



**CENTRAL
LAND
COUNCIL**



**NORTHERN
LAND COUNCIL**
Our Land, Our Sea, Our Life

Northern Land Council and Central Land Council joint submission

to the Department of Climate Change,
Energy, the Environment and Water

Future national water agreement

10 May 2024

Preamble

Water is life-sustaining and provides spiritual sustenance for Aboriginal people¹ of the Northern Territory (NT), who have in turn been its stewards and caretakers for millennia. Aboriginal people make up more than thirty per cent of the NT population and have freehold title rights to around fifty per cent of the NT via the *Aboriginal Land Rights (NT) Act 1976* (Cth) (**Land Rights Act**). Most of the remaining land mass and some sea Country in the NT is subject to native title rights and interests including under the *Native Title Act 1993* (Cth) (**Native Title Act**). Access to the natural resources of these areas, and their free, safe and assured use, is one of the basic rights and expectations articulated through both the Land Rights and Native Title Acts, as well as international Indigenous rights law, particularly the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**). Impacts on the natural environment that threaten access to or use and health of resources have significant implications for the cultural, social, economic, and physical wellbeing of Aboriginal people.

The national water reform agenda is at a critical juncture for the NT. The Central Land Council (**CLC**) and the Northern Land Council (**NLC**) seek urgent and bold reform at the jurisdictional level. Water law and governance in the NT has fallen far behind all other Australian jurisdictions. Both Land Councils strongly assert that the NT Government is failing to comply with the current National Water Initiative (**NWI**) on multiple grounds. This has been thoroughly documented in the Productivity Commission's 2020 and 2024 inquiries. CLC and NLC's 2024 Submissions are **attached** as appendix A and B to this submission.

NT water governance is characterised by a lack of transparency and enforceable planning, as well as a disregard for Aboriginal peoples' perspectives and economic position, Aboriginal cultural values, and environmental health. Water use decisions are consistently made with insufficient scientific evidence in a manner that fails to apply the precautionary principle. We are deeply concerned by the lack of meaningful engagement with Traditional Owners and the failure of the NT Government to adequately take into consideration ecological and cultural impacts before approving high-impact developments and associated licences.

In the NT the water regulation framework is inadequate for supporting the long-term health, well-being and aspirations of Territorians and it does not formally empower Traditional Owners to continue their stewardship.

Reform priorities of land council constituents, identified by our Council Members include:

- The provision of safe, acceptable and secure drinking water supply in all remote communities and homelands.
- Meaningful engagement on water planning and management decisions that directly impact Aboriginal People's rights, interests, values and aspirations.
- The ability to undertake cultural obligations to protect and care for Country, especially when water extraction activities threaten waterways and their dependent ecosystems and cultural values.

¹ This submission uses the term Aboriginal people to mean all Aboriginal and Torres Strait Islander peoples, as it is the preferred term of our constituents, apart from where we are directly referencing the recommendations under the NWI, or where we refer to national Indigenous rights discourse.

- The provision of water specifically for Aboriginal economic development, a critical component of self-determination in the NT.

It is imperative that the Commonwealth Government embed accountability for water governance in the NT in a renewed NWI agreement. Given the significant level of Commonwealth investment into NT water projects it has a duty of care to ensure that due diligence is undertaken in the delivery of these projects. Substantial funding has been provided for development of the Adelaide River Water Allocation Plan, which under current NT law will ultimately be non-binding, unlike other jurisdictions like New South Wales, Victoria and South Australia which all have binding water plans. In contrast statutory protections in the NT are woefully inadequate, as illustrated by the recent Supreme Court decision in relation to the Singleton water licence that water allocation plans are not binding on decision-makers when making water licencing decisions.² This outcome directly contradicts explicit requirements of the NWI to provide ‘a statutory basis for environmental and other public benefit outcomes in surface and ground water systems to protect water sources and their dependent ecosystems’ (NWI pt. 25(ii)). In this context Commonwealth investments lack integrity in their delivery. Further Commonwealth Government funding should only be provided to support the NT to comply with the NWI; funding for water resource development, including water plans, should be suspended until compliance can be demonstrated.

Summary of Recommendations

The current model for a future national water agreement proposed by DCCEEW (2024) is a significant step **backwards** from the 2004 NWI. The Land Councils jointly recommend that a future national water agreement must:

1. Deliver at least the same level of governance and accountability as the 2004 National Water Initiative while addressing critical weaknesses relating to Indigenous rights;
2. Include specific actions to compel substantive reform, as well as objectives and outcomes
3. Establish a dedicated, independent expert water agency with the capacity to accredit implementation plans, regularly monitor and transparently report on the progress of all jurisdictions in achieving the specified actions, and fund independent investigations (undertaken by itself, or by funding other organisations, such as Aboriginal organisations) to drive water policy reform
4. Include a specific action to ensure all jurisdictions deliver a basic level of service for safe, accessible, affordable, and acceptable water to all Australians, as per current best practice recommendations and guidelines including but not limited to the Australian Drinking Water Guidelines.
5. Explicitly broaden this action beyond the ‘urban’ setting, so that all Aboriginal communities and homelands are included.
6. Require jurisdictions to deliver water services that are fit for purpose for the relevant community. Individual remote communities and their representative organisations must

² *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 [59].

be actively involved in determining their required level of service and hence requirements for water service provision.

7. Require transparency for drinking water service provision and funding.
8. Embed accompanying principles and actions to compel jurisdictional reforms to meet improved standards for transparency and accountability in line with Closing the Gap Targets and Priority Reforms.
9. Include requirements for monitoring and publicly reporting on remote drinking water services, including security.
10. Recognise the integral connection between land and water, and ensure that Aboriginal Peoples can continue to govern land and water as one connected living entity under their own laws. Reforms to meet this requirement must be developed in consultation with Traditional Owners and their representative organisations.
11. Ensure Aboriginal and Torres Strait Islander people have meaningful decision-making capacity in the care for and management of water (as well as the rest of Country) including developing polices related to water and the environment and secure, funded partnerships and co-governance arrangements.
12. Allocate water to Aboriginal and Torres Strait Islander Peoples with the same level of legal security as other water access entitlements. Water entitlements should reflect the values and interests of the relevant Aboriginal people.
13. Ensure jurisdictional and Australian government commitments align with commitments under the National Agreement on Closing the Gap.
14. Explicitly require water plans to protect Aboriginal cultural values.
15. Require each jurisdictional action plan to clearly set out the mechanisms to monitor and protect cultural values, based on co-design with Aboriginal people and their representative organisations.
16. Require jurisdictions to recognise native title rights and comply with the Native Title Act. This must include particular reference to the 'Future Acts' provisions, requiring jurisdictions to acknowledge that water licences are future acts and give procedural rights accordingly.
17. Require legally binding water plans that must be complied with in all water licencing decisions, and which are contiguous across each jurisdiction to limit areas outside of water plans.
18. Require that water plans are prepared in collaboration with Aboriginal people and their representative organisations, including funding Aboriginal organisations to participate in the water planning processes and supporting the incorporation and application of Indigenous Knowledge by Aboriginal peoples.
19. Set a moratorium on the issue (of new) or renewal (of existing) water access entitlements until legally binding water plans are in place.
20. Require the development of integrated surface-groundwater plans.
21. Include an updated definition of sustainable extraction for groundwater that embeds ecological protection.
22. Commit to using best available evidence, including Indigenous knowledges (where this is supported by the free, prior and informed consent of the relevant Aboriginal peoples).

