



CENTRAL LAND COUNCIL

Submission to the Northern Territory Government

Draft Territory Water Plan

25 November 2022

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Recommendations

I. Legislation and planning

Best practice water laws

1. Mandatory and statutory-based water planning for all water resources in the NT
2. A requirement to appoint a properly resourced and representative water advisory committees tasked with helping to develop water allocation plans (**water plans**). The appointment of each water advisory committee must be for a minimum of 5 years, recognising its role to assist with review and monitoring of the water plan, as well as assist with its development. Engagement by the NT Government with such committees must be genuine and sustained.
3. Any proposed amendments to, or which affect the operation of, a water plan, to be directed to the relevant water advisory committee whose opinion must be considered and documented before any such changes are made by the relevant decision-maker.
4. Clearly defined requirements regarding the legally binding contents of water plans. These requirements must include a legally enforceable estimated sustainable yield for the water control district and each water resource located therein.
5. Defining the term 'estimated sustainable yield' and ensuring that this definition includes a requirement that it be based on agreed standards of rigorous scientific research and cultural knowledge and the precautionary principle, and protect the health of the water resource over time. The definition of "estimated sustainable yield" must not result in the depletion of the water resource.
6. Mandatory timeframes for the drafting and implementation of water plans
7. A moratorium on the issuing of additional groundwater licences until there is adequate, clear and independent scientific regarding the NT's groundwater resources
8. Mandatory water metering (and ideally, telemetry) with tamper-proof meters of a particular standard for all extractions
9. Clearly drafted and readily enforceable offence provisions
10. Open standing provisions (that is, provisions which empower anyone to appeal an allegedly unlawful decision)
11. The inclusion of clear duties that apply to decision-makers and which, for example, require them to act on the basis of rigorous scientific evidence that complies with best-practice criteria (so as to protect water resources from over-extraction)
12. A yearly water allocation scheme that applies to licences and which is underpinned by clear and evidence-based rules (and which takes into account climate change);
13. Accurate water accounting
14. A requirement that any modelling undertaken in relation to a licensing application be of particular standard and undertaken by an independent third-party expert appointed by an independent committee
15. A requirement to ensure modelling for compliance purposes is based on latest levels of development and its assumptions and the data those assumptions are based on are transparent and communicable

Best practice governance

16. The establishment of an independent water agency responsible for water planning and licensing
17. The person responsible for approving licenses must have relevant qualifications.

18. The establishment of an independent water regulator which is responsible for enforcing offence provisions and license conditions

Pricing

19. The CLC is forming a final position on water pricing. However, our preliminary view is that it ought to be introduced in relation to licensed water extractions consistently with key principles that acknowledge Traditional Owners as the original stewards of the NT's rivers and groundwater. Specifically:

- a. Traditional Owners should not be required to pay to use water on their Country.
- b. Commercial enterprises that are not owned by Traditional Owners should pay a sufficient price for extracting water to ensure that the elements (set out in Diagram 1, above) are accounted for.
- c. The NT should consult extensively with Traditional Owners and suitably qualified experts to ensure that any water pricing model is rigorous, effective and equitable.

II. Drinking water in remote communities

Drinking water in remote communities

20. The Draft Plan commits to the introduction of safe drinking water legislation and the establishment of safe drinking water management plans. While these initiatives are supported the Draft Plan requires further detail on:

- How the transparency requirements under the new legislation will link to the reporting requirements of PWC and IES neither of which are subject to FOI and with respect to IES, it is not which is not overseen by the NT Utilities Commission.
- What role the Department of Health will play in supporting community consultations over Safe Drinking Water Management Plans as distinct from just administering and reporting on the legislation.
-

III. Protection of environmental and cultural values

Environmental values

21. Please refer to our best-practice water law and governance recommendations in Part 3.1, above.

Cultural values

22. The NT Government ought to clearly commit to the creation of new water legislation that is co-designed with Traditional Owners (in accordance with Article 32.2 of UNDRIP) and which includes the following features:

- a. a requirement to provide land councils with sufficient information to understand the potential water drawdown of any proposed licence and in turn conduct an assessment of potential impact on water dependent cultural values;
- b. guidelines for determining cultural water requirements in relevant plans and monitoring programs should be developed with the input of the relevant Land Councils and should be enforceable;

- c. a requirement that water-dependent cultural values be assessed on a case by case (license by license) basis once an application is made and prior to any decision being made;
- d. responsibility for cultural values assessments should lie with Land Councils, not the license proponent; and
- e. all licences must have conditions that require the protection of water dependent sacred sites and other cultural values.

