum values for contaminants.[179] However, implementation of the ADWG is haphazard, and the ADGW is not legally binding.

Notably, the Productivity Commission's International Benchmarking Report: Arrangements for Setting Drinking Water Standards[180] found:

- relatively little resources are devoted to regulatory development and enforcement activities in Australia;
- benefit-cost analysis is rarely used in developing standards;
- there is a scarcity of information on the quality of drinking water in different parts of Australia and the accompanying risk levels; and
- an increase in standards is likely to require significant additional investment in water treatment infrastructure.

Further, it was noted that there is institutional fragmentation within jurisdictions in promulgating and enforcing standards in Australia. Health departments, water resources departments and the water suppliers are all involved. This sharing of responsibility potentially lessens accountability for public health outcomes.[181]

Legislative reform needs to take place across Australia in relation to the provision of and access to safe drinking water. In particular:

- State and Territory Governments should enshrine the legally binding right to water, including safe drinking water, as a basic human right in accordance with the 2010 declaration of the UN General Assembly.
- In line with the Productivity Commission recommendations, access to a basic level of service, based on safe and reliable drinking water should then be ensured.
- To ensure consistency of water quality standards, State and Territory laws should adopt the ADWG as the minimum, enforceable standard. These standards should then be regularly monitored and reported by the responsible department in publicly available registers. This reform would ensure accountability, transparency and public participation in relation to access to safe drinking water.

Northern Territory

Case study: Laramba

Access to safe drinking water remains a challenge for many communities in the NT where 28 of the Territory's 72 remote communities continue to have levels of contaminants above the ADWG. Although the NT Government have committed $28 million in funding to address water quality issues in remote communities, this funding will only address 10 priority communities.[182]

[179] National Health and Medical Research Council, Australian Drinking Water Guidelines (2011), available here.
[180] Productivity Commission (2000) Arrangements for Setting Drinking Water.
[181] Ibid.
[182] Chelsea Heaney, 'New funding to improve water quality in remote NT communities as data shows high contamination levels', ABC News (22 April 2021).

In Laramba, a remote community north-west of Alice Springs, NT Health provided residents with bottled water because their tap water contained naturally-occurring uranium levels that were nearly three times what was recommended by the ADWG.[183]

While uranium levels in the water at Laramba 'are now almost undetectable', after a new water treatment facility opened in Laramba in early 2023, such water quality issues have long been known to the Northern Territory government. An 18-month review conducted by the Water Services Association of Australia identified several key issues in relation to the delivery of safe drinking water to remote communities in the NT including that there are no minimum water quality standards applicable across the NT and that the provision of drinking water in remote communities is not currently regulated.[184]

Western Australia

Case study: Pandanus Park

Pandanus Park is a community 168km east of Broome in the Kimberley region of Western Australia. For years, community advocates and leaders have been advocating for clean drinking water in Pandanus Park.[185]

In 2015, water testing in the community found nitrate concentrations at levels of 80mg/L – below the 100mg/L safety guidelines recommended for adults by the Australian Drinking Water Guidelines, but above the 50mg/L limit for pregnant women and infants up to three months old.

Excessive nitrates in the diet reduce blood's ability to carry oxygen. In infants, this can cause the potentially life-threatening Blue Baby Syndrome, where the skin takes on a bluish colour and the child has trouble breathing.[186]

The Auditor General conducted audits and provided reports about drinking water quality in WA in 2015 and 2021. Although the 2021 follow up report found that water quality had improved in 38 communities, contamination of the water supply by microbes, nitrates or uranium still occurred in 37 of the communities that were assessed in 2015, with high nitrate levels existing in 19 communities.[187]

Media coverage and advocacy by local residents resulted in New South Wales charity, the Yaru Foundation, donating a water filtration system to the Pandanus Park community in 2018. The

[183] Charmayne Allison, 'Aboriginal community of Laramba feels safe to drink tap water now uranium levels are within guidelines', ABC News (30 April 2023).
[184] See Water Services Association of Australia, Closing the Water for People and Communities Gap: A review on the management of drinking water supplies in Indigenous remote communities around Australia (7 November 2022).
[185] Royce Kurmelovs and Isabella Moore, ''I'm doing this out of my heart': the fight for clean water in one remote WA Indigenous town', *The Guardian* (online, 20 October 2021) available here.
[186] Office of the Auditor General Western Australia, Delivering Essential Services to Remote Aboriginal Communities, Report 8 (May 2015) page 16, available here.
[187] Office of the Auditor General Western Australia, Delivering Essential Services to Remote Aboriginal Communities – Follow up (Report 25, June 2021) pages 5, 19-20, available here.

filter system delivers water to the community office only and not to residences. To address the risks of health impacts outlined above, the Department of Communities has supplied bottled water to pregnant mothers and young infants.[188]

Community members want a more permanent solution, with safe drinkable water provided directly to their houses.

d. Transparency/access to information

The NWI says relatively little about access to information and transparency.[189] The renewal advice makes a number of references to transparency, such as in water planning, trade strategies and infrastructure, service delivery and urban planning. We welcome the inclusion of transparency objectives into the renewal advice, but suggest that the advice be strengthened.

Access to information and good water governance arguably go hand-in-hand. Indeed, a great deal of mistrust in governments and between stakeholders could be avoided if more information was made publicly available (and in an accessible format). A peer-reviewed article by staff from the Stockholm International Water Institute (SIWI) affirmed the strong connection between rigorous water governance and access to information:

> *For a multilevel governance structure to be effective it must be coherent and complimented by other governance attributes, such as effective and informed participation among the multiple decision-making centres and actors, for which transparent decision-making and access to information is needed*.[190]

EDO remains concerned that public access to certain water-related information is lacking or non-existent in some jurisdictions. In our experience, this includes but is not limited to:

- licensing and allocation details;
- the names of licence holders; applications and approvals for trades; and
- applications and approvals for other statutory permits (for pumps, or to construct a levee or on-farm dam, for example); and
- compliance and enforcement action.

Failure to supply this information in a readily accessible and meaningful format fuels distrust and makes it difficult to scrutinise approvals and accordingly assess their lawfulness (which calls into question the enforceability of relevant offence provisions).

[188] Royce Kurmelovs and Isabella Moore, ''I'm doing this out of my heart': the fight for clean water in one remote WA Indigenous town', *The Guardian* (online, 20 October 2021) available here.
[189] We note that paragraph [89] of the NWI refers to reporting, but is limited to four areas.
[190] Alejandro Jiménez, Panchali Saikia, Ricard Giné, Pilar Avello, James Leten, Birgitta Liss Lymer, Kerry Schneider and Robin Ward, Unpacking Water Governance: A Framework for Practitioners, *Water*, 2020: 12, p. 11

The latter is particularly problematic as judicial review of allegedly unlawful administrative decisions can generally only occur within a limited, statutorily defined window (often between 30 days and 3 months).

In the NT, WAPs are published on the NT Government website,[191] and there is a publicly available register of surface and groundwater extraction licences and applications for such licences.[192] Surface and groundwater extraction licences are advertised and subject to public comment, decisions must be published, and there is a third party merits review process on decisions to grant such licences.[193] However, a greater focus on transparency of decision-making and access to information is required, noting in particular:

- NT does not publish applications for, decisions on, and copies of other types of licences and permits under the NT *Water Act*, such as permits to interfere with a waterway, or include provision for public comment on the application process.[194] Whilst the third party merits review process is available for these other licence and permit categories,[195] these rights are largely nugatory without a requirement to publish the decisions that would be subject to review.
- There is no legislative requirement for the publication of minutes by WACs (where they are established). In our experience, whilst some WAC minutes are published, there are considerable delays in publication. There is also no legislative requirement for advice given by a WAC to be published.
- Whilst Power and Water Corporation (**PAWC**) publishes some drinking water quality statistics in relation to major town centres and 72 remote communities,[196] PAWC is excluded from access to government information provisions under the *Information Act 2002* (NT) (**Information Act**).[197]
- In general, the freedom of information processes under the *Information Act* are time consuming, costly and often subject to refusals or internal review.[198]

In WA, transparency of decision making and access to information are areas that should be prioritised noting in particular:

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[191] Northern Territory Government, *Water Allocation* (Web Page) available here.
[192] Northern Territory Government, *Water Licensing Portal* (Web Page) available here; see also Northern Territory Government, *Approved water extraction licences* (Web Page) available here.
[193] NT *Water Act* s 30 and Pt 6A.
[194] Part 6A of the NT *Water Act*, which provides for public notification of applications and decisions, only applies to "*water extraction licence decisions*", being applications for surface water extraction licences and groundwater extraction licences: see s 71A(1)-(2) and definition of "water extraction licence" in s 4.
[195] NT *Water Act* s 30.
[196] Power and Water Corporation, *Past drinking water quality reports* (Web Page) available here.
[197] NT *Information Act* s 5(4) provides that a Government owned corporation is a public sector organisation for personal information only, and not in relation to applications to access government information. See *Power and Water Corporation Act 1987* (NT) s 5.
[198] The freedom of information scheme is currently being reviewed by the NT's Information Commissioner given its widespread issues, although public comment has not been sought to our knowledge: Thomas Morgan and Matt Garrick, "NT's Freedom of Information system under scrutiny over delays, refusals and redactions", 18 January 2024 (ABC News, online).

- WA does not publish its licencing applications or approvals – these documents must be requested through Freedom of Information legislation, which in our experience is time consuming and often subject to refusal and internal review processes.
- Water Corporation does not publish its water quality testing other than in a 'detailed overview' format.[199] However, in our experience Water Corporation may provide information when requested.
- There is no legislative requirement for publication of minutes by water resources management committees (where they are established).
- Advisory committees, such as the Warren Donnelly Water Advisory Committee, are not required to publish minutes or advice provided to the Minister.

3. Summary of recommendations

As noted above, EDO provided feedback and recommendations to the Productivity Commission's 2020 Inquiry into National Water Initiative Implementation Progress. Those recommendations are set out in Appendix A.[200] We acknowledge and continue to endorse those recommendations and note that we do not comment on all issues raised in those submissions in the present submission.

We also make the following additional, updated recommendations based on the analysis and case studies set out in this submission.

First Nations water access, management and ownership

The next iteration of the NWI must require States and Territories to provide for First Nations-led reform that generates genuine, legally binding water justice for First Nations. Building upon, and in addition to, EDO's previous recommendations, this should:[201]

- include scope to acknowledge and co-develop legal and governance frameworks which directly reflect First Nations epistemology (ways of knowing) and ontology (ways of being), and which are adequately resourced.
- Include the incorporation of the principle of FPIC of First Nations in all water management frameworks.

Water allocation planning:

In addition to EDO's previous recommendations, the next iteration of the NWI must require:

- All jurisdictions to have legally binding statutory water plans that allocate water to consumptive and non-consumptive uses, prepared in accordance with robust legislative requirements that deliver on modernised NWI commitments and underpinned by peer reviewed science.

[199] See for example Water Corporation, Drinking Water Quality Annual Report 2022-23, accessible here.
[200] These recommendations are taken from the 2020 Submission and 2021 Submission.
[201] See, in particular, EDO's recommendations from the 2020 Submission in relation to (6) Aboriginal water rights, (7) water markets and (9) collaborative governance; and Recommendations 1-5 of the 2021 Submission.

- In the absence of statutory plans, non-statutory policies should provide guidance only and decisions must be made transparently, based on the best available, up-to-date science and incorporating principles of ecologically sustainable development.

Community participation:

In addition to EDO's previous recommendations,[202] the next iteration of the NWI must require:

- Consultation processes for water management decisions to be enshrined in legislation with appropriate timeframes for genuine consultation and co-design.
- First Nations to decide appropriate consultation and engagement for their communities, which may include materials being provided in language and processes taking place on Country.

Advisory committees:

- Where advisory committees are used:
    - The role and functions of the committee should be set out clearly in legislation, including the role of advisory committees with respect to water allocation/management plans.
    - There should be clear governance arrangements for the advisory committee, set out in legislation.
    - The membership of the committee should be diverse and require community representatives from a range of stakeholders.

Climate change:

The EDO continues to endorse its previous recommendations on climate change.[203] In summary:

- Under a renewed NWI, all jurisdictions must ensure water laws and policies are climate-ready, including by reviewing all relevant legislation with a view to incorporating clear and binding requirements for considering the impacts of climate change in decision making and clear requirements for climate change mitigation and adaptation.

Safe drinking water

Building upon EDO's previous recommendations,[204] the next iteration of the NWI must require:

- State and Territory Governments to enshrine a legally binding right to water, including safe drinking water, as a basic human right in accordance with the 2010 declaration of the UN General Assembly.
- In line with the Productivity Commission recommendations, access to a basic level of service, based on safe and reliable drinking water should then be ensured.

[202] See, in particular, EDO's recommendations from the 2020 Submission in relation to (9) Collaborative governance and Recommendation 1 of the 2021 Submission.
[203] For more detail, see EDO's recommendations from the 2020 Submission on (5) climate change.
[204] See, in particular, EDO's recommendations from the 2020 Submission on (10) Water quality.

- To ensure consistency of water quality standards, State and Territory laws should adopt the ADWG as the minimum, enforceable standard. These standards should then be regularly monitored and reported by the responsible department in publicly available registers. This reform would ensure accountability, transparency and public participation in relation to access to safe drinking water.

Transparency and access to information

In addition to EDO's previous recommendations,[205] under the next iteration of the NWI, all jurisdictions must improve transparency and accountability by:

- Ensuring drinking water quality information is published and shared with communities in a timely, accessible and culturally appropriate manner.
- Open-standing, third-party merits review processes are in place with respect to water management decisions including on water licence and permit applications.
- Clearly and publicly reported information around compliance with and enforcement of water laws.

[205] See, in particular, EDO's recommendations from the 2020 Submission on (3) Access to information. See also our recommendations with respect to (1) Measurement, water accounting and auditing and (2) compliance and enforcement.

Appendix A: Recommendations from EDO's 2020 and 2021 Submissions to the Productivity Commission Inquiry on National Water Reform

2020 Submission

1. Measurement, water accounting and auditing

The next iteration of the NWI should emphasise the need for:

- "No meter, no pump" laws and the use of telemetry (and where relevant, the use of remote sensing technology to measure diversions of overland flows).
- Legislated, independent auditing (by Geoscience Australia, for example) of water accounts using remote sensing and other technologies.
- Appropriate adaptive management strategies capable of responding to audit results

2. Compliance and enforcement

The next iteration of the NWI should emphasise the need for:

- Strong compliance and enforcement culture, including appropriately resourced, independent water regulators (modelled on the [NSW Natural Resources Access Regulator]) underpinned by appropriate governance arrangements (as detailed in our recommendations for Section 1 [*above*]).