- 23.** Apply the precautionary principle, and provide principles to guide jurisdictions in its implementation, including
 - a. specific guidance for the inherent uncertainties associated with groundwater extraction, and
 - b. requirements for independently reviewed rigorous science.
- 24.** Commit jurisdictions to co-designing water infrastructure in Aboriginal communities in partnership with the people who live in those communities and their representative organisations to ensure that the infrastructure is fit for purpose and culturally appropriate.
- 25.** Require transparent community service obligation payments where needed to ensure a basic level of service in remote communities, and provide clear principles for their transparent calculation and reporting.
- 26.** Develop best-practice community engagement and communication standards that require jurisdictions to:
 - a. Undertake all activities following the principles of free prior and informed consent, including transparently explaining the role and influence of communities in decision making,
 - b. Review/develop and implement updated community engagement and communication strategies that actively encourage public engagement,
 - c. Regularly and transparently report progress against jurisdictional actions, and
 - d. Co-develop and share materials and means of communication that are accessible for Aboriginal peoples with Aboriginal people and their representative organisations.
- 27.** Require that jurisdictions ensure Aboriginal representation in water governance in the manner that best meets the aspirations of relevant Traditional Owners and Aboriginal people. This could include co-designed partnerships in which relevant Traditional Owners co-govern water resources or allocated seats on boards of directors for water agencies.
- 28.** Ensure Aboriginal Water Reserves are fit for purpose, including being accessible to Aboriginal people, being fully provisioned in legally binding statutory water plans, and being calculated in a manner which properly reflects Aboriginal rights and interests protected under the Native Title Act and Aboriginal Land Rights Act.
- 29.** Ensure that all mechanisms for allocating water to Aboriginal people support full self-determination and do not impose limits on how that water may be used, including caring for Country, cultural economies, or other forms of cultural water use.
- 30.** Mandate water licensing for all large-scale water users, irrespective of the industry.
- 31.** Incorporate the cost of sustainable water planning and associated research into the price of water fees and charges, so that the costs of sustainable water planning can be recovered from water users (or so that any government subsidies can be transparently reported on). Cost recovery for sustainable water planning recovers costs beyond management and administration to include costs for best-available and new science (including modelling) required to underpin decisions, and ensuring Traditional Owners are empowered to continue their stewardship and consulted in relation to cultural requirements.

- 32.** Ensure that Aboriginal people are insulated from cost recovery in acknowledgement of the historical and ongoing impacts of aqua nullius, water dispossession and their exclusion from the water-based economies.
- 33.** Ensure that any proposed changes to water charging and trading regimes require thorough and published expert advice, impact-analysis and public consultation, including specific consultation with Traditional Owners.
- 34.** Where water markets exist (or come to exist, for example in the NT), commit jurisdictions to provide funding and clear strategies to support to Aboriginal organisations to acquire water on the water market.

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Introduction

In broad terms, Australia has failed to come to terms with the legacy of ‘aqua nullius’ (the erroneous assumption that water belonged to no one when the British invaded), which continues to create both legitimacy and sustainability problems for water management (O’Donnell et al. 2023), as well as undermining the inherent and unceded rights of Aboriginal Peoples (Marshall 2017).

The needs of Aboriginal communities for drinking water security and accessing and managing water as part of obligations to care for Country and to develop their economies have remained marginal considerations for national and jurisdictional policy makers, relative to the attention and effort given to:

- (a) developing northern Australian water resources (Australian Government 2015);
- (b) environmental water restoration in regions such as the MDB (Murray-Darling Basin Authority 2012); and
- (c) structural adjustments and the continuation of irrigation production (Productivity Commission 2021; Sefton et al. 2020)

The NT has had the opportunity to reverse this trend given a) the large proportion of land under Aboriginal ownership and b) that water sources are not yet overallocated and exploited to the extent we have witnessed in other jurisdictions, though they are increasingly heading that way.

The NT has not learnt from the mistakes that culminated in the NWI and the mistakes of other jurisdictions, in fact it has resisted reform. The NT has consistently been assessed as non-compliant with the NWI (Gardner 2024; Hart, O’Donnell, and Horne 2020; O’Donnell et al. 2022; Productivity Commission 2017; 2021 and 2024). For example:

- (a) Environmental water allocations still do not have the same legal security as water access entitlements, and in recent water allocation plans (such as Georgina Wiso, Mataranka and Western Davenport).
- (b) There is inadequate information on environmental water needs to support the determination of a sustainable yield.
- (c) As above, water allocation plans are not legally binding, undermining the ability of statutory water allocation plans to set aside water to protect environmental and cultural values (Gardner 2024), or to allocate water to an Aboriginal Water Reserve (Jackson et al. 2023).

After two decades of water policy failure at the national level, as well as by the NT Government in meeting the requirements of the NWI, **it is essential that any future national water agreement delivers:**

1. **Strong governance arrangements, with clear actions and responsibility** for implementation by all jurisdictions, transparent public reporting on progress and genuine consequences for non-compliance;
2. **Explicit measurable commitments**, including actions, to recognise **Aboriginal and Torres Strait Islander rights to access and manage water on Country**, to support their spiritual, cultural, environmental, social and economic outcomes, including:
 - a. A commitment to allocate water access entitlements to Aboriginal and Torres Strait Islander People; and

- b. A commitment to develop new water governance arrangements that transfer decision-making powers to Traditional Owners through partnership or co-governance;
3. Strong commitments, supported by specific actions, to provide **adequate environmental flows to protect ecological systems and cultural values**, as informed by both Traditional Owners and Western science;
4. Renewed commitment to evidence-based water policy and planning in which **Aboriginal and Torres Strait Islander People are engaged as knowledge holders**;
5. Strong commitments, supported by specific actions, to supply **safe, accessible, affordable and acceptable drinking water** to all communities, irrespective of their location.
6. Alignment to all parties' **commitments and actions under the National Agreement on Closing the Gap**.

The 2004 NWI

When the Council of Australian Governments (**COAG**) negotiated the intergovernmental agreement to the 2004 NWI, it did not negotiate or consult with Aboriginal or Torres Strait Islander Peoples. Both the CLC and NLC reiterate that it is the right of Land Councils to participate in consultations and negotiations over new water policy on behalf of our members. Both Land Councils also affirm their intent to actively pursue involvement.

The NWI was the first formal acknowledgement of Indigenous water needs in Australian water policy, with para 25(xi) committing to: '**recognise indigenous needs** in relation to water access and management'. This outcome was further clarified by specific actions in paras 52-54, which stated:

- 'The Parties will provide for indigenous access to water resources, in accordance with relevant Commonwealth, State and Territory legislation, through **planning processes** that ensure **inclusion of indigenous representation in water planning** wherever possible; and **water plans will incorporate indigenous social, spiritual and customary objectives** and strategies for achieving these objectives wherever they can be developed' (para 52);
- '**Water planning processes** will take account of the possible existence of native title rights to water in the catchment or aquifer area. The Parties note that plans may need to allocate water to native title holders...' (para 53);
- '**Water allocated to native title holders** for traditional cultural purposes will be accounted for' (para 54).