IV. Aboriginal engagement

Aboriginal engagement

23. The NT government should work with Land Councils to develop Aboriginal designed and led structures for input into all levels of the regulatory regime including:

- a. policy, plans and actions that deliver benefits from Aboriginal rights and interests in water;
- b. meaningful engagement with Aboriginal Territorians;
- c. methods for best incorporating traditional knowledge into water-related matters; and
- d. making decisions about water allocation for commercial use on their land.

24. Land Councils should be involved in, and funded to, undertake consultation and assist to co-design representative structures where required for specific projects or water plans, and to ensure sacred sites are protected.

25. The Northern Territory Government to consult with land councils over the establishment of a Territory Aboriginal Water Reference Group which is an expert advisory group on water management. This group to provide advice and support to the NTG over implementation of the Territory Water Plans and provide support and representation for regional representative structures described in 24.

Part 1: Introduction

Central Land Council

1. The Central Land Council (CLC) welcomes the opportunity to respond to the Draft Territory Water Plan (**Draft Plan**). This submission is intended to complement previous commentary including but not limited to our response to the Northern Territory Strategic Water Plan Directions Paper (**NT Directions Paper**).
2. The CLC is a Commonwealth Statutory Authority established under the *Aboriginal Land Rights (Northern Territory) Act (Cth) 1976 (ALRA)*, with statutory responsibilities for approximately 780,000 square kilometres of land in the southern half of the Northern Territory (**NT**). The CLC has the function of ascertaining and expressing the wishes and the opinion of Aboriginal people living in its region regarding appropriate legislation concerning their land.¹ The CLC has a function under section 23(1)(ba) ALRA to assist Aboriginal people to take measures to protect sacred sites on land in its region, whether Aboriginal land or not. The CLC also administers a range of programs for the benefit of constituents in relation to environmental management, community development, governance, cultural heritage, and customary practices.
3. Relevantly, the CLC has also been a native title representative body under the *Native Title Act 1993 (Cth)* since 1994. We prepare native title applications, respond to development 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.

Context: Water in the NT

4. Water is life-sustaining and provides spiritual sustenance for the Aboriginal people of central Australia, who have in turn been its stewards and caretakers for millennia. However, in the NT, water is regulated by a system that is inadequate for supporting the long-term health, well-being and aspirations of Territorians and does not formally empower Traditional Owners (which we define to include native title holders) to continue their stewardship.
5. For example, ninety percent of the NT's water supply, including for nearly all remote Aboriginal communities, comes from groundwater aquifers accessed via bores.² These are recharged by wet season rainfall, run-off and floods,³ with recharge events occurring on an intermittent and unreliable basis in central Australia.⁴ Water quality problems persist in many Aboriginal communities with "chemical and biological contamination, palatability issues and water security concerns".⁵ Failure to provide safe drinking water to remote Aboriginal communities is inconsistent with Australia's human rights obligations under a number of international treaties,

¹ ALRA, s. 23(1)(a).

² Grealy, L and Howey, K (2020) *Securing supply: governing drinking water in the Northern Territory*, Australian Geographer.

³ Grealy, L and Howey, K (2020) *Securing supply: governing drinking water in the Northern Territory*, Australian Geographer.

⁴ See, for example, section 4.3.1 of the Western Davenport Water Allocation Plan for 2021-2022, which noted that groundwater recharge is highly episodic in the Western Davenport Water Control District.

⁵ Australian Government. National Water Reform (Productivity Commission Inquiry Report, no. 96, 28 May 2021) 1-257 ('Productivity Commission 2020') at 176.

including Article 6 (the right to life) of the International Covenant on Civil and Political Rights and Article 11 (the right to an adequate standard of living) and Article 12 (the right to the highest attainable standard of health) of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).