3. Access to information

The next iteration of the NWI should emphasise the need for:

- Access to information including but not limited to: details of licensing, allocations and works approvals (available in a centralised, easy to use register); the details of key assessments, decisions and transactions concerning water management (such as business cases for infrastructure projects, efficiency program grants and strategic buybacks).
- Water agencies to cultivate and advance a culture of transparency and openness

4. Sustainable levels of extraction

The next iteration of the NWI should emphasise the need for:

- Ongoing monitoring and auditing of rivers, wetlands and aquifers to assess their "health" (across different indicators) and public reporting on the same at regular intervals.
- The fact that additional reform is required to ensure extractions are sustainable in many catchments – as well as ongoing dialogue about what this concept means in different contexts (highly developed versus pristine catchments, for example)

5. Climate change

Recommendations for Section 5

The next iteration of the NWI should emphasise the need for:

- Climate-ready water laws and policies (as exemplified by elements outlined in the table *extracted at p 34 of this submission*).
- Due consideration of the impacts of proposed infrastructure projects on sustainable extraction limits in a changing climate and Aboriginal cultural heritage

6. Aboriginal water rights

The next version of the NWI should emphasise the need for:

- Aboriginal-led reform that generates genuine, legally binding "water justice" for Aboriginal people.
- Support, resourcing and encouragement of Aboriginal-led collaborative governance approaches (such as that promoted by the Martuwarra Fitzroy River Council).
- Review of the relationship between water, native title, environment, land administration and cultural heritage legislation (at both Commonwealth and State/Territory levels) and appropriate reform

7. Water markets

The next version of the NWI should emphasise the need for:

- Careful analysis of the advantages and disadvantages of water markets, including proper consideration of perverse impacts on Aboriginal people;
- Careful consideration of the different values associated with rivers, wetlands and aquifers when developing water management laws and policies (and consideration of the impact of water markets on these values)

8. Groundwater

The next version of the NWI should emphasise the need for:

- Water planning practises and rules that:
- reflect that surface-groundwater connectivity is dynamic over time;
- clearly articulate the timeframes that are being contemplated vis à vis adverse impacts, and which prioritise a precautionary approach;
- reflect the fact that cumulative impacts can be significant over time; and
- reflect the interdependent relationship between biophysical environmental elements of water systems, and the impact of these interactions on surface- groundwater connectivity.
- Appropriate monitoring of groundwater resources, and metering of bores

9. Collaborative governance

The next version of the NWI should emphasise the need for:

- Deliberative, culturally appropriate, collaborative processes that allow participants to be properly engaged in the process of making decisions (rather than merely being "consulted" before a decision is made by government).
- Aboriginal-led collaborative governance models that are encouraged, supported and resourced.

10. Water quality

The next version of the NWI should emphasise the need for:

- Legislated water quality objectives that must be considered as part of all relevant decision-making processes concerning water and land management.
- Governments to guarantee access to clean drinking water and water for domestic use, as per the Human Right to Life and SDG 6.

2021 Submission

Recommendation 1

Any revised NWI must ensure that innovative organisations like the Martuwarra Council are supported, resourced and encouraged to develop their Indigenous-led collaborative governance models. It must also provide for the implementation of co-governance models of water management.

Recommendation 2

Any revised NWI must explicitly support not only the reallocation of water rights to Aboriginal people in market-based systems, but require that public funding be made available for the same. Further, it must support the development and funding of Aboriginal designed and led 'water holders' that purchase water rights on the market and manage said water consistently with Aboriginal objectives.

Recommendation 3

Any revised version of the NWI must require that proposed legislative or policy responses to securing Aboriginal water entitlements for economic use go through a process of consultation (based on the principle of free, prior and informed consent) and, after that, must be regularly evaluated to analyse if they are meeting the aspirations of Aboriginal people.

Recommendation 4

Any renewed NWI must explicitly acknowledge the links between human and Indigenous rights and water, as well as the need to ensure that these rights are enshrined in relevant water laws

Recommendation 5

We recommend that the Final Report's findings and recommendations acknowledge the current inadequacy of cultural heritage legislation in several Australian jurisdictions and that this, in turn, needs to inform the way that Aboriginal relationships to water are recognised in water legislation.

We further recommend that any renewed NWI explicitly acknowledge the links between Aboriginal cultural heritage (in the holistic sense) and water, and emphasise the need for state and Commonwealth cultural heritage, water and development laws to uphold the principle of free, prior and informed consent in relation to all development that affects Aboriginal cultural heritage linked to water.

Appendix B: Evaluation of the Badu Advisory Report: Review of the NT's implementation of the National Water Initiative in relation to water planning

Evaluation of the Badu Advisory Report:

Review of the NT's implementation of the National Water Initiative in relation to water planning

12 February 2024

Professor Alex Gardner

Contents

Instructions

I have been asked to provide expert advice to the Environmental Defenders Office (**EDO**) by way of an evaluation of the accuracy of the Badu Advisory Review of the Northern Territory's implementation of the National Water Initiative (**NWI**) in relation to water planning in the Northern Territory (**NT**)(**the Badu Review**).[1] In summary, the Badu Review "concluded that the NT's water planning processes are consistent with the provisions of the NWI and subsequent guideline documents".[2]

I acknowledge the brief provided to me by letter dated 17 November 2023.

Overview of the work requested

I have reviewed the laws and documents listed in Annexure A of the Brief, including the "Badu Review", and these documents and three others are now listed in Annexure A to this advice.

I am asked to give my opinion on three questions about the accuracy of the conclusions made in the Badu Review:

1) whether the provisions of the *Water Act 1992* (**Water Act**) and *Water Regulations 1992* (NT) (**Water Regulations**) around water planning and allocation are consistent with the NWI;
2) whether the general approach adopted for the development (preparation) and structure of Water Allocation Plans (**WAP**s) is consistent with the NWI; and
3) whether the approach to water planning and allocation adopted in the NT "Water Allocation Planning Framework" (6 May 2020), including the contingent rules, annual allocation process and "Draft Surface Water Take – Wet Seasons Flows Policy" are consistent with the NWI.

I am also asked to present further comments on the scope and methodology of the Review and provide any further observations or opinions relevant to the three questions above.

Methodology

I address the tasks above in the following three steps or Parts:

1) describe the NT's policy and legal context for this advice by – summarising the relevant NWI objectives and actions (**NWI commitments**), acknowledging the history of the NT Government's NWI commitments from its NWI Implementation Plan, and outlining the water planning provisions of the Water Act and Water Regulations;
2) present my opinions on the conclusions of the Badu Review in relation to questions (1) - (3) above; and
3) provide a summary of my conclusions.

I comment on the scope and methodology of the Badu Review and distinguish my approach in the introduction to Part 2.

I make observations throughout this advice drawing on Productivity Commission *National Water Reform 2020 Inquiry Report* (**2020 PC Inquiry Report**), including the Productivity Commission's Assessment of the NWI implementation progress (2017-2020) and the Water Reform Recommendations.

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[1] Badu Advisory, Northern Territory Department of Environment, Parks and Water Security, *Review of the NT's implementation of the National Water Initiative in relation to water planning*, 13 July 2023. (Badu Review).

[2] Above n 1, Badu Review, executive summary, p.2.

In presenting my advice, I assume that the reader has a knowledge of or access to the documents listed in Annexure A.

Expert Qualifications

I have legal academic and practice expertise and experience that demonstrate my qualifications to prepare this report.

- I have 35 years of experience as a legal academic in the field of natural resources and environmental law, having held a teaching and research appointment at the University of Western Australia Law School since 1988, and adjunct teaching positions at the Australian National University College of Law (2001-2017) and the University of Queensland School of Law (2011-2014) for the purpose of teaching postgraduate classes in Water Resources Law.
- I have published numerous articles on water resources law, including on environmental water provisions, and am the lead author of *Water Resources Law*, LexisNexis Au, 2nd edition 2018. A key theme of the *Water Resources Law* book is how Australian water resources legislation implements the NWI.
- I have held a legal practice certificate in Western Australia since 1994, providing natural resources and environmental legal advice in the public interest, to private parties and to agencies of the Western Australian and Commonwealth Governments.

Executive summary

Part 3 of this advice summarises my responses in Part 2 to the three questions about the Badu Review. This is a succinct summary introducing those responses and noting why I disagree with the conclusion of the Badu Review. My disagreement is partly founded on a different methodology, explained in the introduction to Part 2. In particular, the Badu Review excludes "[c]ommenting on the merits or otherwise of principles, strategies, rules etc. contained within, or the outcomes associated with, the specific provisions contained within WAPs, policies or guidelines".[3]

In contrast, this advice explicitly includes analyses of key strategies and policies and some WAP provisions in relevant assessments of NWI compliance. Further, although the NWI is not a legal instrument, and the Badu Review explicitly avoids presenting a legal analysis of the NT's NWI implementation, this advice gives a greater focus on evaluating the legal basis for the NT's implementation of the NWI than is presented in the Badu Review. The analysis is offered as advice on important legal reforms to implement the three key elements of the NWI to improve water allocation planning under statutory reforms proposed by the NT Government.

The Water Act and Water Regulations provisions around water planning and allocations are not consistent with the NWI commitments.

- Environmental water allocations under WAPs do not have the same legal security as water access entitlements.
- The NT has not enacted legislation to create secure, NWI-consistent water access entitlements for consumptive use. Even if fully NWI consistent entitlements may not be necessary in relatively undeveloped water systems, analysis of the legislation shows that the NT entitlement regime is not fully NWI compliant, even where a WAP and water trading are

[3] Above n1, Badu Review, 1.3 Out of Scope, p.7.

purportedly in place. However, there is evidence that licence conditions are used under the Water Act to support the practice of "announced allocations" by which the Controller may apply an "annual reduction percentage" in a manner consistent with NWI para [29]. However, the NT water licence is not NWI consistent because it is not a secure perpetual entitlement separated from land tenure and unbundled from regulatory approval of water use, and there is inadequate legislative support of the practices of water metering and trading.

- The NT has made progress with a legislative requirement to establish Aboriginal water reserves for the licensing of Indigenous water access for economic benefit. However, the regulations have not been made to authorise the licensing of water from an Aboriginal water reserve, perhaps because there are not confirmed arrangements for establishing a water reserve in water resource systems that are fully allocated.
- Although the PC emphasised the importance of effective community engagement and extolled the guidelines for the attributes of effective engagement practice, the Badu Review acknowledges the challenges in Aboriginal engagement with water allocation planning. Recent experience with general consultation practice and the role of Water Advisory Committees is inconsistent with the NWI Water Planning Guidelines.
- All Australian jurisdictions' legislation, except the Water Act (NT), include legal guidance on planning process.

The general approach for development (preparation) and structure of Water Allocation Plans is not consistent with the NWI

The NT may, consistently with the NWI, determine when a plan is prepared, the area it covers, the detail, duration and time of review, and the resources devoted to its preparation "based on an assessment of the level of development of *water systems*, projected future consumptive demand and the risks of not having a detailed plan".[4] While new water allocation plans are being made, there are three important attributes of the water allocation planning system that illustrate inconsistency with the NWI principles and commitments; mainly relating to when to make a water allocation plan, with what structure, and to what legal effect.

- Contrary to the comment of the Badu Review, the NWI Policy Guidelines and the PC do not set a standard of "fit-for-purpose" to describe the general level of expectations for the preparation of water allocation plans.
- The NWI Policy Guidelines say that "all plans should specify the sustainable water extraction regime for the system" and suggests a "water system classification" that recognizes conservation water systems, low development water systems, and high development water systems.
- It is consistent with the NWI for the NT to apply non-statutory policies and procedures to guide water licensing decisions in those areas not subject to a WAP. There is a further question whether the content of those policies and procedures are consistent with the NWI.
- The recent practice of dividing water allocation plan material into three different components is inconsistent with NWI principles guiding the preparation of water plans, particularly in that key decision-making is left to the licensing assessment procedures and insufficient provision is made for monitoring and reporting on plan performance.

[4] Intergovernmental Agreement on a National Water Initiative 2004, paragraph [38].

- The legal effect of water allocation plan content is unclear because of the inconsistent provisions of the Water Act ss.22B(4) and 90(1), which leave open an interpretation that the Controller is bound to conduct water resource management "in accordance with any water allocation plan" but only required to "take into account" a water allocation plan in making decisions about water extraction licensing. The recent NT Supreme Court decision in the *Singleton Station Case*[5] held that s.22B(4) does not confine the broad licensing discretion under s.90 by requiring a licence to conform to the terms of a WAP. More careful and certain drafting of the legislation and WAPs could bring regulatory benefits and better NWI compliance.
- The NWI goals of water allocation plans providing for 'secure ecological outcomes' and 'resource security outcomes' means that a water allocation plan should be legally binding on the Controller making water licensing decisions and on licensees exercising rights under their water extraction licences.

The approach to water planning and allocation adopted in the NT "Water Allocation Planning Framework" (6 May 2020), including the contingent rules, annual allocation process and "Draft Surface Water Take – Wet Seasons Flows Policy", are inconsistent with the NWI

The guidance on the NT making allocations of water to non-consumptive and consumptive uses comes from relevant provisions of the Water Act, especially s.22B, and four key policies. While elements of this guidance seek to apply NWI concepts, certain key concepts are inconsistent with the NWI.

The Water Act s.22B(5) mandate to allocate water to defined beneficial uses within the *estimated sustainable yield* (ESY) is inconsistent with the NWI objective of achieving an *environmentally sustainable level of extraction* (ESLT) because the former includes both consumptive and non-consumptive uses, such as the environmental water allocation.

- The concepts adapted to the Georgina Wiso Water Allocation Plan, for example, differ from the statutory concepts in adopting a groundwater allocation system that describes a huge volume of environmental water allocation as "storage", a term not employed in the NWI, and makes only a minimal nominal environmental water allocation.
- The non-statutory Background Report to the WAP explains that the storage water for environmental maintenance is available for consumptive use allocation because *[it] is necessary to use aquifer storage to balance infrequent recharge with a continuous demand for water*", especially in the arid zone. The infrequent recharge is converted to an *average annualised recharge calculated from the infrequent actual recharge events [so that it] could sustain the proposed levels of annual extraction by resort to groundwater storage*.
- This conceptual framework is inconsistent with the central principles of the NWI for consumptive pool management of share entitlements subject to prior environmental allocation.
- More research is needed to ascertain how share entitlements in consumptive pool management of groundwater have been implemented around Australia. It is beyond my expertise to evaluate whether the propositions outlined in the Background Report present a sustainable water resource management framework.

[5] The case is discussed at Part 2.4.3 below.

As noted above, it is consistent with the NWI for the NT to apply non-statutory policies and procedures to guide licensing decisions in areas not subject to a WAP, such as applies under the "contingent water allocation" rules of the Water Allocation Planning Framework and the Wet Season Flows Policy. It is beyond my expertise to comment on whether the environmental thresholds adopted in these policies conform to an ESLT. However, the high reliance on these legally unenforceable rules, including in the context of a declared water allocation plan, is a source of uncertainty that may compromise the objective of implementing a statutory water allocation planning system. Greater use of statutory water allocation plans could be an appropriate means of limiting that non-statutory uncertainty.