Water plans were required to set water aside for 'environmental or other public benefit outcomes', which includes 'indigenous and cultural values'. The content of water plans was also required to consider the uses and users of water, including Indigenous water use (Schedule E). The bulk of the actions committed to in 2004 therefore relate to **water planning processes**, rather than the allocation of water access entitlements to Aboriginal people.

We note that this has been contested, with Michael O'Donnell (2011) arguing that the 2004 NWI allows for the granting of water access entitlements to meet the needs of Aboriginal people, including for commercial purposes, and that this should have been a priority for all jurisdictions.

The denial and ongoing neglect of Aboriginal water rights that is reflected in and perpetuated by the NWI of 2004 has clear social justice implications. In drafting the NWI, COAG did not properly consider the implications for Aboriginal peoples of separating land and water titles or other changes, which in combination have entrenched and accelerated water dispossession (Hartwig et al. 2021; Hartwig and Jackson 2020). In the Murray-Darling Basin, the requirement for Indigenous organisations to pay fees and charges associated with water access entitlements, as well as a lack of funding to support infrastructure to deliver water to Country, have contributed to this ongoing water dispossession. Settler state water policy can lead to Indigenous organisations getting stuck in a ‘water trading trap’, where the only option available to them involves selling their water (Hartwig et al. 2021; Jackson, Hartwig, and Carmody 2021).

It is this glaring omission that calls into question the Productivity Commission’s view that the NWI has ‘served Australia well as a foundation for water management’ (Productivity Commission 2024:2). The NWI needs root and branch overhaul to address the historical and ongoing injustice of settler colonial forms of water governance.

Australian academics (e.g. Godden, Jackson, and O’Byrne 2020; Hartwig et al. 2021; Jackson et al. 2023; Langton 2006; Macpherson et al. 2018; Marshall 2017; Martuwarra RiverOfLife, Taylor, and Poelina 2021; Moggridge and Thompson 2021; O’Donnell et al. 2022; Taylor et al. 2022), and practicing lawyers including Tony McAvoy and Michael O’Donnell (see, e.g. O’Donnell 2013) have extensively documented the deplorable treatment of Indigenous peoples’ rights and interests in Australian water policy and management practice in general and the NT in particular. Multiple national government reviews have also documented the lack of action taken to adequately address Aboriginal rights and interests, including the Productivity Commission. Although these inquiries have noted some recent improvements in consultation, they conclude that there has been **no material change in the distribution of water rights** since the NWI was agreed (Productivity Commission 2017, 2021, 2024).

The 2004 NWI, although incorporating specific actions to achieve some outcomes, tended to rely on discretionary language and did not set clear substantive targets to guide the jurisdictions in undertaking their water planning. This mistake should not be repeated in any future agreement which must also move well beyond tokenistic forms of stakeholder consultation as the primary avenue for meeting the rights, needs and expectations of Aboriginal peoples.

Proposed content of the future national water agreement

The Land Councils are **deeply concerned** by the direction DCCEEW has foreshadowed for national water policy in the Discussion Paper. This is especially unsatisfactory given the growing awareness of water injustices in Australia, strong advocacy by Aboriginal people and organisations on water rights matters and the Commonwealth Government's commitment to increase Aboriginal water ownership. The current model for a future national water agreement proposed by DCCEEW (2024) is a significant step **backwards** from the 2004 NWI. We first address the overarching proposed content of the agreement as outlined in the discussion paper, before addressing the substantive content of each of the proposed objectives below.

There must be specific actions to compel substantive reform

The discussion paper states that the future agreement will incorporate objectives, outcomes, and principles (page 9), but does not include actions. The 2004 NWI included objectives and outcomes, but crucially, it also specified a set of actions that each jurisdiction was required to implement. These actions enabled progress to be monitored and transparently reported so that every jurisdiction could be held accountable.

At present, although outcomes are included, these are framed as aspirational, that all parties to the agreement 'will **seek** to achieve'. Using this language is likely to result in a 'race to the bottom'. It means that any measure of accountability will be required to assess not whether the outcome has been achieved, but whether each jurisdiction has attempted to achieve it. This is a vanishingly low bar and will not drive the kind of substantive law and policy reform that is required.

There must be a dedicated, independent agency to hold all parties to account

The 2004 NWI established the National Water Commission (**NWC**), an independent expert water agency with the capacity to review the implementation plans, and regularly monitor the progress of all jurisdictions in achieving the specified actions. In addition, the NWC undertook research into the function of water markets (National Water Commission 2011, 2013, 2014) and environmental water (National Water Commission 2010, 2012). The NWC also played an important role in funding research and policy development by Indigenous organisations, particularly in the Northern Territory, and was a catalysing force for policy reform.

The discussion paper makes no mention of the mechanism by which progress under a future national water agreement will be assessed, or how the jurisdictions will be held to account. Since the dismantling of the NWC in 2014, the Productivity Commission has noted the ongoing lack of compliance from the NT, but there have been no apparent consequences for this failure and no incentive for the NT government to address this deficit. Indeed, we have witnessed the opposite. In March 2023, the NT Government's Minister for Environment and Water attended the United Nations Water Conference in New York. The Minister represented the Commonwealth Minister for the Environment and Water, Tanya Plibersek, and promoted the NT Government's work to progress Aboriginal interests in water planning to demonstrate Australia leading by example.

The re-establishment of an NWC was a commitment made by the Australian Labor Party during the 2022 election campaign,³ and should be a core commitment for any future national water agreement. A re-established NWC should be required to report regularly on all signatories' progress in a transparent and timely manner. This should include both regular in-depth assessments of progress every two years as well as subject-matter specific reporting (which in the past included reports on environmental water and water markets).

The re-established NWC should have funding to support ongoing analysis of water policy in Australia, including funding to support Indigenous organisations in developing their own water policy reform proposals and providing evaluations of jurisdictional progress.

Recommendations

A future national water agreement must:

1. Deliver at least the same level of governance and accountability as the 2004 National Water Initiative while addressing critical weaknesses relating to Indigenous rights;
2. Include specific actions to compel substantive reform, as well as objectives and outcomes; and
3. Establish a dedicated, independent expert water agency with the capacity to accredit implementation plans, regularly monitor and transparently report on the progress of all jurisdictions in achieving the specified actions, and fund independent investigations (undertaken by itself, or by funding other organisations, such as Aboriginal organisations) to drive water policy reform

Objective 1: Water supplies that are safe and secure

In 2004, the NWI included an urban water reform outcome that committed to 'provid[ing] healthy, safe and reliable water supplies' (para 90(i)). However, there were no specific actions to support this outcome, which has made it difficult to hold jurisdictions to account. Nor was specific attention given to the health, acceptability and reliability of water supplies in regional and remote communities which are under-served.