6. Further, water law and governance in the NT has fallen far behind all other Australian jurisdictions, including in relation to statutory water planning, estimated sustainable yields which are enforceable and informed by rigorous scientific evidence, enforceable measures to protect groundwater-dependent ecosystems and species, water metering and monitoring; water pricing; and more. There is also a lack of baseline data to inform water-related decision making and a failure to implement the precautionary principle in such instances.
7. Well-documented legislative inadequacies have also undermined the implementation of Strategic Aboriginal Water Reserves (**SAWRs**). Specifically, a SAWR can only be created if a water plan is in place⁶ and a water plan can only be declared within a water control district⁷. However, there is no legislative obligation to declare a water control district or to create a water plan once a district is declared.⁸ As a consequence, only a small percentage of the NT is covered by a water plan⁹ and in turn eligible to be subject to a SAWR. Further, by the time a water plan is created, there is every possibility that the water in a district will already be over-allocated,¹⁰ which in turn means that it is not possible to issue any licences from a SAWR, once created.
8. Further, and even where a SAWR can be created, water allocated to the reserve is capped at 30% under NT policy – even if Aboriginal land tenure¹¹ within the corresponding area exceeds this figure.¹² The CLC has previously objected to the fact that the definition of “eligible land” for a SAWR, which is found in section 4B of the *Water Act 1992* (NT) (**Water Act**), excludes land covered by non-exclusive native title determinations.
9. CLC is further concerned by the lack of meaningful engagement with Traditional Owners in relation to water-related decisions on their Country and not fully taking into consideration ecological and cultural impacts before approving high-impact developments and associated licences. The Singleton Station matter, which involved the approval of up to 40,000ML/year water licence and 144 associated bores, is perhaps the most recent example of this sort of decision-making.
10. Relevantly, the CLC identified three ‘Directions’ as priorities in its response to the NT Directions Paper:
 - a) Direction 6 (Aboriginal Connections to water are valued);
 - b) Direction 7 (Water dependent environmental values are protected); and

⁶ *Water Act 1992* (NT), s 22A

⁷ *Water Act 1992* (NT), s22B(1)

⁸ *Water Act 1992* (NT), ss. 22, 22B, 22C.

⁹ See: <https://nt.gov.au/environment/water/water-resources-of-the-nt/water-control-districts> (Accessed 22 November 2022).

¹⁰ See for example the Ooloo Dolostone Aquifer Water Allocation Plan 2019-2029, p 73 (which states that “[t]he Northern [groundwater management zone] is overallocated. As a consequence, the Strategic Aboriginal Water Reserve is notional and cannot be provisioned.”

¹¹ We note that under section 4B of the *Water Act*, this is limited to the following three categories: Aboriginal land (scheduled under ALRA); Aboriginal land (NT enhanced freehold); and exclusive possession Native Title Determination areas. The CLC is of the view that non-exclusive Native Title ought to be added to the list of eligible land.

¹² Strategic Aboriginal Water Reserve Policy Framework, p.4.

c) Direction 2 (safe drinking water).

We further noted that ‘the building blocks that are required to put this in place, and that are equally important, are adequate science (Direction 8), Aboriginal designed and led governance (Direction 6) and a conservative approach, to ensure that water for commercial use is not allocated before the other directions are achieved (relates to Direction 7).’