1. Policy and Legal Context

The NT signed the Intergovernmental Agreement on a National Water Initiative 2004 (**NWI**) and agreed to the Northern Territory Implementation Plan in June 2006 (**NT NWI Implementation Plan**). Both these documents are extensive. I have been asked to address those parts that pertain to the NT's NWI commitments relevant to water allocation planning, including attention to the following elements of the NWI:

a. Paragraphs [23]-[24], setting out the objectives for full implementation of the NWI and the "key elements" against which are identified the agreed outcomes and commitments;
b. Paragraphs [25]-[57], setting out the agreed outcomes and commitments with respect to "*water access entitlements and planning framework*" (in particular, clauses 36-40 with respect to *water plans* and clauses 25(ix), 52-54 with respect to *Indigenous access*);
c. Paragraphs [93]-[97], which deal with community partnership and adjustment issues;
d. Schedule A, which sets out the timeline for implementation of key actions; and
e. Schedule E, which contains guidelines for water plans and planning processes.

By para [3] of the NT NWI Implementation Plan, the NT stated that it "*intends to complete full implementation of the NWI, as initially detailed, by 2010*" but, where necessary, the NT "*may agree to modify this implementation plan on the basis of further information or analysis where necessary to achieve the objectives of the NWI*". I am instructed that the NT NWI Implementation Plan has not been formally modified. However, it is arguable that the original terms of the NWI commitments are in the process of being modified by the formal reviews of the implementation of the NWI.

The Productivity Commission (**PC**) reviewed the implementation of the NWI in 2020.[6] The NT Government and the Badu Review have included in the scope of the NWI commitments some of the recommendations that the PC has articulated through its 2020 PC Inquiry Report, which includes the NWI Implementation Assessment 2017-2020 and the Water Reform report.[7] The 2020 PC Inquiry Report is supplemented by a set of "Supporting Papers", some of which are referred to in the Badu Review. Although the Australian Government has agreed to renew the NWI in partnership with the States and Territories, this has not yet happened.

[6] A Gardner et al, *Water Resources Law*, LexisNexis Au, 2nd edition 2018, [3.11]
[7] Australian Government, Productivity Commission, *National water reform 2020*, Final Report released on 2 September 2021, available at https://www.pc.gov.au/inquiries/completed/water-reform-2020#report

I summarise below the key NWI objectives and actions for water allocation planning, the history of the NT's commitments to implement the NWI and the relevant attributes of NT law and policy. References to the 2020 PC Inquiry Report and Supporting Papers are addressed in Part 2 below analysing the Badu Review's conclusions.

Before proceeding with this discussion, it is helpful to explain the meanings of the word "allocation", as this word is used in the context of the planning instrument and the access entitlement. In the former context, it refers to the function of a water plan to allocate or share water between broad community level categories or purposes.[8] In the latter context, the NWI uses the word "allocation" to describe the volume of water credited, under the terms of the water allocation plan, to the water account of the individual access entitlement holder as the share of the consumptive pool for that entitlement holder for a water season.[9]

1.1. The NWI objectives and actions - the NWI commitments

1.1.1. Objectives of the NWI for Water Planning

The NWI **paragraph [23]** states the objectives, which are as follows (with presently irrelevant exclusions).

23. Full implementation of this Agreement will result in a nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes by achieving the following:

    i) clear and nationally-compatible characteristics for secure *water access entitlements*;

    ii) transparent, statutory-based water planning;

    iii) statutory provision for *environmental and other public benefit outcomes*, and improved environmental management practices;

    iv) complete the return of all currently overallocated or overused systems to *environmentally-sustainable levels of extraction*;

    …

    vi) clarity around the assignment of risk arising from future changes in the availability of water for the *consumptive pool*;

    vii) water accounting which is able to meet the information needs of different water systems in respect to planning, monitoring, trading, environmental management and on-farm management;

    …

    x) recognition of the connectivity between surface and groundwater resources and connected systems managed as a single resource.

The concept of *environmentally-sustainable level of extraction* is defined as "the level of water extraction from a particular system which, if exceeded would compromise key environmental assets,

[8] A Gardner et al, *Water Resources Law*, LexisNexis Au, 2nd edition 2018, [14.49]. Other forms of water plan may address water quality, use, flood control or drainage.

[9] A water season is typically a year, from 1 July to 30 June following. However, some water allocation plans in Australia may provide for an allocation over a period of more than one year.

or ecosystem functions and the productive base of the resource".[10] It is fundamental to all water resource allocation,[11] and can be seen as a conceptual limit on allocation to the consumptive pool.

The NWI **paragraph [24]** lists the 'key elements' of the NWI program of actions for achieving these objectives, including -

(i) water access entitlements and planning framework,

(v) water resource accounting,

(viii) community partnerships and adjustment issues.

The following summarises the NWI paragraphs in relation to each of these three key elements.

1.1.2. Three key elements of the NWI for Water Planning

NWI paragraphs [25]-[57] set out the agreed outcomes and commitments with respect to **water access entitlements and water planning**. These paragraphs express important propositions about the legal character of access entitlements and plan provisions for environmental and other public benefit outcomes, as explained in *Water Resources Law* at [14.39], with emphasis in the original.

> "25 The Parties agree that, once initiated, their *water access entitlements* and planning frameworks will:
> (i) enhance the security and commercial certainty of water access entitlements by clearly specifying the statutory nature of those entitlements;
> (ii) provide a statutory basis for environmental and other public benefits in surface and groundwater systems to protect water sources and their dependent ecosystems;
> …
> 37 Broadly, water planning by states and territories will provide for:
> (i) secure ecological outcomes by describing the *environmental and other public benefit outcomes* for water systems and defining the appropriate water management arrangements to achieve those outcomes; and
> (ii) resource security outcomes by determining the shares in the *consumptive pool* and the rules to allocate water during the life of the plan.
>
> The cumulative effect of these NWI propositions is that water allocation plans are to establish a secure basis for environmental water allocations and consumptive use water entitlements, and that these plans are to have a binding legal effect on the management of water resources by both executive government and any persons with interests in either form of allocation. This legal certainty is seen as essential for the operation of the market in water entitlements."

NWI paragraphs [28]-[30] express the essential attributes of the NWI water access entitlements and associated rights; namely, that the traditional water licence be replaced by "unbundled" NWI entitlements for access, allocation and use.[12]

- The *access* entitlement is to be separate from land title and to be expressed as a perpetual share of a consumptive pool of a specified water resource determined by a water plan: para [28].
- The *allocation* entitlement is to be a periodic (usually seasonal) allocation of water to the access entitlement made consistently with a water plan: para [29].
- The *use* entitlement is to be a regulatory approval of water use at a particular site for a particular purpose and is separate from the access and allocation entitlements: para [30].

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[10] Intergovernmental Agreement on a National Water Initiative 2004, p.29, Schedule B(i): Glossary of Terms.
[11] For example, see *Water Act 2007* (Cth) ss.3 and 23. See also, NWI [25(v)].
[12] A Gardner et al, *Water Resources Law*, LexisNexis Au, 2nd edition 2018, [12.3] and [18.4]-[18.6].

This unbundled regime is important for facilitating the trade of water access rights, with the access and allocation entitlements to be tradable.

It must be acknowledged that the NWI entitlement system is seen as primarily applicable to water access rights for commercial purposes and public water supply. Contemporary water resources legislation usually preserves basic landholder access rights for domestic and stock watering purposes, and similar limited access purposes such as firefighting. In the NWI (para [55] ff), these water access rights are treated as "interception" of surface and ground water resources that should be regulated by statutory rights and accounted for in water allocation planning, but not by the access entitlements system.

The NWI treats Indigenous access to water resources as an aspect of water planning. It provides in:

> **Paragraph [25]** that the water access entitlements and planning frameworks will "(ix) recognise indigenous needs in relation to water access and management", and
>
> **Paragraphs [52]-[54]** that through planning processes, in accordance with legislation, the Parties will provide for indigenous access to water resources by:
>
> - "inclusion of indigenous representation in water planning wherever possible",
> - incorporating in water plans indigenous social, spiritual and customary objectives and strategies for achieving those objectives, and
> - allocating water to native title holders and accounting for that water.

It is apparent that the NWI did not explicitly say that water resources legislation should recognise Indigenous water needs through conferral of access entitlements in addition to plan provisions.

NWI paragraphs [80]ff address **water resource accounting** for the administration of entitlements, which is equally important for the functioning of the water allocation and entitlement trading system, starting with a register of entitlements. Paragraph [80] records the parties' agreement that an accounting system should "ensure that adequate measurement, monitoring and reporting systems are in place … to support public and investor confidence in the amount of water being traded, extracted for consumptive use, and recovered and managed for *environmental and other public benefit outcomes*".

This function of water resource accounting of entitlements is complemented by the monitoring of the implementation of water plans against water plan objectives: **paragraph [40]**. Water plan monitoring should be "consistent with the nature and intensity of resource use" and be publicly reported. The reporting should assist governments and water users to manage risk, including to the consumptive pool, and inform plan amendments. Under the terms of the NWI, monitoring plan implementation is monitoring the administration of a statutory instrument. In my opinion, the framework for such monitoring should also have a statutory basis.

NWI Paragraphs [93]-[97] express the outcomes and actions for **community partnerships and adjustment issues** affecting entitlements holders and communities that may arise from reductions in water availability from implementing the NWI reforms. While these propositions have a generic relevance in expressing principles of "open and timely consultation with all stakeholders" and the provision of "accurate and timely information to all relevant stakeholders", it is apparent that these NWI propositions are directed at general community and Indigenous engagement, and at the difficulties anticipated in relation to "pathways for returning overdrawn surface and groundwater

systems to environmentally sustainable extraction levels" – para [95].[13] The NWI provisions for water planning express more generally applicable principles of open, transparent, well-informed community consultation in water allocation planning. For example, NWI **paragraph 36** provides:

> "Recognising that settling the trade-offs between competing outcomes for water systems will involve judgements informed by best available science, socio-economic analysis and community input, **statutory *water plans*** will be prepared for surface water and groundwater management units in which entitlements are issued (subject to paragraph 38). Water planning is an important mechanism to assist governments and the community to determine water management and allocation decisions to meet productive, environmental and social objectives." [emphasis added]

Paragraph [38] provides that the State or Territory will determine when a plan is prepared, the area it covers, the detail, duration and time of review, and the resources devoted to its preparation "based on an assessment of the level of development of *water systems*, projected future consumptive demand and the risks of not having a detailed plan."[14] **NWI para [39]** and **Schedule E** give guidance on the content and process of a plan, including by Schedule E clause 6 that declares:

> "[w]ater planning processes include:
>
> i) consultation with stakeholders including those within or downstream of the plan area;
>
> ii) the application of the best available scientific knowledge and, consistent with the level of knowledge and resource use, socio-economic analyses;
>
> iii) adequate opportunity for consumptive use, environmental, cultural, and other public benefit issues to be identified and considered in an open and transparent way; …"

In conclusion, it is important to note that the NWI conceived of water planning and water plans as processes and instruments defined by statute. For example, **NWI para [23(ii)]** refers to "statutory based water planning"; **para [23(iii)]** refers to "statutory provision for environmental … outcomes", and **para [36]** refers to "statutory water plans". Significantly, the definition of "water plan" in **NWI Schedule B(i)** is "statutory plans for surface and / or groundwater systems … developed in consultation with all relevant stakeholders on the basis of best scientific and socio-economic assessment, to provide secure ecological outcomes and resource security for users".

1.2. NT's NWI Implementation Commitments

The NT accepts the **NWI para [23]** objectives in the NWI Implementation Plan. It states that the NT does not have over-allocated river systems or groundwater resources but that it will provide an annual public audit of the level of allocation in all river and groundwater systems.[15] The NT's NWI Implementation Plan gives numerous responses and commitments to the key elements. I have focused on the NT's commitments in relation to the three key elements identified above in Part 1.1; namely -

- water access entitlements and planning framework – paragraphs [25]-[57], especially [28]-[30] regarding the NWI entitlements plus [25] and [52]-[54] regarding Indigenous access;
- water resource accounting – paras [40] and [80]; and

[13] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.193.

[14] See also, A Gardner et al, *Water Resources Law*, LexisNexis Au, 2nd edition 2018, [15.16].

[15] Northern Territory Government, NWI Implementation Plan 2006, p.15.

- community consultation, community partnerships and adjustment – paragraphs [93]-[97] and, more pertinently, [36], [38], [39] and Schedule E guidelines;

NWI Schedule A is the original timeline for implementation of key actions, which is mostly redundant now except for providing a checklist of what may be incomplete or ongoing actions. The NT NWI Implementation Schedule also contains some commitments about the time for implementation of key actions, which are similarly mostly redundant now. In any case, the NT NWI Implementation Plan 2006 generally assesses the NT to have already fulfilled the NWI commitments or to be on track to fulfill them in the immediately following years; for example, in relation to paragraphs [28]-[30].[16] As we shall see, there can be misunderstandings of what the NWI requires.

More effective guidance regarding ongoing commitments is now provided by the PC's 2020 Inquiry Report, including its recommendations for contemporary interpretations of the NWI commitments. I also acknowledge the approach of the Badu Review in addressing ongoing commitments to be drawn from the 2010 NWI Policy Guidelines for Water Planning and Management, 2017 Guideline Modules, and the PC's 2020 Inquiry Report, including the Supporting Papers.[17] These additional documents provide a detailed elaboration of the NWI principles that exceeds the scope of this advice. Only selective reference can be made to these additional sources to aid in an evaluation of the NT's fulfilment of the NWI commitments.

1.3. The water planning provisions of the Water Act and Water Regulations

The Water Act and Water Regulations are the most sparsely expressed water resources management legislation in Australia. The relatively small population has placed modest demands on the development and use of widely distributed, often very scarce, water resources.[18] The past regulatory demands have been less than other Australian jurisdictions. However, as the Territory Water Plan 2023 explains,[19] the current legislation "does not provide all the necessary mechanisms for best practice water resource management in the current context of climate change, growing competition for water and community expectations around governance and accountability". The NT Government is preparing new legislation to submit to the NT Legislative Assembly by 2026.

Nevertheless, the purpose of this advice is to evaluate the Badu Review of the NT's implementation of the NWI in relation to water planning. The essential features of the current law relating to water planning are outlined here.[20]

1.3.1. Public control of most water resources

Water in a waterway (broadly defined) or groundwater is Crown vested: s.9. This means that a person must find authority under the Act to take and use water or to interfere with a waterway or groundwater for that purpose.