In 2023, Wyrwoll et al (2022) reported that:

'At least 25,245 people across 99 locations with populations <1000 reportedly accessed water services that did not comply with health-based guideline values. Including larger towns and water systems, the estimated service gap rises to at least 194,572 people across more than 115 locations. Considering health parameters and the ADWG definition of 'good' aesthetic characteristics, the reported service gap rises further to at least 627,736 people across 408 locations. **Forty percent of all locations with recorded health exceedances were remote Indigenous communities.**'

³<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F8517807%22;src1=sm1#:~:text=Labor%20will%20commit%20%2426%20million,and%20fairness%20into%20water%20policy.>

Across the NT, 63 out of the 72 remote communities that are supplied with reticulated water from the NT service provider receive water that does not meet Australian Drinking Water standards (Power and Water Corporation 2022); this is estimated to be over 33,000 people in the NT.⁴ All but one of the communities within CLC region are at high, very high or extreme risk rating in relation to drinking water security. Additionally, ageing infrastructure contributes to high loss of water and in combination with quality issues, limits provision of essential services such as dialysis.⁵

CLC has not been privy to updated data on water security in remote communities since 2020, as this is no longer made publicly available in the NT. This contradicts the Closing the Gap National Agreement's Priority Reform 4: Shared Access to Data and information at a Regional Level. The Land Councils are in negotiations with the NT Government to reinstate public data sharing, which should be a basic norm of Australian water policy.

There are four communities in the CLC region and four communities in the NLC region where the water supply does not meet health guideline parameters. The figure is much higher for aesthetic parameters, which are crucial for the acceptability of drinking water and have critical health impacts:

- i) Where water is discoloured, malodorous or tastes unpleasant, it will not be considered safe by local communities, who will be forced to seek alternatives which may be unhealthy and/or expensive (Bailie, Carson, and McDonald 2004; Beal et al. 2019; Jaravani et al. 2016, 2017; Thurber et al. 2020);
- ii) Having to buy bottled water is a financial burden for low-income households and inconsistent with affordable access (Dharriwaa Elders Group and Walgett Aboriginal Medical Service 2020); and
- iii) high levels of hardness and total dissolved solids also affect water infrastructure integrity, operational costs, and safety (Browett, Pearce, and Willis 2012).

The Land Councils welcome the Productivity Commission's interim report's recognition of the health implications of aesthetic concerns, and call for accountable actions related to this recognition. Drinking **water quality and security is essential** for the viability, self-determination, and sustainability of Aboriginal communities across the NT.

We continue to stress the paramount importance of implementing and enforcing minimum standards based on health advice, and the active involvement of Aboriginal communities and representative organisations to determine their required level of service and hence requirements for water service provision. Aboriginal communities must have a partnership role in designing water infrastructure to deliver Objective 1 (see discussion in Objective 5). Water service provision may look different in each case (as determined by the values and needs of the local community) and acceptability of the water will be as important as technical definitions of safety, as articulated above.⁶

⁴ See <https://waterwatchradio.podbean.com/e/episode-49-water-rights-the-new-land-rights/>

⁵ See <https://waterwatchradio.podbean.com/e/episode-49-water-rights-the-new-land-rights/>

⁶ And recognised by the Productivity Commissions 2024 interim report.

Recommendations

A future national water policy agreement must:

4. Include a specific action to ensure all jurisdictions deliver a basic level of service for safe, accessible, affordable, and acceptable water to all Australians, as per current best practice recommendations and guidelines including but not limited to the Australian Drinking Water Guidelines.
5. Explicitly broaden this action beyond the 'urban' setting, so that remote Aboriginal locations are included.
6. Require jurisdictions to deliver water services that are fit for purpose for the relevant community. Individual remote communities must be actively involved in determining their required level of service and hence requirements for water service provision.
7. Require transparency for drinking water service provision and funding.
8. Embed accompanying principles and actions to compel jurisdictional reforms to meet improved standards for transparency and accountability in line with Closing the Gap Targets and Priority Reforms.
9. Include requirements for monitoring and publicly reporting on remote drinking water services, including security.

Objective 2: Aboriginal and Torres Strait Islander water interests

As noted above, the 2004 NWI recognised Indigenous water needs, but did not commit to allocating water access entitlements to meet those needs. Consistent critical commentary has observed the failure to substantively improve Aboriginal water access because national and state policy has not explicitly acknowledged the inherent rights of Aboriginal peoples to water.

The discussion paper repeats this error by referring to Aboriginal peoples 'water interests and values' (page 13) rather than Aboriginal peoples inherent rights to water (CAWI 2023 Table 4).

Any future national water agreement must acknowledge the contemporary expression of aqua nullius, which manifests in almost all water legislation throughout Australia (O'Donnell 2023). In the NT, this is located in s 9(2) of the *Water Act 1992* (NT), which stipulates that 'the property in and the rights to the use, flow and control of all water in the Territory is vested in the Territory'. This means that the settler state government has claimed the authority to control all water in the Territory, without regard for Aboriginal laws for water management. So far, the only Australian jurisdiction to formally acknowledge the fiction and impacts of aqua nullius is Victoria (Department of Environment, Land, Water and Planning 2022).

In 2018, the National Cultural Flows Research Project (MLDRIN, NBAN, and NAILSMA 2018) set out a pathway to cultural flows (Figure 1) that includes:

- (1) water rights,
- (2) influence in water landscapes, and
- (3) transforming the foundations of water governance

All three of these elements must be included in any future national water agreement.

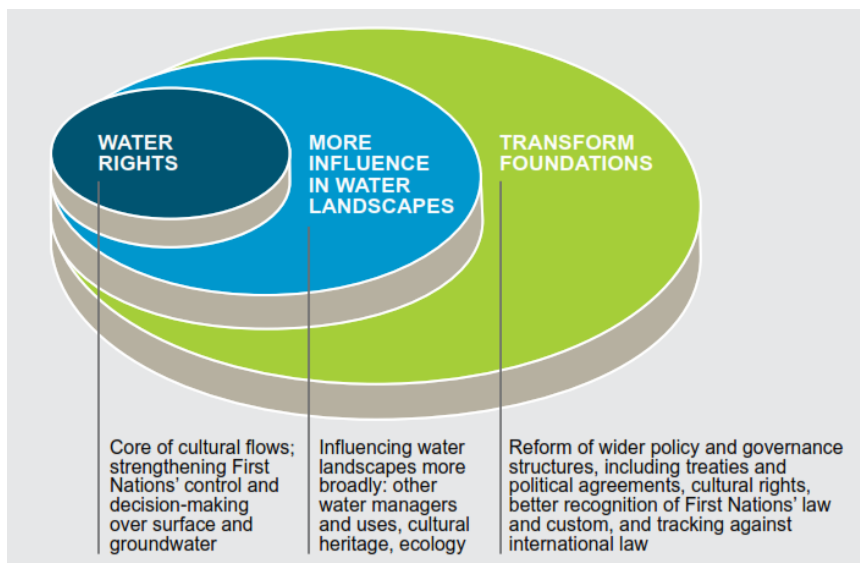


Figure 1 Pathways to law and policy reform (MLDRIN, NBAN & NAILSMA, 2018)

The cultural flows framework aligns with the resolutions and priorities of the Land Councils, which call for water governance that is founded upon respect of Aboriginal peoples' water rights, continuing knowledge and stewardship of water. The Land Councils maintain that water and land are linked, and must be managed together.

This represents a foundational departure from the 2004 NWI, which committed to separating water access entitlements from land, but is an important step towards recognising and valuing Aboriginal laws.

Excerpt of Joint Land Council resolution, Barunga 7 June 2023:

The Central Land Council and Northern Land Council recognise water, land and Aboriginal people are deeply connected. Aboriginal people have responsibilities to protect their country, its environments and their families for future generations and demand recognition of their rights to traditional waters to allow them to fulfil these responsibilities. Aboriginal people have been the stewards of our waterways for millennia. Aboriginal people have a right to good drinking water so that we can live well in our communities and homelands.