11. We are therefore pleased to see the NT Government making a number of high-level commitments in the Draft Plan that are consistent with these priorities. Specifically, we wish to acknowledge that proposals to introduce safe drinking water legislation, replace the Water Act with a modern statute by 2026 and conduct a remote infrastructure audit, are all a step in the right direction.
12. We are also supportive of the proposal to appoint a new independent Controller of Water Resources, but require further details as to how the role will in practice be ‘*independent of the NT Government*.’¹³ Further, and while we support the creation of an expanded Office of Water Security, this should sit entirely outside of the Department of Environment, Parks and Water Security (**Department**) rather than being elevated to a division within the Department. This, coupled with other legislative and governance reforms, would help to restore trust in the independence and integrity of the NT’s water management frameworks.
13. However, given the nature and scale of the deficiencies articulated in paragraphs [3] to [9], and the priorities identified by the CLC and summarised in paragraph [10], we had anticipated a Draft Plan which included considerably more detail. Specifically, the CLC had at a minimum expected that the Draft Plan would establish key areas for reform and link these to specific objectives, key performance indicators (**KPIs**), actions and finally accountability mechanisms. Further, for any such KPIs to be meaningful, they would need to be specific, measurable, achievable, relevant and time bound (**SMART criteria**).
14. By way of contrast – and notwithstanding our support for some of the NT Government’s high-level commitments – it is our view that the Draft Plan is lacking in rigour and detail, largely inconsistent with SMART criteria and extremely vague as to how implementation of the Draft Plan will be measured and monitored.
15. Further, as an Aboriginal organisation advocating for our constituents’ rights and interests in relation to water on Country, we are particularly disappointed by the lack of ambition in relation to continuing water stewardship, which extends well beyond documenting the cultural values of water. Relevantly, and as the Singleton Station matter amply demonstrates, documentation of cultural values (in this case by the CLC), provides no guarantee that those values will be prioritised and protected above and beyond large-scale and high-impact developments. Indeed, and as we have persistently submitted, Aboriginal rights and interests in relation to water can only be properly protected when they are clearly and unambiguously inscribed in laws which have been co-designed by Traditional Owners. However, the Draft Plan does not indicate that the NT Government supports such legislative reform, let alone provide any details regarding what such legislation might look like in practice.

¹³ Draft Plan, p. 19.

Part 2: Focus of this Submission

16. This submission will provide commentary in relation to the following matters (linked to priorities set out in the Draft Plan), several of which are interconnected:

I. Legislation and planning

- *Priority 6 – Placing a value on water*
- *Priority 9 - Contemporary water resource management legislation*

II. Drinking water in remote communities

- *Priority 1 - New safe drinking water legislation*
- *Priority 3 - Improved water security for remote communities*
- *Priority 12 - Ensure water supply and sewerage services meet customer needs*
- *Priority 14 - The role of the Office of Water Security*

III. Protection of environmental and cultural values

- *Priority 8 - Documenting the cultural values of water*
- *Priority 9 - Contemporary water resource management legislation*
- *Priority 10 - Climate resilience and adaptation for the water sector*
- *Priority 11 - Accelerated water science program*

IV. Aboriginal engagement

- *Priority 7 - Territory voices in water security*
- *Priority 8 - Documenting the cultural values of water*
- *Priority 9 - Contemporary water resource management legislation*

Part 3: Substantive Commentary

I. Legislation and planning

17. Fit-for-purpose legislation is the backbone of any properly functioning and equitable water management system. Unfortunately, the NT has not had an appropriate regulatory framework for the management of its water resources for far too long. The CLC therefore welcomes the proposal to replace the Water Act with a contemporary statute that, inter alia, includes *'a framework for allocation decisions that sets in legislation the protections for environmental and cultural values, taking into account the risks and impacts of climate change'*¹⁴.
18. However, it is unclear why it would take until 2026 to draft such legislation. This is particularly true given that first, the National Water Initiative 2004 provides a broad (and adaptable) framework for the development of water resource legislation. Second, there are well-developed water law frameworks in other jurisdictions which can be used to inform this new statute and third, the CLC and many other experts and organisations have written multiple submissions and papers over many years setting out what best-practice water laws in the NT ought to contain.
19. To that end, CLC would have expected to see not only a tighter timeframe (2024, for example) but significantly more detail regarding the potential contents of such legislation. Accordingly, we support the detailed commentary provided by the Environmental Defenders Office in a series of briefing notes regarding the key deficiencies of the Water Act¹⁵ and would suggest that this analysis heavily inform any replacement legislation. In particular, the CLC supports the 'best-practice' features set out in the recommendation table, below (many of which are included in water laws in other Australian jurisdictions).
20. Relevantly, these best practice features include governance arrangements which clearly separate out the policy development and licensing aspects of water management from enforcement functions (to avoid conflicts of interest).¹⁶ It also includes basic criteria for the appointment of any Controller of Water Resources (or equivalent decision-maker).
21. As a related matter, the CLC is still forming a final position on water pricing. However, we are of the preliminary view that licensed water extractions ought to be priced on the condition that such reform is enshrined in law and at a minimum respects the following three principles.
22. First, that Traditional Owners (including native title holders) are the original and ongoing stewards of the Territory's surface and groundwaters and as such, should not be charged to use licensed water on Country; to do so would exacerbate water dispossession.
23. Second, commercial enterprises that are not owned by Traditional Owners and which derive financial benefit from the NT's aquifers ought to pay a sufficient price for water extractions to ensure that the costs set out in Diagram 1, below, are covered. Pricing extractions in this manner