There are statutory public and private rights to access, take and use water for stock watering and domestic purposes: ss.10-15. A person who wishes to take and use water in volumes that exceed the statutory rights will need to apply for a licence: Part 5, Division 2, and Part 6, Division 4. Similarly, a

[16] Northern Territory Government, NWI Implementation Plan 2006, pp.17-19.
[17] Above n1, Badu Advisory Review, pp.10-15.
[18] Above n1, Badu Advisory Review, at p.1 lists "unique characteristics" for water planning in the NT.
[19] Northern Territory Government, *Territory Water Plan*, 2023, p.34.
[20] The *Water Resources Law* book, chapters 15-17, discuss in detail the Australian State and Territory laws relating to the water resources planning system, the content of a water allocation plan and the legal effect of a plan. The barest planning provisions of the Water Act are not discussed there.

person wishing to construct works to take surface or groundwater must apply for a permit to do so. Part 5, Division 1, and Part 6, Division 3. Parts 6A – 6C are generally beyond the scope of this advice,[21] though it is important to note that Part 6C, which came into operation on 1 August 2023, ends the exemption of mining and petroleum activities from the Water Act licensing of access to water resources for those industries' activities.[22]

The Minister may appoint a Controller of Water Resources (**Controller**) to exercise key administrative functions under the Act, including to conduct and authorise water resources investigations, and to determine applications for permits to carry out works in relation to surface and ground water, and applications for licences to operate those works for the purposes of taking surface or ground water: s.18. The Controller "must keep one or more registers of licences" granted under the Act, and the registers are to be publicly available on the Agency's website, containing the information prescribed by the Regulations: s.95. The register information must identify the licence holder, the date and duration of the licence, location of the property from which the water is taken, the water source and the annual maximum quantity of water that may be taken under the licence: Water Regulation 17. The Controller has also established a modest (static) form of 'water trade register' pursuant to some water allocation plans (**WAP**s),[23] but I can find no legislation authorising the water trade register.

1.3.2. Planning process

The Minister controls the planning process, beginning with the power to declare Water Control Districts (**WCD**) and to declare a WAP to apply in respect of all or part of a WCD: ss.22 and 22B. The Minister must specify the period (term) of a WAP, a maximum of ten years, and must ensure that a review "is conducted at intervals no longer than 5 years": s.22A(3)-(4).

I am instructed that there are currently eight declared WCDs; some quite small and others quite large, extending from Darwin and Gove in the north to Alice Springs and the Great Artesian Basin in the south.[24] In respect of those WCDs, no WAP is proposed for two WCDs, three WAPs are being prepared and there are seven declared WAPs, three of which apply to aquifers within one WCD.[25] The Water Act clearly gives the Minister the discretionary powers to decide whether to establish a WCD and to prepare a WAP. The Minister can also decide the process for making a WAP because the Act and Regulations say nothing about plan-making process. There are also no express statutory provisions for amending a plan, though it could be implied that a Minister may make a new WAP to replace an existing WAP, even if its term had not expired. The Georgina Wiso Water Allocation Plan 2023-2031[26] and the draft Western Davenport Water Allocation Plan 2022-2032,[27] for example, refer to a power to amend the plan. This may be relying on *Interpretation Act 1978* (NT) s.43, which provides that a

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[21] Water Act Parts 6A – 6C deal with "water extraction licence decisions", "development of land for subsequent licences" and "revoked exemption licence decisions", respectively.

[22] *Water Legislation Amendment Act 2023* (NT), Gazette Number G14, 06/07/2023, s.12 inserting Part 6C. Water quality regulation of mining and petroleum industry activities are not covered by the pollution provisions of the Water Act if they occur in carrying out a mining or petroleum activity and are confined within a mining or petroleum site: ss 7, 16, 17 and 17A ff.

[23] Northern Territory Government, "Water trade register", showing publication of "approved water trades": https://nt.gov.au/environment/water/licensing/water-extraction-licence/water-trade-register .

[24] The Northern Territory Government provides a map of the Declared Water Control Districts.

[25] The Northern Territory Government provides a map of the Water Allocation Planning Areas.

[26] Northern Territory Government, Georgina Wiso Water Allocation Plan 2023-2031, section 5.1.

[27] Northern Territory Government, draft Western Davenport Water Allocation Plan 2022-2032, section 5.1.

power to take an action or make a statutory instrument includes a power to revoke, amend or vary the action or instrument. That power resides with the Minister.

1.3.3. Content of WAPs

The Minister largely controls the content of WAPs. The Administrator of the NT (by convention on the advice of the Minister) may declare beneficial uses of water in a WCD: s.22A(1), and s.4(3) defines the potential beneficial uses of water, which include water for a mining activity or a petroleum activity. By statutory declaration, the "environment" and "Aboriginal economic development" are beneficial uses of water in a water control district: s.22A(2).

A WAP for a WCD must ensure that water is allocated within the "estimated sustainable yield to beneficial uses", and such allocation "is to include an allocation to the environment": s.22B(5)(a) and (6). An allocation of the estimated sustainable yield to beneficial uses is also to include "an Aboriginal water reserve" if any of the land in the WCD subject to the WAP is "eligible land": s.22B(7) and 22C. The Minister must consult the relevant Aboriginal Land Council before designating eligible land for an Aboriginal water reserve. The total volume of water allocated "for all beneficial uses" (including all statutory and licence access rights) must be less than the sum of the allocations to each beneficial use": s.22B(5)(b).

1.3.4. Legal effects of a WAP

There are three express legal consequences where a WAP applies in a WCD. First, the licence rights to take surface or ground water must be tradable (in part or full): s.22B(5)(c). Secondly, the water resources management "is to be in accordance with any water allocation plan …": s.22B(4). Thirdly, the Controller "must take into account" any applicable water allocation plan in making decisions about water extraction licences, including the grant or amendment of such licences: s.90(1)(ab). The exact meanings of these provisions are open to legal interpretation.

First, neither the Act nor Regulations provides a water trading process or authorisation (except for s.71J in the context of Part 6B relating to land development), so it seems that water trading is to be regulated under a WAP. For example, the Georgina Wiso Water Allocation Plan 2023-2031[28] and draft Western Davenport Water Allocation Plan 2022-2032,[29] provide for the authorisation of a water trading agreement provided it is consistent with the department's policy on water trading. The power to make WAPs in s.22B includes subsection (5)(c), which provides that a WAP "is to ensure that … the right to take water under a licence granted under section 45 or 60 is able to be traded (in part or in full)". There is no apparent statutory authority for the Department to make a water trading policy with any legal effect, so the design and application of any such policy will be within the discretion of the Department.

Secondly, does s.22B(4) impose a legal duty on the Controller to manage the water resources in compliance with the relevant WAP? What legal effect does the WAP have on licensees and other stake holders, including those with public interests? Can it create binding legal rights and duties that may be enforced by the Controller against private persons, and vice versa, or even between private parties? There is also the question of the legal effect of s.90(1) requiring the Controller to "take into account" any applicable WAP when making decisions about water extraction licences, discussed below at 2.2.3. As explained in Part 1.1 above, the NWI envisages a statutory water planning system that creates legal

[28] Northern Territory Government, Georgina Wiso Water Allocation Plan 2023-2031, section 4.3.
[29] Northern Territory, draft Western Davenport Water Allocation Plan 2022-2032, section 4.5.

certainty for the public and private interest outcomes of a plan. There is doubt about whether the succinct planning provisions of the Water Act achieve this. Nevertheless, the Georgina Wiso Water Allocation Plan 2023-2031,[30] section 4.2 purports to provide a limit on the grant or amendment of water extraction licences in excess of the plan allocation.

1.3.5. Consultation

Consultation in the making and administration of a WAP is important. The **NWI Schedule E, cl.6**, points to that importance in making a water allocation plan: see Part 1.1 above. The Water Act's only recognition of a consultation mechanism is in the Minister's power to establish and appoint members to a Water Advisory Committee (**WAC**) for the Territory or a part of the Territory or a particular purpose: s.23(1). There is no statement of any function of a WAC in relation to preparing a WAP, but one assumes that a WAC could advise the Controller in relation to water licensing and the preparation of a WAP. If a WAP is declared, the Minister "may" establish and appoint members to a WAC for the plan: s.23(1A).

The word "may" is used in each subsection to authorise the Minister to exercise this power. There is an interesting question whether the Minister could have a duty to exercise the power to establish a WAC for a declared WAP. A WAC appointed for a WAP is to advise the Controller on the effectiveness of the WAP and is authorised to perform functions conferred on it by the Controller: s.23(1B)(b). However, the Act provides no criteria for the appointment of members or their term; these issues are determined entirely by the Minister, so the WACs enjoy no independent legitimacy or security of tenure. I am instructed that little use is made of the Water Act's provisions for WACs, and this is supported by evidence presented to the PC 2020 Inquiry.[31]

1.3.6. Water allocation planning policies

There are, of course, other important provisions in the Water Act; for example, Part 6A relating to the Controller's decisions on water extraction licences. The provisions described above are those that may be relevant to the administration of water allocation planning, including for water accounting.

In the administration of water allocation planning, there are four important policy instruments that supplement the statutory framework in implementation of the NWI objectives and commitments. These instruments will be discussed further in Part 2. In summary, they are as follows.

- Classification of the Top End and Arid Zone for Northern Territory water resources, 2021[32] - defines, by climatic and hydrologic criteria, these two water resource zones for water resource allocation purposes according to "contingent allocation rules". In simple terms, the "Top End" is characterised by regular (annual) wet season rainfall greater than 600mm and regular (annual) groundwater recharge. The "Arid Zone" is characterised by no regular wet season rainfall, less than 600 mm annually and infrequent groundwater recharge, if at all.

- Water Allocation Planning Framework, 2000[33] - sets the framework for issuing licences by prescribing the "contingent allocation rules" *for non-consumptive water allocations* in the Top

[30] Northern Territory Government, Georgina Wiso Water Allocation Plan 2023-2031, section 4.2.
[31] See below Section 2.1.4, Community partnerships and consultation.
[32] Northern Territory Government, Department of Environment, Parks and Water Security, Water Resources Division, "Classification of the Top End and Arid Zone for Northern Territory water resources", 2021.
[33] Northern Territory Government, Department of Environment and Natural Resources, Policy, "Northern Territory Water Allocation Planning Framework", 2000, amended 2020.

End and Arid zones in respect of both rivers and aquifers where there is an absence of directly related research. For example, this policy allocates 80% of a Top End river flow at any time for environmental and public benefit. There are important questions of interpretation, especially in respect of the Arid Zone Aquifers rule that "total extraction over a period of at least 100 years will not exceed 80 per cent of the total aquifer storage at the start of extraction". Another question is does this policy apply to the allocation of surface or ground water by a WAP?

- Applying announced allocation licence conditions[34] - describes the process for making an *annual allocation to licences* varying the volume of licensed extraction in response to water availability. This process is generally applied to Top End water resources, and less frequently to Arid Zone water resources. This policy applies where more than 50% of the consumptive pool is allocated for extraction under water licences and may be applied to supplement the terms of a WAP or to maintain 80% of Top End natural river flows in accordance with the Water Allocation Planning Framework. It is unclear when this policy was adopted and first applied.

- Surface Water Take – Wet Season Flows Policy: 2022 Draft for consultation[35] - provides allocation rules for the consumptive use taking of surface water in the Top End wet season *at three levels of decision-making*; annual licensing and annual allocations to licenses and under a WAP. It is an adjunct to the NT Water Allocation Planning Framework, which is said not to apply to "surface water take during the wet season". The draft instrument purports to express a "contingent allocation rule … applied when scientific research is not available". Where:
  - relevant and available scientific research establishes the maximum volume that may be extracted, that will guide the decision-making;
  - the scientific research is not available, the draft instrument sets a "contingent allocation rule" for a Top End river basin that the "consumptive pool" is calculated as 5% of the 25th percentile of (average annual?) total flows recorded over 50 years for the three highest flow months (January, February, March).

  The questions are why would such a non-statutory instrument be adopted to inform licensing decisions under a WAP that has been adopted under the Act, and how is the consumptive pool contingent allocation of 5% of the 25th percentile of the three wettest months to be allocated between competing licensees? This draft policy is further considered in Part 2.5.2.

Summary

In summary, the description of the legislative and policy provisions shows a highly flexible regulatory framework for water resource management in the NT. The water resource uses may range from:

- Statutory water access rights for limited public and private purposes,
- to permitting and licensing for water resources access greater than the statutory authorisations outside WCDs,

[34] Northern Territory Government, Department of Environment, Parks and Water Security, "Announced water allocations" website, including "announced allocation fact sheet" (undated).

[35] Northern Territory Government, Department of Environment, Parks and Water Security, "Surface Water Take – Wet Season Flows Policy: Draft for consultation", 15 September 2022.

- up to situations of both direct statutory and licence authorisation of water use triggering a regime of WCDs and WAPs that purports to establish a formal water allocation planning system.

The implied statutory purpose of a WAP is that it should be applied in the management of water resources that are subject to higher levels of water resource use, possibly levels that could exceed an estimated sustainable yield. At this level of allocation, Government should no longer be accepting or granting applications for water licences. Rather, any person seeking a new water access right will need to acquire such a right by water trading. Equally, a licensee proposing to reduce the extraction and use of water could decide to sell part of their licence entitlement.

With this framework in mind, I turn in Part 2 to an evaluation of the conclusions by the Badu Review, focusing on the three questions identified above in the "Overview of the work requested".

2. Advice on the conclusions of the Badu Review in relation to questions (1) - (3)

2.1. Badu Review Conclusions

The Badu Review "concluded that the NT's water planning processes are consistent with the provisions of the NWI and subsequent guideline documents".[36] In support of this overall conclusion, the Badu Review makes seven observations about features of those water planning processes and identifies seven "focus areas for continuous improvement" of the NT's implementation of the "NWI's water planning related aspects".[37]

The seven observations about the features of the water planning processes are as follows.

A. The type of specification of existing water extraction licences in the NT is currently appropriate for the context.
B. Statutory water allocation plans (WAPs) are progressively being developed for areas where there is emerging demand and where there is the most competition for the use of groundwater. Outside those areas, NT-wide policies and procedures are being used to guide consistent decision making.
C. Trading of water extraction licences is available in areas covered by WAPs.
D. The water planning processes seek to balance social, economic and environmental values.
E. Research and scientific assessments are carried out to develop knowledge to support planning processes.
F. Community engagement is carried out as a part of the planning processes.
G. Aboriginal Water Reserves are established under WAPs.

The Badu Review includes a detailed table in Appendix A and Appendix B purporting to assess the relevance of NWI principles, including as elaborated by the PC recommendations (Appendix B), to the NT context and evaluating the NT's implementation of the principles by reference to the seven observations listed above.

[36] Above n 1, Badu Review, executive summary, p.2.
[37] Above n 1, Badu Review, executive summary, pp.2-5.

2.2. Differences with the Badu Review

This advice differs from the Badu Review in three ways. First, the focus of this advice is more on the Badu Review discussion of "key themes"[38] rather than a scrutiny of the detailed evaluation in Appendices A and B. Secondly, the Badu Review excludes from the scope of the review "[c]ommenting on the merits or otherwise of principles, strategies, rules etc. contained within, or the outcomes associated with, the specific provisions contained within WAPs, policies or guidelines".[39] In contrast, this advice explicitly includes analyses of key strategies and policies and some WAP provisions in relevant assessments of NWI compliance.

Thirdly, the NWI is not a legal instrument; it is a national policy agreement subject to evolving policy elaboration. Any evaluation of the NT's water allocation planning and entitlement system against the NWI provisions and subsequent elaboration of the NWI principles must concede a degree of pragmatism and subjectivity. The Badu Review evaluation is presented mainly as general factual observations of water resource management actions with occasional references to the statutory support for those management actions supporting the overall conclusion. This advice attempts a greater focus on evaluating the legal basis for the NT's implementation of the NWI.