We have been asking for too long and waiting for too long for stronger water laws that respect the knowledge, rights and responsibilities of Aboriginal people.

We welcome bold and strong water reform, but it must be developed in consultation with Aboriginal people from the start, and protect and promote our rights and interests to water. Water is for all of us.

Recommendations

A future national water agreement must:

10. Recognise the integral connection between land and water, and ensure that Aboriginal Peoples can continue to govern land and water as one connected living entity under their own laws. Reforms to meet this requirement must be developed in consultation with Traditional Owners in each jurisdiction.
11. Ensure Aboriginal and Torres Strait Islander people have meaningful decision-making capacity in the care for and management of water (as well as the rest of Country) including developing polices related to water and the environment and secure, funded partnerships and co-governance arrangements.
12. Allocate water to Aboriginal and Torres Strait Islander Peoples with the same level of legal security as other water access entitlements. Water entitlements should reflect the values and interests of the relevant Aboriginal people.
13. Ensure jurisdictional and Australian government commitments align with commitments under the National Agreement on Closing the Gap.
14. Explicitly require water plans to protect Aboriginal cultural values.
15. Require each jurisdictional action plan to clearly set out the mechanisms to monitor and protect cultural values, based on co-design with Aboriginal people and organisations.
16. Require jurisdictions to recognise native title rights and comply with the Native Title Act. This must include particular reference to the 'Future Acts' provisions, requiring jurisdictions to acknowledge that water licences are future acts and give procedural rights accordingly.

Objective 3: Sustainable water planning

Sustainable water planning depends on three key elements:

- (1) robust evidence (see Objective 4) that supports
- (2) legally binding water allocation plans, which are
- (3) prepared in collaboration and share power with Aboriginal Peoples and local communities.

The current discussion paper focuses on the challenges posed by climate change, which are essential, but overlooks elements 2 and 3.

The risks posed by water planning failures are significant in a jurisdiction where water security and quality are a critical and growing concern, and where we are dependent on groundwater for 90% of drinking water supplies.

The Cambrian Limestone Aquifer (**CLA**), a large groundwater system in the NT, provides a relevant and alarming example. During the past decade water extraction has increased substantially in the north of the CLA (Currell et al. 2024). Licencing has proceeded in the absence of water allocation plans, and in the case of the Georgina Wiso area, a water Plan was rushed through without input

from a stakeholder water advisory committee. Traditional Owners from both the CLC and NLC regions were denied a role in formulating the Plan's objectives, commenting on the proposed sustainable yield or any of the proposed management safeguards. The Georgina Wiso WAP allocates 210 GL/year to consumptive uses, which (if fully utilised) would be a 14-fold increase on current extraction rates. Currell et al. (2024) note that this was done without considering the water requirements of places of importance to Aboriginal people and of high conservation value.

More recently, the draft Mataranka Water Allocation Plan has been released and it too proposes to substantially increase extraction. It recognises that the entitlements granted during the past decade and outside a formal planning process means that it is not possible to fully provision the Aboriginal Water Reserve as per the NT's Policy Framework. Across the entire Plan area, less than one half of the Reserve is now available for the use and benefit of Traditional Owners. The problem is most acute in the South Zone, where the proportion of Aboriginal land is very high and competition for water has recently been allowed to markedly intensify.

The Draft Mataranka Plan proposes an implementation action that would allow the Water Controller to recover unused licenced water in the two zones that are to be capped and to allocate any recovered water to the Aboriginal Water Reserve. The Plan does not contain targets or a timetable to recover sufficient water for the Reserve, and if unused entitlement water is recovered and made available for use, increased extraction may adversely affect the Roper River. Traditional Owners concerned about the impacts of water extraction on profoundly important GDEs, such as Mataranka and Bitter Springs, are unlikely to want to put the Roper under further pressure, and having been locked out of even the most recent allocation decisions they should not be made to bear the cost either in environmental or economic terms.

For over a decade, Traditional Owners, Aboriginal organisations, and water governance specialists (e.g. Jackson and Barber (2013)) have been raising the possibility that increased competition for water in this area might result in the inequity now manifest.

The NLC and CLC fear this pattern of exclusion will be repeated across NT water resource systems, as water planning processes lag substantially behind water resource licencing. In addition, there is a distinct lack of integrated water planning, despite repeated calls for integrating water systems and consideration of cumulative impacts. In response to NLC correspondence about integrated water planning, on 17 December 2020, the DEPWS CEO advised the NLC that a Water Advisory Committee would be established and convened for the Daly River Basin 2021 to;

"...for the first time, to consider water resources at the whole of basin level, including a plan for the Flora Tindal Limestone Aquifer. The committee will also provide advice on the effectiveness of the Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2024 and the Ooloo Dollostone Water Allocation Plan 2019-2029 with particular reference to whether or not these declared plans deliver social and economic benefits within ecological constraints".

As at May 2024, this has still not commenced.

Recommendations

A future national water agreement must:

17. Require legally binding water plans that must be complied with in all water licencing decisions, and which are contiguous across each jurisdiction to limit areas outside of water plans.
18. Require that water plans are prepared in collaboration with Aboriginal people, including funding Aboriginal organisations to participate in the water planning processes and supporting the incorporation and application of Indigenous Knowledge by Aboriginal peoples.
19. Set a moratorium on the issue (of new) or renewal (of existing) water access entitlements until legally binding water plans are in place.
20. Require the development of integrated surface-groundwater plans.
21. Include an updated definition of sustainable extraction for groundwater that embeds ecological protection.

Objective 4: Evidence-based decision-making

The 2004 NWI includes an action that requires water plans to be informed by the ‘best available science, socio-economic analysis and community input’ (para 36). This should be expanded to explicitly incorporate Indigenous knowledges (with the consent of Aboriginal people). Aboriginal people should be funded from independent sources (such as the re-established National Water Commission) to develop sustainable water plans in partnership with state and territory governments so that they can provide additional sources of evidence (including Indigenous knowledges) and ensure that the water plans give effect to their responsibilities to care for Country. This would facilitate water plans based on best practice, which are more likely to be genuinely sustainable and rebuild Aboriginal peoples’ trust in the water planning processes and ability to make use of water access entitlements for economic development.

The discretionary language in the 2004 NWI that enables each jurisdiction to determine the level of risk and therefore the level of resourcing required to support water planning (para 38) should be minimised. Instead, there should be a clear link between the requirement for the ‘best available’ information and the cost of water service provision, so that jurisdictions are required to either recover the costs of water planning as part of the fees and charges for water services, or transparently report on the other arrangements that they have made (see para 66(v) in 2004 NWI).

The Western Davenport Water Allocation Plan (**WAP**) demonstrates the lack of evidence-based decision-making in the NT. Expert analysis of the 2018-2021 Western Davenport WAP commissioned by the CLC, and reports by other stakeholders, found that baseline data for the area was undermined by extremely limited knowledge about groundwater sources and insufficient hydrological modelling and incomplete studies of groundwater dependent ecosystems in the area.⁷ This was the WAP in place at the time the Singleton water licence was granted. The application for

⁷ Western Davenport Plan, Associated Documents and Groundwater Model Review, 16.07.21.

the licence did not provide new information that would rectify the deficiencies and limitations in baseline data and monitoring identified in the Western Davenport WAP. Despite these uncertainties, no environmental impact assessment was required or undertaken prior to granting the licence. Instead, the Water Controller relied on the concept of adaptive management to defer unacceptable uncertainty over key matters that should have been subject to rigorous environmental impact assessment *prior* to the grant of the licence.