¹⁴ Draft Plan, p30.

¹⁵ <https://www.edo.org.au/publication/briefing-note-deficiencies-in-the-existing-water-law-and-governance-framework-in-the-northern-territory/> (Accessed 16 November 2022).

¹⁶ This is consistent with governance arrangements in NSW, which were implemented following an inquiry by Ken Matthews AO into allegations of water theft and maladministration of NSW's water laws. See https://www.industry.nsw.gov.au/data/assets/pdf_file/0016/120193/Matthews-interim-report-nsw-water.pdf (Accessed 22 November 2022).

should go some way to addressing the cultural and ecological impacts of commercial-level water extractions, with this being consistent with one of the key elements of ecologically sustainable development (ESD), namely the ‘polluter (or extractor) pays’ principle.¹⁷ While we acknowledge that pricing environmental and cultural impact is a complex exercise, peer-reviewed literature provides some useful examples of how this can be achieved in relation to water.¹⁸ Additional input from experts would also be required.



Diagram 1¹⁹

CAPEX = capital expenditure (major, long-term expenditure)

OPEX = operational expenditure (day-to-day expenses)

24. Third, any revenue generated from any pricing mechanism must be transparently accounted for and reallocated in accordance with specified criteria developed in consultation with stakeholders and Traditional Owners.

Recommendations

Best practice water laws

1. Mandatory and statutory-based water planning for all water resources in the NT
2. A requirement to appoint a properly resourced and representative water advisory committees tasked with helping to develop water allocation plans (**water plans**). The appointment of each water advisory committee must be for a minimum of 5 years, recognising its role to assist with review and monitoring of the water plan, as well as assist with its development. Engagement by the NT Government with such committees must be genuine and sustained.
3. Any proposed amendments to, or which affect the operation of, a water plan, to be directed to the relevant water advisory committee whose opinion must be considered and documented before any such changes are made by the relevant decision-maker.

¹⁷ See definition of ESD in s.3A of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) and in particular the reference to improved valuation, pricing and incentive mechanisms.

¹⁸ See for example: INSERT.

¹⁹ Source: Andrés, L.A., Saltiel, G., Misra, S., Joseph G., Lombana Cordoba, C., Thibert, M., & Fenwick, C. (2021). *Troubled tariffs: Revisiting water Pricing for affordable and sustainable water services*. World Bank, Washington, DC, pg. 24.

4. Clearly defined requirements regarding the legally binding contents of water plans. These requirements must include a legally enforceable estimated sustainable yield for the water control district and each water resource located therein.
5. Defining the term 'estimated sustainable yield' and ensuring that this definition includes a requirement that it be based on agreed standards of rigorous scientific research and cultural knowledge and the precautionary principle, and protect the health of the water resource over time. The definition of "estimated sustainable yield" must not result in the depletion of the water resource.
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11. The inclusion of clear duties that apply to decision-makers and which, for example, require them to act on the basis of rigorous scientific evidence that complies with best-practice criteria (so as to protect water resources from over-extraction)
12. A yearly water allocation scheme that applies to licences and which is underpinned by clear and evidence-based rules (and which takes into account climate change);
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Best practice governance

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17. The person responsible for approving licenses must have relevant qualifications.
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Pricing

19. The CLC is forming a final position on water pricing. However, our preliminary view is that it ought to be introduced in relation to licensed water extractions consistently with key principles that acknowledge Traditional Owners as the original stewards of the NT's rivers and groundwater. Specifically:
 - d. Traditional Owners should not be required to pay to use water on their Country.
 - e. Commercial enterprises that are not owned by Traditional Owners should pay a sufficient price for extracting water to ensure that the elements (set out in Diagram 1, above) are accounted for.
 - f. The NT should consult extensively with Traditional Owners and suitably qualified experts to ensure that any water pricing model is rigorous, effective and equitable.