The Badu Review describes itself as -

> intended to provide high-level strategic advice regarding strategic water issues. Badu Advisory does not provide legal, engineering, financial services, or tax advice.[40]

Nevertheless, the Badu Review acknowledges that the NT Government has proposed to develop new legislation to replace the *Water Act 1992* (NT), quoting the Draft Territory Water Plan (2022):[41]

> The Water Act 1992 (NT) has provided a sound legislative basis for the investigation, allocation, use, control, protection, management and administration of water resources. However, it does not provide all the necessary mechanisms for best practice water resource management in the current context of climate change, growing competition for water and community expectations around governance and accountability.

This statement does not say or establish that the current law and policies are consistent with the NWI principles for water allocation planning. Further, the declaration in the Territory Water Plan 2023 that it is committed to meeting the NWI guidelines on water planning by taking various actions and developing new legislation tends to acknowledge that the current law and policy does not meet those guidelines, even if one chooses to describe the proposed reforms as "continuous improvement".[42]

The following analysis is offered as advice on important legal reforms to implement the three key elements of the NWI, including the recommendations of the PC 2020 Inquiry Report, and drawing on the benefit of the Badu Review observations.

For convenience, I re-iterate the three questions to be answered in this advice. Are the Badu Review conclusions accurate in relation to the NWI consistency of the:

1) provisions of the Water Act and Water Regulations around water planning and allocation;

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[38] Above n 1, Badu Review, pp.11-15.
[39] Above n 1, Badu Review, 1.3 Out of Scope, p.7.
[40] Above n 1, Badu Review, disclaimer, p.2.
[41] Above n 1, Badu Review, executive summary, p.2. The *Territory Water Plan 2023* p.34 reiterates this.
[42] Northern Territory Government, *Territory Water Plan 2023* pp.33-34.

2) general approach adopted for the development (preparation) and structure of Water Allocation Plans (WAPs); and
3) approach to water planning and allocation adopted in the NT "Water Allocation Planning Framework" (6 May 2020), including the contingent rules, annual allocation process and "Draft Surface Water Take – Wet Seasons Flows Policy"?

Before addressing those questions, I note two points about the Badu Review.

a) It gives seven summary observations to support its conclusion that the NT's water planning processes are consistent with the provisions of the NWI and subsequent guideline documents. These observations are cited, as relevant, to answering the three questions for this advice.
b) It introduces (pp.8-9) the NT water planning context that describes the Territory's small population, with a large area at an early stage of development in which there are only 595 water extraction[43] licences granted and significant interest in mining and agricultural development opportunities. The obvious riposte could be that the predominantly very arid landscape with a high reliance on groundwater that is only infrequently recharged, is undeveloped in water intensive enterprises because there is little development potential. As pointed out in Part 1.1.1, one of the fundamental concepts of the NWI is not to over-allocate and / or overdraw surface and groundwater systems beyond an *environmentally-sustainable level of extraction*. This concept is fundamental to all water resource allocation,[44] even to water resources that may be regarded as "undeveloped".

2.3. Are the Water Act and Water Regulations provisions around water planning and allocations consistent with the NWI commitments?

Part 1.1 above identifies three key elements of the NWI program of actions for water access entitlements and water planning and the NWI principles pertinent to those three elements. The following discussion analyses the content of the Water Act and Water Regulations against those principles, noting the relevant observations of the Badu Review and recommendations of the PC 2020 Inquiry Report.

2.3.1. Legal security of access entitlements and plan provisions for environmental & other public benefit outcomes

The Badu Review does not specifically address the legal security of access entitlements and plan provisions. However, the PC does address the character of this legal security question in so far as it asks whether jurisdictions have complied with the NWI by making progress "in affording environmental water at least the same level of security as water for consumptive uses".[45]

This question is generally raised by the Badu Review observation "D. the water planning processes seek to balance social, economic and environmental values". Thus, our question becomes: do the NT's statutory water allocation plans provide for similar legal security for water access entitlements and environmental outcomes consistently with the NWI principles?

[43] I am instructed that, in early February 2024, there are 607 licences granted.
[44] For example, see *Water Act 2007* (Cth) ss.3 and 23.
[45] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.31. And see NWI para [35(i)].

The PC concludes that, "overall", jurisdictions (except Western Australia) have "largely achieved their NWI commitments regarding water for environmental and public benefit outcomes".[46] The PC's explanation is that jurisdictions have afforded "environmental water at least the same level of security as water for consumptive uses". The PC also concludes that the NT conducts ongoing monitoring of water plan areas.[47] With respect, the PC's evaluation is based simply on whether the making of a water plan is under a statutory provision; there is no evaluation of the terms of the legislation providing for water planning and consumptive use entitlements.

The Water Act Parts 5 and 6 provide for the grant of legally secure water licences on conditions for surface and ground water resources, the terms of which may be varied by direction[48] subject to the provision for just compensation to the extent that the exercise of a statutory power or function constitutes an acquisition of property.[49] The Controller may also, during the currency of a licence, serve a notice on a licensee to amend the licence terms and conditions though not to increase the total quantity of water that may be taken.[50] In exercising such a power, the Controller must "take into account" any relevant factors from a long list of considerations, including any applicable WAP.[51] The Controller may also suspend or revoke a licence if the licence holder has contravened a licence condition.[52] A "person aggrieved by an action or decision" under the Water Act may apply to the Minister for review.[53] A person aggrieved would also have rights to seek judicial review of an action or decision. The key point here is that, although the Controller may amend water licences, including because of the provisions of a WAP, consumptive use entitlements are held under licences that may only be changed by the exercise of a statutorily defined power that is subject to review.

There is not the same legal security for water plan provisions for environmental and public benefit outcomes. First, the NT is one of five jurisdictions that do not hold environmental water under water access entitlements.[54] Secondly, the power of the Minister to declare WCDs and WAPs, described in Part 1.3.1 – 1.3.2 above, is not subject to any statutory statement of process for making or amending a WAP. Although the Minister may specify the period of a water plan (s.22B(2)), there appears to be no legal barrier to the Minister replacing a plan with a new plan before the specified term has expired. As noted in Part 1.3.2, the Georgina Wiso Water Allocation Plan 2023-2031 and draft Western Davenport Water Allocation Plan 2022-2032 purport to provide an internal authorisation to amend the plan.

It is acknowledged that the Minister's power to change a WAP may be exercised to increase or decrease the plan allocation to environmental outcomes or consumptive use purposes. The difference is that a change in plan allocation to consumptive use purposes will not affect the existing water licences, but it will immediately and directly affect the only legal expression of an environmental water

[46] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.31.
[47] Ibid p.140.
[48] Water Act ss.45, 60 and 70.
[49] Water Act s.107.
[50] Water Act s.93(1) and (4).
[51] Water Act s.90
[52] Water Act s.93(2).
[53] Water Act s.30. I have not researched how the test of standing to appeal a decision has been applied.
[54] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.133.

allocation. I conclude, therefore, that planned environmental water does not have the same legal security as allocations under consumptive use entitlements.

2.3.2. Water Access Entitlements, Seasonal Allocations and Water resource accounting

The Badu Review observations A and C are:

A. "The type of specification of existing water extraction licences in the NT is currently appropriate for the context."

C. "Trading of water extraction licences is available in areas covered by WAPs."

As explained in Part 1.1, the NWI paragraphs [28]-[30] propose the "unbundled" entitlements for water access, allocation and use. The NT's NWI response and commitment in respect of these principles was to acknowledge that it partially met these principles and would conduct consultation to propose law reform to meet the NWI requirements by December 2006 and implement consumptive pool management in water access entitlements and in water allocation plans on an ongoing basis.[55]

The PC reported in 2021 that the NT has not enacted legislation to create secure, NWI-consistent water access entitlements for consumptive use, though it had made progress since 2017 by removing the exemption from the entitlements framework for the minerals and petroleum industries.[56]

The PC has commented that "fully NWI consistent entitlements may not be necessary in relatively undeveloped water systems, as demand for the resource is low and water sources may be poorly understood. However, as competition for water resources increases, so too would the costs of not having NWI consistent entitlements."[57] The PC maintained the view it expressed in 2017: the reform of entitlements should occur where cost effective. I do not have the information to evaluate the cost effectiveness of reforming the NT entitlement regime in relation to those water resources that are the subject of WAPs. However, analysis of the legislation shows that the NT entitlement regime is not fully NWI compliant, even where a WAP and water trading are purportedly in place.

First, the Water Act expresses no specific power(s) to amend or vary a water allocation under a licence to give effect to the Announced Allocations policy and NWI para [29]. However, the *Interpretation Act 1978* (NT) ss.42-43 provide that a power to grant a statutory instrument includes the power to subject it to any conditions, and that a power to take an action or make a statutory instrument includes a power to revoke, amend or vary the action or instrument. These provisions will be subject to the operation of specific powers under the Water Act to grant licences on conditions and to amend those licence conditions, as discussed in Part 2.1.1. The PC's evidence is that the Controller may grant and amend water licences and include in Top End ground and surface water licences the "announced allocation" condition authorising the Controller to apply an "annual reduction percentage".[58] Although I have no evidence as to how widely used is the licence condition facilitating the Announced Allocations policy, it may be concluded that the NT's water allocation framework is compliant with

[55] Northern Territory Government, NWI Implementation Plan 2006, pp.16-19.

[56] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, pp.3, 11 and 14.

[57] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.16, referring to Supporting Paper A, *Entitlements and planning*.

[58] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.26. See, for example, NT Government, "Announced water allocations" - https://nt.gov.au/environment/water/management-security/water-allocation/announced-water-allocations .

NWI paragraph [29][59] where a WAP and licence conditions facilitate the application of the Announced Allocations policy to make annual allocations of available water to water licences.

In other respects, the NT water licences are not NWI compliant.

- The term of a licence is limited to 10 years, rather than being perpetual: s.45(4) and 60(3)-(4), unless the Minister agrees to issue a longer-term licence in special circumstances.
- The licence is not fully separated from land title because the licence application form requires a description of "Property from which the water is to be extracted" and "Property on which water is to be used".[60]
- The water licence entitlement to access (take) water is not "unbundled" or separated from the instrument for regulation of the use of the water: s.90(1).
- Further, the NT applies "a licensing policy that requires entitlement holders to trade or use their water allocation over a specified period, or have it reduced or forfeited" – the so-called 'use it or lose it' policy.[61] The PC comments that this policy is inconsistent with the NWI goal of secure property rights,[62] whereas the Badu Review comments:[63]

  > There should also be continued focus on the success of the current approach of reviewing and removing unused water extraction licences as this will become more difficult as water resources become more fully allocated.

It is suggested that the NT's proposed legislative reform should provide for a transition to an NWI compliant entitlement system when a water allocation plan is made for the water resource. NSW and Queensland adopted this approach in the legislative reforms to transition to the NWI system. These reforms will better enable sustainable water resource management, including environmental water outcomes. They will also require better water accounting.

NWI para [80] proposes effective water resource accounting, with a register of entitlements, and adequate measurement, monitoring and reporting systems to support public confidence in the "amount of water being traded, extracted for consumptive use, and recovered and managed for *environmental and other public benefit outcomes*". Although there is a register of water licences for recording key information about the licensee and licence authorised by Regulation,[64] there are no legislative provisions for regulating the making or recording of the water allocations and no legislative support for the "water trade register".[65] Rather, there seems to be a frequent use of government websites to prescribe regulatory requirements, even in respect of water resources that are subject to a WAP and, therefore, at a level of development that warrants NWI compliant regulation.

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[59] See NWI para [29]: "The allocation of water to a water access entitlement will be made consistent with a water plan …". And see Part 1.1.2 above.

[60] Northern Territory Government, Form for water licence application under sections 45 and 60: https://nt.gov.au/__data/assets/pdf_file/0008/944783/apply-to-take-water-form.pdf . Water Regulations 8 and 9 provide that an application must be in accordance with the approved form, but there appears to be no form prescribed by the Water Regulations.

[61] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.15.

[62] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.15.

[63] Above n 1, Badu Review 6.2.5 at p.17.

[64] Water Act s.95 and Water Regulation 17.

[65] https://nt.gov.au/environment/water/licensing/water-extraction-licence/water-trading

With respect, the Badu Review comment[66] that this is a 'fit for purpose' entitlement and trading system does not seem supported by lack of a legislated framework to implement the NWI principles or by the PC 2020 Inquiry Report. The PC concluded:

> "jurisdictions have largely achieved their NWI commitments for water accounting … However, … demand for more information (particularly at the system level) and timely provision of it have increased. Water accounting requires improvement so [that] it is fit-for-purpose, particularly at the system level where water resources are fully developed."[67]

In respect of reporting on delivery of planned environmental water, the PC added: "… there is scope for improvement. … the amount of information made publicly available for planned environmental water and its accessibility is limited, and reporting is irregular in some jurisdictions."[68] On non-urban water metering and measurement, the PC explained that national guidelines were agreed in 2019 and a NT Non-Urban Water Metering Code of Practice for Water Extraction Licences allows for implementation up to 2027 instead of by the nationally agreed July 2020.[69] As at August 2020, "the proportion of water use … allocated through licences" in the NT was unknown as all water resources have not been quantified and some licences had multiple extraction points requiring metres.[70]

2.3.3. Indigenous access to water resources

The Badu Review observation G is that: "Aboriginal Water Reserves are established under WAPs."

As noted in Part 1.1 above, the NWI [52]-[54] call for the inclusion of Indigenous representation in water planning and the incorporation of Indigenous objectives and strategies for achieving those objectives, plus allocation of water to native title holders, but does not explicitly say that water resources legislation should recognise Indigenous water needs through conferral of access entitlements in addition to plan provisions.

The Water Act provides that a WAP may allocate water "to meet aesthetic, recreational and cultural needs",[71] and this statutory power should enable the NT to meet the PC's recommendation that WAPs should provide for "clear, measurable and well-informed cultural outcomes" and that cultural outcomes "should be pursued through environmental watering where they are consistent with achieving agreed ecological outcomes".[72] The PC records various actions in the NT for better recognising Indigenous cultural values and their water requirements,[73] and affirms that native title rights to access water for personal, domestic, social and cultural purposes are recognised in native title determinations but the right to use water for commercial purposes has not yet been recognised in native title law.[74]

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[66] Above n 1, Badu Review 6.2.5 at p.17.

[67] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.151.

[68] Ibid p.153. The PC does not identify jurisdictions with this observation, so it seems generally true.

[69] Ibid p.155. See also PC, Supplementary Paper E, "Ensuring the integrity of water resource management", May 2021, pp.18-19.

[70] Ibid p.158.

[71] Water Act s.4(3)(c). Such an allocation could be for Aboriginal and non-Aboriginal cultural values.

[72] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, Supporting Paper D, Key points, p.4.

[73] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.39 ff.

[74] Ibid.