The decision to grant the licence was also made without adequate consideration of relevant Aboriginal cultural values, or how the licence was expected to impact them. CLC's commissioned expert review identified many cultural values and sacred sites around Singleton that would be significantly impacted by the licence.⁸

The NLC is extremely disappointed by the extension of the current water management arrangements in the Katherine region for a further eighteen months. The Katherine Tindall Limestone Aquifer Water Allocation Plan 2019-2024 was patently inadequate, hence its declaration for only five years. In light of insufficient data to determine non-consumptive water requirements and establish an evidence-based estimated sustainable yield, the plan carried over the estimated sustainable yield from the previous 2016-2019 water allocation plan as an interim measure. The plan stated that determining environmental and cultural water requirements was a priority and would be undertaken during the plan's implementation. Five years later, this work has not progressed.

Recommendations

A future national water agreement must:

22. Commit to using best available evidence, including Indigenous knowledges (where this is supported by the free, prior and informed consent of the relevant Aboriginal peoples).
23. Apply the precautionary principle, and provide principles to guide jurisdictions in its implementation, including
 - a. specific guidance for the inherent uncertainties associated with groundwater extraction, and
 - b. requirements for independently reviewed rigorous science.

Objective 5: Water infrastructure

Ageing and inadequate water infrastructure presents a critical challenge in remote communities and homelands across the NT and Australia (Infrastructure Australia 2021). The Land Councils are deeply concerned by reports from service providers that infrastructure across many communities is coming to or already at the end of its effective life. This presents high risks of service failure, decreased operations and financial loss. These issues require significant, coordinated and transparent investment processes. To be effective, this investment program must be based on meaningful consultations with remote residents and service providers.

⁸ Addendum: Aboriginal Cultural Values Impact Assessment prepared by Susan Dale Donaldson, 07.02.2023.

The NT Government has acknowledged that funding and planning for remote water services in the NT, including maintenance and asset replacement, currently occurs in an opaque way, with very little public information available (Department of Treasury and Finance 2022:18). The Land Councils have found that there is a complete lack of clarity about which infrastructure projects are funded and why, and whether investments have been through cost/benefit analyses and assessments of ecological sustainability.

For example, the Land Councils have been deeply disappointed by the lack of consultation by the NT Government to inform proposals to the National Water Grid Fund. The Land Councils welcome investment by the Commonwealth which has considerable implications for remote Aboriginal communities across the NT. Despite being announced to progress commitments under Closing the Gap, and the significant value-add Land Councils could bring to informing needs-based funding, the NT Government has not yet consulted with Land Councils. We have only received briefings after priorities are chosen and applications made. This falls well-short of the priority reforms, and means the Land Councils have no way of informing the NT Government's prioritisation of projects, or explaining the choices to our constituents. We are in discussions with the NT Government to negotiate mechanisms to inform proposals moving forward, but despite ongoing advocacy the process remains unresolved.

Further, the Productivity Commission found in 2020 that the NT Government's use of community service obligations (CSOs) and grants is not transparent or consistent with the NWI (Productivity Commission 2021:173). For commercially unviable water services, such as remote Aboriginal communities, the NWI states that operational subsidies are to be provided as transparent and untied CSOs. In the NT, the funding of water services in remote communities instead occurs via opaque recurrent grants from the NT Department of Territory Families, Housing and Communities to Indigenous Essential Services. This remains unaddressed by the NT Government. As per Objective 1, any water infrastructure for Aboriginal communities must be developed in partnership with the relevant communities.

Recommendations

A future national water agreement must:

24. Commit jurisdictions to co-designing water infrastructure in Aboriginal communities in partnership with the people who live in those communities to ensure that the infrastructure is fit for purpose and culturally appropriate.
25. Require transparent community service obligation payments where needed to ensure a basic level of service in remote communities, and provide clear principles for their transparent calculation and reporting.

Objective 6: Sustained community trust

NT Government water planning processes have consistently eroded community trust.

The 2004 NWI included a requirement for all parties to develop implementation plans in accordance with a scheduled timeframe as well as the establishment of a National Water Commission (NWC) to assist with the effective implementation of this Agreement (paras 8-10, Schedule A). Each

jurisdiction was also required to engage with their communities (paras 93-97), but the role of the independent, expert water agency - who (1) accredited implementation plans (bringing a level of quality control across multiple jurisdictions); (2) reported regularly on progress of implementation, and (3) produced additional analysis to drive further reform - was essential to delivering genuine trust from the community. See recommendation 3.

In addition, a key mechanism for building wider water literacy, as well as wider community trust in government water management, is the requirement for genuinely representative water governance arrangements. Water agency boards and other governing bodies should include representation from all sectors of the community. In particular, water boards and other governing bodies should be required to include Traditional Owner representation, so that the people on whose Country the water agency operates have a role in determining the strategic direction for that organisation.

The Georgina Wiso WAP demonstrates the NT Government's lack of commitment to Aboriginal access and inclusion. The Georgina Wiso WAP was declared in November 2023, and is the largest water allocation plan in the NT. As stated above, the WAP was developed in the absence of a stakeholder Water Advisory Committee, and without consultation with local Aboriginal people. As a result, there has been no opportunity for Aboriginal people to have meaningful involvement in decision making or to have their needs and rights represented, including consideration of cultural values.

Additionally, in late 2023, the three Traditional Owner members of the Mataranka Water Advisory Committee resigned from that committee, amid concerns their views were not being taken into consideration in the preparation of the plan. This means that since the National Water Reform 2020 Inquiry, Aboriginal representation on water advisory committees in the NT has further declined.

In the development of the new plan for the Western Davenport District, a majority of the members of the Western Davenport Water Allocation Committee (**WAC**) felt that the NT Government misrepresented and minimised their concerns and greatly constrained the WAC's influence. Most of the WAC members consistently reiterated concerns that the sustainable yield allocates too much water for consumptive uses and weakens environmental and cultural protections, however the NT Government did not make any substantial changes to the Plan to address the WAC's advice and concerns.⁹ The final draft plan was released for public comment without reference to the concerns of the majority of WAC members and their unwillingness to endorse the draft Plan.

The NT Government also curtailed Aboriginal people's participation by presenting misleading information in consultations, and by disregarding advice of Traditional Owners to protect cultural values. During consultations in September 2022, the NT Government told Traditional Owners that one of the objectives of the new plan will be to '*protect regional Aboriginal and other cultural values associated with water*'. Traditional Owners expressed the critical importance of this objective. However, the NT Government then removed the objective of protecting Aboriginal cultural values from the new Draft Plan. Traditional Owners were deeply disappointed by what they felt was disingenuous consultation and disregard of their advice.

⁹ See CLC's submission to the Productivity Commission's interim report, 2024

Under the NWI, all jurisdictions have agreed that water access entitlements and planning frameworks should recognise the needs of Aboriginal people in relation to water access and management (NWI pt. 52(ii)). Amongst other commitments in the *Territory Water Plan*, the NT Government has committed to Aboriginal representation in water planning processes. Despite this rhetoric, both Land Councils continue to be disappointed with the ongoing and current lack of involvement and meaningful engagement of Aboriginal people in water planning.