However, the NT has made progress on this last point. Under the NT's Strategic Aboriginal Water Reserve Policy, a WAP *may* set aside a proportion of water for eligible Aboriginal Water Rights holders.[75] The implementation of this policy was not successful. For example, the Katherine Tindall Limestone Water Allocation Plan 2019-2024 established a "Strategic Aboriginal Water Reserve" with a "notional (empty) reserve until water is available for allocation".[76]

The Water Act was amended in 2019 to *require* a WAP to provide for an Aboriginal water reserve for Aboriginal economic development, with the amendments commencing operation on 8 July 2020.[77] The new statutory provisions do three things for WAPs:[78]

1. define "Aboriginal economic development" to be economic development by or for the benefit of eligible Aboriginal people;
2. declare Aboriginal economic development to be a beneficial use of water in a WCD; and
3. require a WAP to include an Aboriginal water reserve if any land in the WCD to which the WAP relates is "eligible land" (which is defined, essentially, to be land held under exclusive native title or private land held for the benefit of Aboriginal people)[79] and designate that land in the WAP if there are water resources there.[80]

The 2019 amendments also conferred on the Controller a limited power to grant water extraction licences allocating water in an Aboriginal water reserve.[81] The Controller must not grant a water extraction licence for water in an Aboriginal water reserve unless consent is given by Aboriginal persons of a prescribed class in a prescribed manner and form. I am instructed that no regulations have been made to prescribe the class of persons to give consent or the manner and form of consent. Presently, the Controller has no power to grant licences to take water from an Aboriginal water reserve.

Perhaps the Regulations to prescribe the consultation process are yet to be approved because of the potential tension between a statutory requirement for a WAP to provide an Aboriginal water reserve and situations where a water resource may already be fully allocated to existing consumptive use purposes. The PC's recommendation is that governments work with Traditional Owners to determine pathways for economic development and facilitate access to consumptive water entitlements within existing entitlement frameworks, either by allocating from the consumptive pool where it is not fully allocated or by buying water on the market where the consumptive pool is fully allocated.[82] It seems

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[75] Ibid p.41. See also Northern Territory Government, *Strategic Aboriginal Water Reserve: Policy Framework*, version 13/10/17, and Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, Supporting Paper D, p.25.

[76] Northern Territory Government, Department of Environment and Natural Resources (2019), Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2024, pp.8, 15 and 52. At the declaration of this plan, Aboriginal Water Reserve was not a beneficial use class recognised under Water Act s.4(3) and so there could have been a lack of statutory authority under s.22B(5)(a) to allocate water to this purpose within the estimated sustainable yield.

[77] *Water Further Amendment Act 2019* (NT) inserted a set of provisions to establish Aboriginal water reserves for Aboriginal economic development, which commenced operation on 8 July 2020. for

[78] See Water Act ss.4(1), 4(3)(j), 22A(2)(b) and 22B (7).

[79] Water Act s.4B.

[80] Water Act s.22C.

[81] Water Act s.71BA.

[82] Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, Supporting Paper D, p.4.

that the NT Water Act and Regulations are close to being able to do this, subject to improved rights and procedures for community partnerships and consultation.

2.3.4. Community partnerships and consultation

The Badu Review observed that:

"F. Community engagement is carried out as a part of the planning processes."

The Water Act provisions for the establishment and functions of a WAC are discussed above at 1.3.5.

The PC noted that the NT had reported that its WACs, which have Aboriginal members, "continued to contribute to the development of water allocation plans" and that on-country engagement in water planning helped improve water literacy, co-design Aboriginal engagement in water planning, and to seek advice on Aboriginal water management requirements.[83] However, a Northern Land Council (**NLC**) submission[84] to the PC Inquiry asserted "continued erosion of the ability for community and stakeholders to be involved in water management decisions made by government which affect their rights and interests" and that "community engagement arrangements associated with water planning, licensing and management in the NT need to be significantly improved". The NLC commented particularly about the decline in the functioning of the water advisory committees, the only formal mechanism for community involvement in the water allocation planning; it pointed to a decline in committee memberships from 80 in 2017 to 12 in March 2021.

The PC was unable to make a "fully informed judgement" on whether all Australian governments had largely achieved the NWI requirement to provide information to support community engagement with decision making processes and respond to stakeholder concerns.[85] However, through Supporting Paper J, the PC emphasized the importance of effective community engagement and extolled the guidelines for the attributes of effective engagement practice, noting that the NWI provisions had arguably become dated and were no longer fully fit for purpose as the range and nature of water management reform priorities had changed. Much of the concern was with the evolution of community engagement perceptions in the Murray-Darling Basin, but there can be no doubt that the PC's advocacy of best-practice principles is equally applicable to the NT.

The Badu Review acknowledges the challenges in the NT in Aboriginal engagement – effective community engagement takes time.[86] Consistently with this recognition, the Badu Review gives close attention to improving stakeholder engagement, including an increased focus on the water interests of Aboriginal people. This is particularly so in areas where the NT Government decides not to prepare a WAP but seeks only to apply water planning principles and policy-based rules when dealing with licence applications.[87]

For now, it suffices to notice again the complete lack of guidance on water resource planning process under the present legislation, except for the Minister's discretionary power to appoint WACs. The NWI conceives of water allocation planning as a statutory process. All other Australian jurisdictions'

[83] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, p.200.
[84] Ibid 204.
[85] Ibid 204.
[86] Above n1, Badu Review p.12.
[87] Above n1, Badu Review pp.16-17.

legislation includes legal guidance on planning process; the Water Act (NT) is alone in not doing so.[88] Two points may be made about that lack of legal guidance in relation to the Georgina Wiso Water Allocation Plan 2023-2031.[89]

First, for example, there is no evidence given in the WAP documents of the appointment of a WAC for consultation regarding the preparation of the Georgina Wiso WAP. The WAP section 5 says that a WAC will be established where appropriate to advise on the effectiveness of the plan.[90] Given the apparent contest of competing interests (for example, the petroleum industry and some Aboriginal communities) in the area of the Georgina Wiso WAP, there are three deficiencies in the terms of the Water Act s.23 for the establishment of WACs: there is no explicit duty on the Minister to establish and resource a WAC; there is no statutory guidance on the composition and term of members of a WAC; and there is no duty to include a report on the consultation that was undertaken.

Secondly, there is no evidence in the WAP documents of any other form of consultation. I am instructed that the draft WAP documents were released for four weeks of consultation between 18 November and 16 December 2022. The NWI Water Policy Guidelines 2010 say "[t]here is a need to allow sufficient time for appropriate engagement. A rule of thumb is that at least 12 months should be provided for engaging stakeholders in the planning process when capacity building is required. Stakeholders need time to develop the skills to participate in a meaningful manner."[91]

Although the NWI provisions cited in Part 1.1.2 do not indicate any form of legal prescription for consultation, let alone a requirement to form an advisory committee, the NWI Water Planning Guidelines 2010 include various propositions in sections 3.1 and 3.2 that could inform legislative reforms on consultation.

- An overarching principle: "Stakeholders should be engaged throughout the planning process. … To be transparent, the process by which objectives and outcomes of water plans are identified should be made publicly available, including the information base upon which trade-offs and decisions are made."
- A set of principles about stakeholder engagement: including stakeholder identification, timing and type of stakeholder engagement, adequacy of information and opportunity for stakeholder input, and stakeholder engagement in setting outcomes.

2.4. Is the general approach adopted for the development (preparation) and structure of Water Allocation Plans (WAPs) consistent with the NWI?

The Badu Review makes four broadly relevant observations here (B, D, E, and F), but I focus on one.

"B. Statutory water allocation plans … are progressively being developed for areas where there is emerging demand and there is the most competition for the use of groundwater. Outside those areas, NT-wide policies and procedures are being used to guide consistent decision making."

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[88] It is acknowledged that the statutory provisions for water allocation planning under the *Rights in Water and Irrigation Act 1914* (WA) have not been used in more than twenty years: See Gardner et al, *Water Resources Law*, 2nd edition, chapter [15.2].

[89] Northern Territory Government, Georgina Wiso Water Allocation Plan 2023-2031, and the Georgina Wiso Background Report 2023-2031.

[90] Georgina Wiso Water Allocation Plan 2023-2031, section 5, p.12.

[91] NWI Water Policy Guidelines for Water Allocation Planning, 2010, Section 3.2, Stakeholder engagement. See also, above n1, Badu Review p.12, acknowledging the impact of timing on effective community engagement.

I have no bases for disagreeing with this observation as a statement of fact. The pertinent legal and policy question is whether key attributes of the NT's water allocation planning system are consistent with the NWI in respect of those issues that extend beyond the NWI principles addressed in Part 2.1. Three attributes of the NT planning system warrant attention for their significance in the preparation and structure of WAPs:

- When to make a WAP and over what area?
- The separation of a WAP into three documents, and
- The Water Act prescription of WAP content and legal effect.

2.4.1. When to make a WAP and over what area?[92]

Until recently, a relatively small proportion of the land area of the NT has been covered by a WAP. This area has been much increased by the recent declaration of the Georgina Wiso Water Allocation Plan 2023-2031. Other WAPs are being drafted for the same WCD.[93] The **NWI paragraph [38]** makes clear that the NT will determine when a plan is prepared, the area it covers, the detail, duration and time of review, and the resources devoted to its preparation "based on an assessment of the level of development of *water systems*, projected future consumptive demand and the risks of not having a detailed plan". The NWI Policy Guidelines for Water Planning and Management 2010 (**NWI Policy Guidelines**) gives further guidance on how a jurisdiction may decide "when a plan is justified".[94]

The Badu Review, in referring to the NWI Policy Guidelines, says that the principles and considerations for developing the plans that are "relevant to the NT" are to "[i]dentify the scale and type of plan: The NT water resources tend to be low-use and low-risk systems. The challenge is to use transparent risk assessments to show that basic approaches are *fit-for-purpose*."[95] [emphasis added] It is helpful to make a few points from the NWI Policy Guidelines.

- A search of that document shows that the term "fit-for-purpose" is used only once in the context of optimising the use of fit-for-purpose water and water from alternative sources; i.e., it describes water quality. The NWI Policy Guidelines do not use that term to describe approaches to water planning. The PC does use this term in its Implementation Assessment report in the context of suggesting system improvements, such as in water accounting and reporting.[96]
- The NWI Policy Guidelines does say that "[a] water plan may not be justified in low-use low-risk systems, or perhaps only a very basic plan is needed in these cases, …".[97] Increasing pressure on the resource and risks of environmental harm are the main reasons for developing a plan. An example of this increasing resource pressure could be the factors that led to the making of the Georgina Wiso WAP 2023-2031.[98]

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[92] These issues are discuss in Gardner et al, *Water Resources Law*, LexisNexis, 2nd ed, 2018, [15.14]-[15.33].

[93] Northern Territory Government, Department of Environment, Parks and Water Security, *Georgina Wiso Background Report 2023-2031*, Overview, p.6. In the same WCD, the plans in draft are for Mataranka and Floro River.

[94] NWI Policy Guidelines for Water Allocation Planning, 2010. A copy of the Guidelines is apparently not available on the Department of Climate Change, Energy, the Environment and Water website on "National Water Initiative policy guidelines and support modules", visited 20 December 2023.

[95] Above n1, Badu Review p.36, Table item 38.

[96] Australian Government, Productivity Commission, *Assessment of National Water Initiative Implementation Progress (2017-2020)*, 2021, search for various uses of the term "fit for purpose".

[97] NWI Water Planning Guidelines

[98] Northern Territory Government, Georgina Wiso Background Report 2023-2031, p.7, refers to setting allocations to petroleum activities prior to significant development occurring.

- The NWI Policy Guidelines list various principles to apply in developing the plan, emphasising risk-based assessments and that "all plans should specify the sustainable water extraction regime for the system". The Guidelines then list considerations for "water system classification" as either:
  - "conservation water systems" with little or no water resources development, and rules to minimise impacts on conservation values;
  - "low-development water systems" with low levels of demand and low ecosystem risks, which may be managed by regional management arrangements or simple water plans; and
  - "high-development water systems" with limits on total allocation designed to protect the resource and entitlement security for water users, and subject to more sophisticated management.

It is not surprising that the Badu Review has been brief and selective in citing propositions from the extensive NWI Policy Guidelines. However, the Badu Review emphasises a highly discretionary approach to interpreting the Guidelines application to the NT. For example, it gives no recognition to planning for conservation water systems; it addresses only low development systems that do not require a WAP and higher development systems that may or will require a WAP.

That said, it is consistent with the NWI for the NT to apply non-statutory policies and procedures to guide water licensing decisions in those areas not subject to a WAP.[99] However, there is a further question whether the content of those policies and procedures are consistent with the NWI; and that question is considered in Part 2.5 in relation to NT policies identified in Part 1.3.6.

2.4.2. A WAP in three documents

The NT Government has recently adopted the practice of presenting three separate documents for a WAP; a "background report", a statutory "water allocation plan" declared by the Minister under Water Act s.22B, and an "implementation actions report".[100] How does this practice conform with the NWI principles and the NWI Policy Guidelines?

The relevant essential principles to be derived from the NWI [39]-[40] and Schedule E are paraphrased here.

39. The relevant State or Territory will prepare water plans 'along the lines' of Schedule E, paragraph (1) of which identifies the characteristics and components to guide the preparation of water plans, including descriptions of:
    i. the water source or water sources covered by the plan (ie. its geographic or physical extent);
    ii. the current health and condition of the system;
    iii. the risks that could affect the size of the water resource and the allocation of water for consumptive use under the plan, in particular the impact of natural events such as climate change and land use change, or limitations to the state of knowledge underpinning estimates of the resource;
    iv. the overall objectives of water allocation policies;

[99] See PC comments above at Part 2.3.2.

[100] For example, the Georgina Wiso Water Allocation Plan 2023-2031 and the draft Western Davenport Water Allocation Plan 2022-2032 are presented this way: see the Overview description at the beginning of each of the three documents.

v. the knowledge base upon which decisions about allocations and requirements for the environment are being made, and an indication of how this base is to be improved during the course of the plan;
vi. the uses and users of the water including consideration of indigenous water use;
vii. the *environmental and other public benefit outcomes* proposed during the life of the plan, and the water management arrangements required to meet those outcomes;
viii. the estimated *reliability* of the water access entitlement and rules on how the consumptive pool is to be dispersed between the different categories of entitlements within the plan;
ix. the rates, times and circumstances under which water may be taken from the water sources in the area, or the quantity of water that may be taken from the water sources in the area or delivered through the area; and
x. conditions to which entitlements and approvals having effect within the area covered by the plan are to be subject, including monitoring and reporting requirements, minimising impacts on third parties and the environment, and complying with site-use conditions.

40. In implementing water plans, Parties will monitor the performance of the water plan (objectives, outcomes and management arrangements), factor in knowledge improvements, and provide regular public reports to help water users and governments manage risk, with timely indications of possible changes to the consumptive pool.

The 2010 NWI Policy Guidelines for Water Allocation Planning also says, at 3.7, Monitoring, "[a] monitoring program should be included in the plan to provide an ongoing assessment of whether the management objectives are being achieved …".

At the time of the NT's NWI Implementation Plan 2006, the NT was in the early stages of water resource planning. The NT's NWI response[101] was to endorse the above NWI principles, assert that water allocation plans incorporate strategic monitoring and knowledge improvement work programs that are reviewed in annual progress reports by Water Advisory Committees and that such reports would be made public and account for performance against the NWI principles. I have no evidence about the fulfilment of the reporting process but there are two comments to make about how the current plan documentation operates in relation to the above principles.