Recommendations

A future national water agreement must:

26. Develop best-practice community engagement and communication standards that require jurisdictions to:
 - c. Undertake all activities following the principles of free prior and informed consent, including transparently explaining the role and influence of communities in decision making,
 - d. Review/develop and implement updated community engagement and communication strategies that actively encourage public engagement,
 - e. Regularly and transparently report progress against jurisdictional actions,
 - f. Co-develop and share materials and means of communication that are accessible for Aboriginal peoples with Aboriginal people.
27. Require that jurisdictions ensure Aboriginal representation in water governance in the manner that best meets the aspirations of relevant Traditional Owners and Aboriginal people. This could include co-designed partnerships in which relevant Traditional Owners co-govern water resources or allocated seats on boards of directors for water agencies.

Objective 7: Efficient use of water

Water efficiency was a key plank of the 2004 NWI, but the unspoken assumption was that it was possible to determine what constitutes water ‘waste’. In some cases (such as leaks from water pipes in urban areas) this is relatively uncontroversial, but in others, water ‘wastage’ can include water that is essential for river health (such as water flowing out to sea) or the maintenance of sacred sites and cultural values. In the NT, water licence holders are still subject to a ‘use it or lose it’ requirement under NT policy, which promotes inefficient use of water by incentivising water licence holders to maximise the water they are using, or face the likelihood of reductions in allocations (NT Government 2020). It is essential that a renewed agreement works to support jurisdictions to explore and address unintended outcomes such as this, to ensure efficient water use.

Aboriginal Water Reserves

In the Discussion Paper, this objective does not acknowledge the historical and ongoing exclusion of Aboriginal people from water markets (Hartwig et al. 2021) and water-based economic development (Jackson et al. 2023; Nikolakis and Grafton 2021; Nikolakis, Grafton, and to 2013).

The Aboriginal Water Reserve (**AWR**) was introduced in the NT in 2017 to attempt to address this ongoing economic exclusion, enabling water to be set aside for future use by Aboriginal people to support economic development. While the Land Councils support the broad intent of the policy, the AWR faces a number of hurdles that mean that it is ineffective at providing efficient and effective access to water for Aboriginal economic development. In summary:

AWRs are only available in areas where the Minister has declared a water allocation plan (**WAP**). Currently, this is only 13.8% of the NT (this will increase marginally to 16.8% once the WAPs in Western Davenport, Mataranka and Adelaide regions are declared). The NT Government develops water allocation plan areas without adequate consideration of the desires of Aboriginal people to access or use water. Failure to ensure that plan areas align with water resources, or to take into account reasonable levels of uncertainty in water resource boundaries, can operate to disadvantage Aboriginal people when AWRs are established.

The volume of water under the AWR is calculated based on the proportion of 'eligible land' within a WAP Area. 'Eligible land' is defined under the *Water Act 1992* as Aboriginal land under the Land Rights Act, exclusive-possession Native Title, Aboriginal freehold, and leasehold land. Non-exclusive native title determination is not considered eligible land, even though non-exclusive native title holders invariably have rights under the Water Act and their native title determination to access and take water. This limits the volume of water that can be allocated for Aboriginal use, because most native title determinations are non-exclusive determinations over pastoral leases. This privileges pastoralists' use of water over uses of native title holders, even though both have co-existing rights in the same areas of land.

The AWR volume is capped at 30% of the consumptive pool, even in areas containing more than 30% of eligible Aboriginal land. In areas with more Aboriginal land, even Land Rights land is not sufficient to ensure Aboriginal peoples' access to an equivalent share of water rights and the economic development this could support (Jackson et al 2023).

While the AWR will require affected Aboriginal peoples' consent to access, licencing decisions will still sit with the Water Controller, who has the power to refuse to grant a licence from the Reserve, even if Aboriginal people give their consent. Furthermore, while enabling legislation was passed four and a half years ago, the regulations governing consent have not been made, so it is currently impossible for Aboriginal people to make use of the AWR. One of the reasons for this delay is that the current legislation is not well adapted to traditional Aboriginal land ownership and decision-making structures.

AWRs only allow for licenses for the purpose of extraction for economic use. Leaving water in the ground for environmental and cultural uses for example is not supported. This does not allow for the spectrum of Aboriginal interests in water (Jackson et al. 2023).

AWRs are not available where the government has already over allocated water systems, so there is also no guarantee that water will be available for use under the AWR. Four of the current eight WAPs have *zero actual allocations* of water to the AWR (see Table 1). The Ti-Tree WAP for example has indicated a 22% volume for the AWR based on the environmentally sustainable yield, but there is no water available for use at all. WAPs (such as Georgina Wiso) are increasingly gazetted without sufficient evidence to ensure the estimated sustainable yield will protect environmental and cultural values (see earlier discussion in Objectives 2, 3 and 4). If significant licensed allocations are made,

then when estimated sustainable yields are downgraded, under current policy settings the AWR will be partially or completely lost. Instead, AWRs should be guaranteed if water was considered available at the time of their creation, and any later downgrades of estimated sustainable yield should be recovered from licences granted after the establishment of the AWR.

Further, although water licences are also still linked to land, it is envisaged that in the NT (as is already occurring in WA, see Taylor et al 2023), the primary use of the AWR will be to facilitate the leasing of water to non-Aboriginal organisations. Leasing would potentially provide an income stream to the eligible Aboriginal organisation(s), but in doing so, each lease would entrench the separation of land and water, as water would be used by others, on other land. This creates complexities for AWR consent processes, as at a cultural (and physical) level, decisions about the taking of water cannot be made purely by reference to abstract allocation volumes, decoupled from the impacts of take on the land and environment.

Finally, the AWR model does not empower Aboriginal people to have a stronger role in water management (Jackson et al 2023).

Table 1 AWR allocations in declared Water Allocation Plans (WAPs) (adapted from Jackson et al 2023)

Water allocation plan	Aboriginal water reserve
Mataranka 2024 (draft)	18% notional allocation 7% actual allocation (water available) <i>There is a significant risk that extracting additional water from the aquifer could lead to a reversal of flow in the Roper River (Currell et al 2024)</i> <i>Plan proposes that unused water entitlements might be reallocated to the Reserve</i>
Georgina Wiso 2023	10% (actual allocation) <i>Environmental and cultural values not specified and may require future reductions in sustainable diversion limit</i>
Ti-Tree 2020	22% notional allocation 0% actual allocation
Katherine (Tindall Aquifer) 2019	10% notional allocation 0% actual allocation
Ooloo Dolostone Aquifer 2019	20% notional allocation 10% actual allocation (zero in northern groundwater management zone)
Western Davenport Ranges 2018 (under review)	24% actual allocation
Alice Springs 2016	No AWR (plan predates 2019 law reform)
Berry Springs 2016	No AWR (plan predates 2019 law reform)

Although the AWR can potentially secure limited guarantees that Aboriginal economic interests in water are not entirely disregarded by over-allocation (as has occurred in southern Australia), the AWR ultimately operates to constrain those interests to a commodified form of water which is most

likely to be made available for use by non-Aboriginal people, and the wider benefits of increased economic activity may not flow to all land holders of eligible land. Although some of the water plans in the NT protect the Reserve from under-utilisation, some Aboriginal organizations are fearful that if they do not use it, they may lose it should competition intensify (O'Donnell et al., 2022).