First, the new format of a WAP with a separate Background Report and Implementation Actions Report does not conform to the NWI guidance in Schedule E. While it is understandable that the NT Government wishes to confine the content of a WAP to those aspects of a water allocation plan that are to be given legal effect under the Water Act, in my opinion this model omits important content listed in (i) – (x) above.

For example, the Georgina Wiso WAP *does* address items (i), (iv), (vi), (vii) and aspects of (ix) but it *lacks* enough reference to items ii, iii, viii, ix and x. Information regarding items (ii), (iii) and (vii) – but not regarding reliability of access entitlements – can be found in the Background Report. Elements of (ix) and (x) can be found in the Implementation Actions report, such as Schedule G, Risk and adaptive management. The WAP provides less guidance to the Controller and licensees and other water users than the NWI envisages. Too much of the important decision-making on the limits of water licence abstraction of groundwater is left to be determined in the water licensing assessment process.

[101] Northern Territory Government, NWI Implementation Plan 2006, pp.23-24, Key Action 2.4

Secondly, the NWI para [40] type of commitments for monitoring and reporting plan performance are also in the Georgina Wiso Implementation Actions report, sections 3 – 5. While the report contains much good information in this regard, it is a concern that the WAP says in Overview at p.4 that the Implementation Actions detail how the Water Act s.34 provisions for ongoing water resources assessment will apply to the water resources in the plan area. With respect, s.34 is too general to provide monitoring and reporting duties in respect of the implementation of the specific water allocation plan. The Water Act s.22B(4) provides "Water resource management in a water control district is to be in accordance with any water allocation plan declared in respect of the district". While the WAP Overview at p.4 refers to the Background Report and the Implementation Actions report, it also makes clear that it is only the WAP that is declared by the Minister under s.22B(1) of the Water Act and only the WAP that the Controller *must* take into account when making a decision under Water Act s.90 regarding licences. In my opinion, the provisions for monitoring and reporting need to be included in the water allocation plan to take the benefit of s.22B(4) and s.90. This would also be more consistent with the NWI principles, subject to the prescription of the legal effect discussed at Part 2.4.3.

2.4.3 Water Act prescription of the legal effect of the WAP content

The Georgina Wiso WAP 2023-2031 section 4.2 and the draft Western Davenport WAP 2022-2032 section 4.3 both declare that:

> "[w]ater extraction licences cannot be granted or amended if the granting or amending would result in the total volume of water that may be taken from a water management zone exceeding the volume allocated to the water management zone and the beneficial use …".

This statement seems to be consistent with the NWI vision for the legal effect of a WAP, as discussed above in Parts 1.1 and 1.3.4. However, as foreshadowed, there is doubt about whether the provisions of the Water Act achieve this legal result.

The *Water Act* also contains a concerning ambiguity in the expression of the legal effect of a water allocation plan. Section 22B(4) provides: "Water resource management in a water control district is to be *in accordance with* any water allocation plan declared in respect of the district" [emphasis added]. 'Water resource management' is not defined in the *Water Act* but usage of the term in the three planning documents makes clear that it is intended to include decision-making by the Controller.

The Water Act s.90(1) provides that, in deciding whether to grant or amend a licence or in making a water extraction licence decision, "the Controller *must take into account* any of the following factors that are relevant to the decision: … (ab) any water allocation plan applying to the area in question" [emphasis added]. It is s.90(1) that is cited in the WAP Overviews, with no mention of s.22B(4).[102] The WAP Overviews go on to say that the Background Report and Implementation Actions "and other factors *may* be taken into account, where relevant to the decision". This statement may operate under s.90(1)(k), which authorises the Controller to consider any other factors the Controller considers should be "taken into account". The legal effect of s.90 propositions is less than the statement in s.22B(4) "to be in accordance with".

It is important to clarify what is the operation of these two provisions (ss.22B(4) and 90(1)) on the licensing decision-making of the Controller, which could benefit from statutory amendment.

[102] Georgina Wiso Water Allocation Plan 2023-2031, Overview, p.4, and the draft Western Davenport Water Allocation Plan 2022-2032, Overview, p.5.

Australian jurisdictions give different legal effects to water allocation plans,[103] so there could be different opinions on what is the best practice for water planning regulation. The legal effect of the plan will also depend on the language used in the plan provisions.

The legal effect of ss.22B(4) and 90(1)(ab), and of the effect of the language in the *Western Davenport Water Allocation Plan 2018-2021* (WDWAP), were addressed by the Supreme Court of the Northern Territory in *Mpwerempwer Aboriginal Corporation RNTBC v Minister for Territory Families & Urban Housing as Delegate of the Minister for Environment & Anor and Arid Lands Environment Centre Inc v Minister for Environment & Anor* [2024] NTSC 4 (delivered 31 January 2024) – the *Singleton Station Case*. This case concerned judicial review challenges to the appeal decision by the Minister upholding the grant, on 8 April 2021, of a water licence to take up to 40,000 megalitres of water for a large horticultural project to be developed in stages over 3,500 ha of pastoral lease land. The plaintiffs' concern was that the volume of water extraction authorised under the licence was "modelled to significantly lower the water table across a large area" of the subject land and adversely impact the environment generally and the Aboriginal cultural values and legal rights in the affected arid landscape: at [4], [5] and [10]. One of primary legal issues was the legal effect of ss.22B(4) and 90(1)(ab) on the scope of the licensing discretion of the Controller and the Minister (on appeal) because the licensed water allocation was inconsistent with WDWAP Part 8.2.1., which set limits to the modelled change in groundwater levels to protect groundwater dependent ecosystems (GDE): at [40].

An additional issue was the effect of a non-statutory document published by the NT Department of Environment and Natural Resources on 13 February 2020 entitled "Guideline: Limits of acceptable change to groundwater dependent vegetation in the Western Davenport Water Control District" (the Guideline"), which was expressed to be "intended to be read subject to the Western Davenport Water Allocation Plan 2018-2021": at [11]. However, it was acknowledged that the Guideline adopted different criteria from the WDWAP Part 8.2.1, purporting to protect 70% of current more ecologically valuable GDEs and setting different criteria for modelled drawdown in respect of shallow and deeper groundwater: at [11] and [61]-[65]. The Guideline purported to change the licensing criteria of the WDWAP Part 8.2.1. to a less rigorous set of criteria that provided less protection of GDEs. The Controller and, on review, the Minister applied the Guideline to the licence decision-making, explaining that the licence conditions were appropriate to manage the risk and uncertainty: at [66].

The Court rejected the plaintiffs' challenges on various grounds; the focus here is on the statutory interpretation issues described above. The Court's reasoning gave primacy to the decision-maker's duty to take account of the factors listed in s.90(1), including sub-paragraph (ab), any applicable water allocation plan, and s.90(1)(k), any other factors that the Minister considers should be taken into account, such as the Guideline. The Court opined that s.90(1) contained no requirement that the licence decision must accord with a relevant water allocation plan; rather, the purpose of a duty to take into account a plan and other factors "is to allow the decision maker to be guided by any such plan but not to be fettered in a way which would preclude consideration of a water extraction licence application which did not meet the criteria set out in the plan": at [47]. The Court concluded that the Minister had "a wide discretionary power under s.90(1)": at [48].

The Court then turned to whether s.22B(4) limited that power and obliged the Minister to refuse a licence application that "did not fully or substantially accord with the water allocation plan": at [49].

[103] See Gardner et al, *Water Resources Law*, 2nd edition, chapter 17.

The Court considered the legislative history of s.22B, inserted in 2000 to implement national water policy and the water allocation planning process. The Court held that the allocation planning process was the content of 'water resource management' in s.22B(4) and a "different sphere of operation" from the broad s.90(1) discretion to consider a range of relevant factors in water licence decision-making: at [51]-[59].

In my opinion, the NWI goals of water allocation plans providing for 'secure ecological outcomes' and 'resource security outcomes' means that a water allocation plan should be legally binding on the Controller making water licensing decisions and on licensees exercising rights under their water extraction licences. Securing this legal effect likely also requires a statutory prescription of the process for making water allocation plans.[104]

2.5. Is the approach to water planning and allocation adopted in the NT "Water Allocation Planning Framework" (6 May 2020), including the contingent rules, annual allocation process and "Draft Surface Water Take – Wet Seasons Flows Policy", consistent with the NWI?

How does the NT plan allocations of water to non-consumptive (environmental and other public benefit outcomes) and consumptive uses? The guidance on making these allocations comes from relevant provisions of the Water Act, especially s.22B, and four policies identified in Part 1.3.6:

a. Classification of the Top End and Arid Zone for Northern Territory water resources, 2021;
b. Northern Territory Water Allocation Planning Framework, 2000;
c. Applying announced allocation licence conditions; and
d. Surface Water Take – Wet Season Flows Policy.

These policies seem potentially applicable to situations where there is no relevant WAP and to the preparation and application of a WAP. The classification of water resources is adequately described at 1.3.6 and application of the Announced Allocation Licence Conditions is discussed in Part 2.1.2, so attention will be given here to (b) and (d).

Three Badu Review observations are relevant here:

"B. Statutory water allocations plans are progressively being developed for areas where there is emerging demand and where there is the most competition for use of groundwater. Outside those areas, NT-wide policies and procedures are being used guide consistent decision making.

D. The water planning processes seek to balance social, economic and environmental values.

E. Research and scientific assessments are carried out to develop knowledge to support planning processes."

2.5.1. Water Act s.22B and the concept of environmentally sustainable level of extraction

It is helpful to begin this analysis with the provisions of the Water Act for water allocations by WAPs, which are introduced in Part 1.3.3 above and, purportedly, give effect to the NWI concepts of "secure ecological outcomes", "tradable entitlements" in a "consumptive pool", and recognition of Indigenous needs: NWI paragraphs [23(iii)], [25(i), (ii) and (ix)], [28]-[29], [37] and others, which are discussed at Part 1.1. The main relevant provisions are s.22B(5), (6) and (7).

[104] Ibid, chapter [17.1].

(5) The water allocation plans for a water control district are to ensure that:

(a) water is allocated within the *estimated sustainable yield* to beneficial uses; [emphasis added]

(b) the total water use for all beneficial uses (including those provided through rural stock and domestic use and licences granted under sections 45 and 60) is less than the sum of the allocations to each beneficial use;

(c) the right to take water under a licence granted under section 45 [surface water] or 60 [ground water] is able to be traded (in part or in full); …

(6) An allocation under subsection (5)(a) is to include an allocation to the environment.

(7) An allocation under subsection (5)(a) is to include an Aboriginal water reserve …

Ten potential beneficial uses are listed in s.4(3) and selectively declared applicable to the WCD by the NT Administrator, but always include "environment" and "Aboriginal economic development" by statutory declaration: s.22A(1) and (2).

The NT concept of "estimated sustainable yield" (**ESY**) is not defined in the Water Act but is defined in the Georgina Wiso WAP and the Draft Western Davenport WAP at section "3.1 Key definitions": it "means the amount of water that can be allocated from the water resource to support declared beneficial uses that is sustainable".[105] These WAPs go on to explain that the ESY is determined having regard to several factors, including the NT's commitment to the NWI para [23(iv)] objective of an *environmentally sustainable level of extraction* (**ESLT**).

Applying Water Act s.22B(5)(a) and (6), the ESY is to be distinguished from the NWI concept of ESLT.[106] The statutory concept of ESY includes consumptive and non-consumptive beneficial uses (including the environment), while ESLT defines a limit on the level of consumptive use allocated to the consumptive pool. The Georgina Wiso WAP attempts to avoid this distinction by creating a new class of water allocated to maintaining important ecological functions and other values outside of the ESY, thus applying a different approach to the ESY than that in s.22B.

> "… the ESY is determined after prioritising water for non-consumptive uses. That is, the majority of the water is retained in the environment to maintain important ecological functions and for cultural purposes and values of water in the region. A comparatively low proportion of the water is allocated to the ESY and therefore available to take for drinking and sustainable development".[107]

This approach in the Georgina Wiso WAP aligns the ESY more to consumptive use and makes a large allocation to "storage", a concept not included in the Water Act, in order to respect the ESLT: see Tables 1 and 2 at pp.9-10, copied below.

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[105] In the Draft Western Davenport WAP, section 3.1, has slightly different wording. The definition of ESY means "the amount of water that can be allocated from the water resource to support declared beneficial uses that *are* sustainable". It seems that in the Georgina Wiso WAP it is the allocated amount of water that is sustainable, while in the Draft WD WAP it is the beneficial uses that are sustainable.

[106] ESLT is defined in Part 1.1.1 above.

[107] Northern Territory Government, the Georgina Wiso Water Allocation Plan 2023-2031 , 10 November 2023, Section 3 "How is the water shared", "Overview", p.7.

Table 1 Estimated sustainable yield – groundwater (ML/year)

Groundwater ML	Georgina Basin	Wiso Basin	Total
Cambrian Limestone Aquifer			
Inflows/year	0	0	**0**
Recharge/year	585,000	46,000	**631,000**
Outflows/year	3,500	300	**3,800**
Evapotranspiration/year	0	0	**0**
Storage	660,000,000	80,000,000	**740,000,000**
Estimated sustainable yield ML/year	**186,154**	**23,846**	**210,000**

Table 2 Allocation to beneficial uses – groundwater (ML/year)

Groundwater ML/year	Georgina Basin	Wiso Basin	Total
Beneficial uses			
Rural stock and domestic	14,250	5,300	**19,550**
Public water supply	800	216	**1,016**
Aboriginal water reserve for Aboriginal economic development	17,109	3,142	**20,251**
Petroleum activity	8,000	2,000	**10,000**
Other consumptive uses - agriculture, aquaculture, cultural, industry, mining activity	145,985	13,178	**159,163**
Environment [1]	10	10	**20**
Total allocations ML/year	**186,154**	**23,846**	**210,000**

[1] Nominal allocation within consumptive uses as requirement of the Act, section 22A(2), the majority of the water is retained in the environment for non-consumptive uses to maintain important ecological functions and for cultural purposes and values of water in the region.

As a concession to the statutory requirements of s.22A(2) and 22B(6), the WAP makes a nominal allocation of 10 ML/year to the environment as a statutory beneficial use. The true environmental allocation (i.e., the water not allocated to consumptive uses) is the vast volume of water designated as "storage".[108] I know of no NWI concepts or principles that designate simply as storage a large volume of groundwater retained in the natural environment to achieve the ESLT, but further research is needed on this question.

Perhaps this would not matter if the WAP protected that storage from consumptive use allocation; but it does not. The problem is that the WAP (so-called) does not explain this, even though WAP section 4.2 states that "water extraction licences cannot be granted or amended" if doing so would result in the total volume of water that may be taken exceeding the volume allocated to the beneficial use in that zone. To gain a true understanding of the ESY and the application of "storage" water, one must study the Georgina Wiso Background Report.[109]

The Background Report, sections 3-6, contain various explanatory propositions.

[108] See Georgina Wiso WAP Table 1, the figures of 660,000,000 and 80,000,000 allocated to 'storage'.

[109] Northern Territory Government, Department of Environment, Parks and Water Security, Georgina Wiso background report 2023-2031, Report 13/2023.