Recommendations

A future national water agreement must:

28. Ensure Aboriginal Water Reserves are fit for purpose, including being accessible to Aboriginal people, being fully provisioned in legally binding statutory water plans, and being calculated in a manner which properly reflects Aboriginal rights and interests protected under the Native Title Act and Aboriginal Land Rights Act.
29. Ensure that all mechanisms for allocating water to Aboriginal people support full self-determination and do not impose limits on how that water may be used, including caring for Country, cultural economies, or other forms of cultural water use.

Water pricing and cost recovery

It is crucially important to ensure that the impact of aqua nullius on Aboriginal peoples is recognised in all water pricing policy. Non-Aboriginal Australians have had the benefit of over a century of water rights, which were free to acquire and use for much of that time (and largely still are free in the NT). We also note that in the NT particularly there is a range of exemptions from the need to obtain a water use licence at all. Pastoralists use the 'stock and domestic' exemptions to use significant volumes of water with no metering, monitoring or charges. The NWI should mandate water licensing for all large-scale water users, irrespective of the industry. Cost recovery from commercial water users who have been benefiting from the economic development outcomes during this period is essential, but governments must ensure that Aboriginal peoples are not unfairly affected by any increases to water fees and charges. Failure to address this issue is already driving continued loss of water rights from Indigenous organisations in NSW (Hartwig and Jackson 2020; Hartwig, Jackson, and Osborne 2020). In Victoria, this issue is being addressed by waiving fees (in some circumstances) and government funding (where fees cannot be waived without increasing costs to other water users) (Department of Environment, Land, Water and Planning 2022).

In the NT, water remains largely free to acquire and use (subject to small government application fees). There is no pricing regime to licenced water that covers the cost of independent research, regulation, monitoring and compliance or even administration. This means the NT government has granted licences for vast amounts of water without charge to companies deriving private profit.

Until water is properly valued and priced for private development, there is little incentive for industry to improve water efficiency and the NT has no way to recoup the costs for sustainable water management.

The NT Government have committed to developing a water charging framework through the *Territory Water Plan*, released June 2023. The NT Government have begun discussions on the charging framework with a Government-appointed steering group of stakeholders. Neither CLC nor NLC were approached to participate on the steering group. This failure to consult is unacceptable given the risks of adverse impacts for Traditional Owners, particularly in the context of Land Councils' role in the development of Aboriginal Water Reserves.

The particularities of the NT context have critical implications for water pricing and trading and the extent to which approaches and lessons from other jurisdictions can be adopted here. Important considerations include, but are not limited to:

- a) the extent and type of Aboriginal land ownership,
- b) that water entitlements remain tied to land ownership,
- c) the limited coverage of Water Allocation Plans, and
- d) the risks of insufficient evidence underpinning allocations leading to expensive future water buybacks where systems are overallocated.

The NT Government has the opportunity to review the negative and/or perverse outcomes of water charging regimes in other jurisdictions and establish a context-appropriate regime for the NT that avoids the pitfalls of other systems and properly takes into account the finite nature of water and its value to the community, particularly Traditional Owners.

In regard to water trading and markets, the Land Councils submit that the particularities of the NT context necessitate significant research and scoping to identify the barriers, costs and benefits of water trading, and public consultation on whether water trading should be encouraged.

Recommendations

A future national water agreement must:

- 30. Mandate water licensing for all large-scale water users, irrespective of the industry.
- 31. Incorporate the cost of sustainable water planning and associated research into the price of water fees and charges, so that the costs of sustainable water planning can be recovered from water users (or so that any government subsidies can be transparently reported on). Cost recovery for sustainable water planning recovers costs beyond management and administration to include costs for best-available and new science (including modelling) required to underpin decisions, and ensuring Traditional Owners are empowered to continue their stewardship and consulted in relation to cultural requirements.
- 32. Ensure that Aboriginal people are insulated from cost recovery in acknowledgement of the historical and ongoing impacts of aqua nullius, water dispossession and their exclusion from the water-based economies.
- 33. Ensure that any proposed changes to water charging and trading regimes require thorough and published expert advice, impact-analysis and public consultation, including specific consultation with Traditional Owners.
- 34. Where water markets exist (or come to exist, for example in the NT), commit jurisdictions to provide funding and clear strategies to support to Aboriginal organisations to acquire water on the water market.

Acknowledgement

This document has been prepared based on expert advice from Dr Erin O'Donnell (University of Melbourne) and Professor Sue Jackson (Griffith University).

About the Central Land Council

The Central Land Council (CLC) is a Commonwealth Statutory Authority established under the *Aboriginal Land Rights (NT) Act 1976* (Cth) (**Land Rights Act**). The CLC has statutory responsibilities for approximately 780,000 square kilometres of land in the southern half of the NT. Our functions include:

- a) ascertaining and expressing the wishes and opinion of Aboriginal people living in the area of the CLC as to the management of Aboriginal land in the area;
- b) protecting the interests of traditional Aboriginal owners of Aboriginal land;
- c) assisting Aboriginal people to take measures likely to assist in the protection of sacred sites on land (whether or not Aboriginal land); and
- d) consulting with traditional Aboriginal owners of Aboriginal land about any proposals relating to the use of that land.

The CLC also administers a range of programs for the benefit of its constituents in relation to environmental management, community development, governance, economic participation, cultural heritage, and customary practices.

The CLC is also a native title representative body under the *Native Title Act 1993* (Cth) (**Native Title Act**) for the southern half of the NT. We prepare native title applications, respond to proposals with the potential to impact on native title rights and interests ('future acts'), negotiate Indigenous land use agreements and support many corporations representing native title holders known as prescribed bodies corporate.

About the Northern Land Council

The NLC was established in 1973. Following the enactment of the Land Rights Act, the NLC became an independent statutory authority responsible for assisting Aboriginal people in the northern region of the NT to acquire and manage their traditional lands, waters and seas.

The Land Rights Act combines concepts of traditional Aboriginal law and Australian property law and sets out the functions and responsibilities of the land councils. Under the Land Rights Act, the key functions of land councils include expressing the wishes and protecting the interests of Traditional Owners¹⁰ throughout the land council's region.

The NLC is also a native title representative body under the Native Title Act and has functions to represent native title holders, including in consultations and negotiations relating to Indigenous land use agreements, future acts, rights of access and other matters relating to native title. In this capacity, the NLC also represents the Aboriginal people of the Tiwi Islands and Groote Eylandt.

Aboriginal people make up more than 30 per cent of the NT population and have freehold title rights to around 50 per cent of the NT via the Land Rights Act, with most of the remaining land mass and some sea country subject to native title rights and interests. Access to the natural resources of these

¹⁰ For the purposes of this submission, the term Traditional Owner includes traditional Aboriginal owners (as defined in the *Aboriginal Land Rights (NT) Act 1976*, native title holders (as defined in the *Native Title Act 1993*) and those with a traditional interest in the lands and waters that make up the NLC's region.

areas, and their free, safe and assured use, is one of the basic rights and expectations articulated through both the Land Rights and Native Title Acts. Any impact on the natural environment that threatens access to, or use of, resources has cultural implications for the Aboriginal people that rely on these resources.

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