- Groundwater recharge is difficult to calculate. Groundwater discharge to groundwater dependent ecosystems is believed to be limited. Groundwater storage is believed to be very large. Section 3.5.2 – 3.6.2.
- Most of the water is retained and maintained for non-consumptive uses, including environmental water values, although the extent of terrestrial groundwater dependent ecosystems in the plan area is very limited. A low proportion of water is allocated to ESY: sections 4 and 6.
- Section 6 Overview: "The ESY is determined after prioritising water for non-consumptive uses". "Taking the ESY of 210,000 ML/year for 100 years means 97% of the current water remains stored. This percentage does not account for recharge events that will also occur during this period." This approach is set by the NT Water Allocation Planning Framework: Section 6, p.25.
- "In arid regions like Georgina Wiso where rainfall is low, unpredictable and recharge to water resources is infrequent, underground aquifers must be relied upon to sustain life. *It is necessary to use aquifer storage to balance infrequent recharge with a continuous demand for water. Relying on stored water volumes is a more precautionary approach than relying on recharge*, as it does not rely on highly variable recharge or uncertainties about climate change." [Emphasis added] Section 6 introduction and 6.3.2.
- After modelling the effect of future extractions based on existing and potential uses for a range of beneficial uses, the *average annualised recharge calculated from the infrequent actual recharge events could sustain the proposed levels of annual extraction by resort to groundwater storage*: section 6.3.3. Projected long term recharge from a slightly wetting climate trend could exceed groundwater drawdown from regular extraction.

I make three observations about my assessment of the Water Act s.22B, ESY and the concept of ESLT. First, the allocation planning provisions of the Water Act do not conform to the NWI principles for the primary reason that the definition of "beneficial uses" includes allocations to the environment which are then mistakenly included in the ESY. The Water Act concept of ESY is not applied in recent WAPs.

Secondly, the conceptual framework that designates long term storage of groundwater as for the benefit of environmental conservation values but equally accessible over time for consumptive use is inconsistent with the central principles of the NWI for consumptive pool management of share entitlements subject to prior environmental allocation. For example, the Georgina Wiso WAP conceptual framework allocates groundwater for consistent levels of consumptive use extraction when the variation in water availability would normally determine a variation in periodic allocations available for consumptive use extraction. It is acknowledged that the time scales for this variability in the Arid Zone of the NT are different from those of south-east Australia where NWI concepts were developed, and more research is needed to ascertain how share entitlements in consumptive pool management of groundwater have been implemented around Australia.

Thirdly, it is beyond my expertise to evaluate whether the propositions outlined in the Georgina Wiso Background Report present a sustainable water resource management framework. I cannot evaluate whether the Badu Review observations D and E are sustained by this framework.

2.5.2 Contingent Allocation Rules, especially where there is no WAP

It has already been explained that the NWI leaves with the State or Territory Government the decision when to make a WAP and over what area, subject to NWI policy guidance: see Part 2.4.1. It is also consistent with the NWI for the NT to apply non-statutory policies and procedures to guide licensing

decisions in areas not subject to a WAP. What can we say here about the Water Allocation Planning Framework and the Wet Season Flows Policy?

1) Both are legally unenforceable non-statutory policy instruments with the status of permissive relevant considerations in any decision making and may not be administered inconsistently with the Water Act. While both policies may be applied in preparing a WAP, the requirement of s.22B(4) to manage water resources in accordance with a declared WAP means that the terms of these policies may not be applied inconsistently with any such WAP.

2) Both emphasize that all available scientific research will be applied in setting water allocations and that contingent allocation rules will apply where that scientific research is not available.

3) Each of these policies has distinctive operation in relation to the defined Top End and Arid Zone.

4) The Water Allocation Planning Framework declares that water allocations for non-consumptive use will be set in priority to allocations for consumptive use. The contingent allocation rules for Top End rivers and aquifers allocate 80% of water for environmental and other public benefits and new licences will not be granted if they will exceed the 20% threshold. In the Arid Zone, at least 95% of flow at any time in any part of a river is allocated to the environment, and groundwater extractions are not to cause a "deleterious change in groundwater discharges to dependent ecosystems" or to exceed 80% of total aquifer storage over a period of 100 years from the start of extraction – a proposition that seems directed at sustaining 80% of the original aquifer storage over a period of 100 years. Each of these principles forbids new licences to be granted "unless supported by directly related scientific research", but what constitutes "support" is quite unclear.

5) The Wet Season Flows contingent allocation rule applies to wet season "take" from Top End rivers and may inform licence decisions and the basis of consumptive use under a WAP. It presents a formula for calculating, from data across 50 years, a consumptive pool at 5% of the 25th percentile of total flows during the three highest flow months of the year (generally January – March), which is estimated to be amount to 2% of median annual flow. The extraction entitlement will be set by licence conditions as to location and rates of take, and licensees will be required to monitor, record and report on the conditions of take. It is unclear how such licence entitlements would be allocated between competing licensees.

Are these policies consistent with the NWI? The persistent reliance on such non-statutory policies may delay the making of WAPs and be generally inconsistent with the NWI Policy Guidelines, as discussed in Part 2.4.1. On the other hand, there are no specific NWI principles that determine when a WAP should displace non-statutory policies and bring more specificity and certainty to water allocation. It is also beyond my expertise to comment on whether the environmental thresholds adopted in these policies conform to an ESLT. However, as the Badu Review comments, there is a particular concern with "the extent to which groundwater storage can be allocated",[110] especially in the Arid Zone. They comment that this practice seems "intended to enable access to groundwater storage for urban water supplies and not as a default level of allocation for consumptive purposes

[110] Above n 1, Badu Review, section 6.2.4, "Precautionary decision making outside water allocation plan areas", pp.16-17, and section 6.2.7.

(such as agriculture)"; they recommend limiting the circumstances for such allocations. I suggest that the greater use of statutory WAPs is an appropriate means of limiting such allocations.

3. Summary of the Part 2 analysis of the Badu Review

3.1. Are the Water Act and Water Regulations provisions around water planning and allocations consistent with the NWI commitments?

- Legal security of access entitlements and plan provisions for environmental and other public benefit outcomes

Notwithstanding the PC's conclusion that, overall, the NT has afforded environmental water the same level of security as water for consumptive uses, an evaluation of the Water Act provisions shows that environmental water allocations have less security than water access entitlements. Consumptive uses are given the legal support of the WAP allocations and licences that are subject to various procedural protections. A WAP must make an environmental water allocation within the ESY, but the Water Act prescribes no process for amending a WAP; it can be changed entirely at the Minister's discretion.

Further, the analysis in Part 2.5.1 shows that the Water Act provisions for making an environmental water allocation as a "beneficial use" are unworkable because the s.22B(5) concept of ESY (estimated sustainable yield) is not functionally equivalent to an ESLT (ecologically sustainable level of take) because it incorporates both consumptive and non-consumptive allocations. The example of the Georgina Wiso WAP 2023-2031 departs from the statutory concepts to make only a nominal environmental water allocation while describing the vast bulk of the water retained for environmental values as "storage", a term that is not included in the Water Act or used in the NWI.

- Water Access Entitlements, Seasonal Allocations and Water resource accounting

The PC repeated in its Water Reform 2020 report that the NT has not enacted legislation for the fully compliant NWI share entitlement regime. Even though such an entitlement regime may not be required in undeveloped water systems, analysis of the Water Act shows that the NT entitlement regime is not fully NWI compliant, even where a WAP and water trading are purportedly in place. The Announced Allocations policy implemented through licence conditions demonstrates compliance with NWI para [29], but this is implemented by administrative discretion and not required by law unless incorporated under a WAP.

In other respects, the NT water licences are not NWI compliant as to a perpetual term, full separation from land title, and unbundling from the instrument for regulating water use. Further, the application of the 'use it or lose it' policy, though potentially helpful in the context of the current entitlement regime, is not NWI compliant.

Also, there is non-compliance with the NWI water accounting requirements. The Water Act and Regulations provide no legislative support for the water trade register or for making and recording announced allocations, which may inhibit trade in those allocations. The NT is also non-compliant with the national code for water extraction metering.

- Indigenous access to water resources

The PC noted the NT's progress in recognising water requirements for Indigenous cultural values and in providing for Aboriginal Water Reserves under WAPs. However, a 2019 amendment to the Water Act requiring WAPs to provide for Aboriginal Water Reserves has limited operation because

regulations have not been made to prescribe the class of persons to give consent to a licence to take reserved water, and the form for such consent. Further negotiations are needed to facilitate Aboriginal access to consumptive use entitlements for economic development.

- Community partnerships and consultation

The Water Act makes no provision for the process of consultation in making and administering WAPs, except that it provides in simple and highly discretionary terms for the appointment of WACs (Water Advisory Committees). The PC cited evidence of a serious decline is use of the WACs and commented that the NWI provisions on consultation are out-dated. The Badu Review acknowledges the challenges in Aboriginal engagement, especially where there is no WAP. Even in the making of the Georgina Wiso WAP 2023-31, the evidence is of a lack of consultation meeting the NWI Water Policy Guidelines 2010. There is a need for more legislative guidance on consultation.

3.2. Is the general approach adopted for the development (preparation) and structure of Water Allocation Plans (WAPs) consistent with the NWI?

- When to make a WAP and over what area

The NWI para [38] makes clear that the NT will determine when a plan is prepared, the area it covers, the detail, duration and time of review, and the resources devoted to its preparation "based on an assessment of the level of development of *water systems*, projected future consumptive demand and the risks of not having a detailed plan". However, the NWI Policy Guidelines 2010 list various principles to apply in developing a plan, including a water system classification for "conservation", "low-development" and "high development". All plans should specify the sustainable water extraction regime. It is not consistent with the 2010 guideline to think that a WAP is not needed until there are high levels of water resource development. That said, it is consistent with the NWI for the NT to apply non-statutory policies and procedures to guide water licensing decisions in those areas not subject to a WAP.

- A WAP in three documents

While it is understandable that the NT Government wishes to confine the content of a WAP that is to be given legal effect under the Water Act, the new format of a WAP with a separate Background Report and Implementation Actions Report does not conform to the NWI guidance in Schedule E. Thus, a WAP provides less guidance to the Controller and licensees and other water users than the NWI envisages. Of particular concern is the reliance on the general water investigation provisions of Water Act s.34 to provide for the ongoing mandate for monitoring and reporting on the implementation of a specific WAP. The provisions for monitoring, reporting and amending a water allocation plan need to be included in a WAP to take the benefit of Water Act provisions giving legal effect to a WAP: s.22B(4) and s.90.

- Water Act prescription of the legal effect of the WAP content

It is confusing that the provisions of Water Act s.22B(4) and s.90(1) give different legal effect to a WAP: water resource management is to be "in accordance" with a WAP, versus the Controller making a water extraction licence decision "must take into account" any applicable WAP. The NT Supreme Court has recently held in the *Singleton Station Case* that s.22B(4) does not confine the broad licensing discretion under s.90(1) by requiring a licence to conform to the terms of a WAP. The Court's analysis shows that more careful and certain drafting of the legislation and WAPs could bring regulatory

benefits. The NWI goals of water allocation plans providing for 'secure ecological outcomes' and 'resource security outcomes' means that a water allocation plan should be legally binding on the Controller making water licensing decisions and on licensees exercising rights under their water extraction licences.

3.3 Is the approach to water planning and allocation adopted in the NT "Water Allocation Planning Framework" (6 May 2020), including the contingent rules, annual allocation process and "Draft Surface Water Take – Wet Seasons Flows Policy", consistent with the NWI?

- Water Act s.22B and environmental water allocations

The essential question here is how does the NT plan allocations of water to consumptive and non-consumptive uses. The primary statutory mandate is that a WAP must allocate water to beneficial uses within the ESY (estimated sustainable yield). An allocation must be made to the environment as a statutorily declared beneficial use. The concept of ESY in the Water Act mandate is to be distinguished from the NWI concept of ESLT (*environmentally sustainable level of extraction*). The Water Act does not define ESY, but it includes in ESY both consumptive and non-consumptive uses. In the Georgina Wiso WAP, the ESY concept seems to include only consumptive uses; a meaning that is closer to the NWI concept of ESLT.

Further, the Georgina Wiso WAP designates the primary environmental water allocation as ground water "storage", and a true understanding of that concept and consumptive use access to the storage is only explained in the Background Report. It seems that the approach taken in the WAP is set by the Water Allocation Planning Framework. Vast aquifer storage is used to balance the infrequent recharge of the Arid Zone aquifer against a continuous demand for a relatively modest fixed volume of water for consumptive use. The infrequent recharge (potentially decades apart) is adjusted to an average annualised recharge to sustain the proposed levels of annual extraction from the groundwater storage. The allocation limit is calculated as a percentage of drawdown on the storage over 100 years, and potential recharge events in that time are not calculated.

Both the statutory concept of ESY as including non-consumptive uses and the designation of long-term storage of groundwater for environmental conservation values and consumptive use access are inconsistent with the central principles of consumptive pool management of share entitlements subject to prior environmental allocation. More research is needed to ascertain how share entitlements in consumptive pool management of groundwater have been implemented around Australia.

- Contingent Allocation Rules, especially where there is no WAP

It is also consistent with the NWI for the NT to apply non-statutory policies and procedures to guide licensing decisions in areas not subject to a WAP. The Water Allocation Planning Framework and the Wet Season Flows Policy are important policies for guiding allocation decision making by setting contingent allocation rules when there is no WAP and a lack of directly relevant scientific research to inform licensing. Each purports to set conservative limits on licence allocations from surface and ground water. It is also beyond my expertise to comment on whether the environmental thresholds adopted in these policies conform to the NWI concept of an ESLT, but I note the concern expressed in the Badu Review about the extent to which ground water storage can be allocated.

My legal concerns are that these unenforceable non-statutory policy instruments have the status only of permissive relevant considerations for decision making. While they could not be administered inconsistently with a declared WAP, it seems that they are greatly relied upon and even inform the preparation and application of declared WAPs. This structure is inconsistent with the essential NWI principle of statutory water allocation planning.

Professor Alex Gardner 12 February 2024

Annexure A

Legislation

Water Act 1992 (NT) – as in force 1 August 2023

Water Regulations 1992 (NT) – as in force 1 August 2023

Interpretation Act 1978 (NT)

National Water Initiative

Intergovernmental Agreement on a National Water Initiative 2004

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Badu Advisory, *Review of the NT's implementation of the National Water Initiative in relation to water planning*, 13 July 2023

Water Resources Management documents, Northern Territory

NT Government, Map of the Northern Territory Declared Water Control Districts, 2022

NT Government, Map of the Water Allocation Planning Areas, April 2023

NT Government, "Classification of the Top End and Arid Zone for Northern Territory water resources", 2021

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NT Government, Department of Environment, Parks and Water Security, "Announced water allocations" website, including "announced allocation fact sheet" (undated)

NT Government, *Draft Surface Water Take – Wet Season Flows Policy*, 15 September 2022

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NT Government, Katherine Tindall Limestone Water Allocation Plan 2019-2024, 16 August 2019