II. Drinking water in remote communities

25. As noted in the introductory part of this submission, access to safe drinking water remains a significant issue in remote Aboriginal communities. In the CLC region, 18% of communities lack safe drinking water, while 100% are consuming water that fails to meet aesthetic benchmarks.²⁰
26. At a high level, these inadequacies are a function of several (often inter-related) factors, each of which will be discussed in turn. The first of these is inadequate law and governance. More specifically, the NT lacks legislation which, *inter alia*, imposes an enforceable obligation on the government to ensure that drinking water guidelines are applied across the Territory. Further, governance in relation to the provision of drinking water is fragmented and spread across multiple bodies with varying levels of transparency and accountability.
27. For example, the Power and Water Corporation (**PWC**) is licenced under the *Water Supply and Sewerage Service Act* (2000) NT (**WSSS Act**) to deliver water to 18 gazetted towns in the NT. PWC is subject to regulatory oversight by the NT Utilities Commission, with direct accountability to customers via a standardised ‘customer contract’ published in the gazette. By way of contrast, there are 72 Aboriginal communities (around 50% of the NT’s Indigenous population) outside of PWC’s delivery area who are serviced by Indigenous Essential Services (**IES**). IES does not hold a licence and is not overseen by the Utilities Commission. However, and despite PWC being subject to legislative requirements, both entities are plagued by an overall lack of transparency regarding their operations: neither is subject to freedom of information laws, while reporting is limited to annual reports that are high-level in nature.
28. The second of these is aging, inadequate and in some instances failing water infrastructure including failing chlorination equipment (McLennan 2017),²¹ and delays in infrastructural delivery and refurbishment.”²² These deficiencies are underpinned by a failure to direct sufficient public funds to what ought to be considered essential, non-negotiable services which are in turn are linked core human rights. To this we would add – again – a lack of transparency regarding the process for prioritising work and allocating funds. The Alpururulam case study, below, amply illustrates these deficiencies.
29. The third – which is again linked to the first two matters – is poor water quality, including intermittent algal blooms (Maddocks 2016) and contamination by heavy metals (Kurmelovs 2020; Grealy 2020). To this we can add, in certain instances, insufficient water availability as a consequence of bore depletion (Beavan 2019) (noting this can also diminish water quality).

Thus, and while the CLC certainly welcomes some of the proposed initiatives referred to in the Draft Plan (notably the Government’s pledge to develop safe drinking water legislation), there is insufficient detail to determine whether these ‘actions’ and the current level of resourcing is capable of addressing the serious and systemic problems underpinning the drinking water crisis in remote Aboriginal communities.

30. For example, while ‘developing and publishing a regional and remote community water infrastructure priority list’ by 2024 is a step in the right direction, the Draft Plan ought to have

²⁰ Data from Power and Water Corporation. 2021. [Annual Drinking Water Quality Report](#), 2021.

²¹ Reference in Howey, K. and Grealy, L., 2021. Drinking water security: the neglected dimension of Australian water reform. *Australasian Journal of Water Resources*, 25(2).

²² Howey, K. and Grealy, L., 2021. Drinking water security: the neglected dimension of Australian water reform. *Australasian Journal of Water Resources*, 25(2), p. 112.

included, at a minimum, criteria for the development of this list. Similarly, there is no indication that capital expenditure will increase to address the ongoing budgetary requirement, merely a statement that expenditure will 'continue'. Finally, the CLC is concerned by the lack of information regarding the proposed partnership between the NT Government and National Water Grid Authority to, inter alia, 'accelerate the delivery of infrastructure priority list in remote communities.' Again, we would have expected the Draft Plan to provide considerably more detail regarding this partnership, how it will benefit remote communities (if at all) and how Traditional Owners will be involved in key decision-making processes.

Case study 1: Alpururulam

The community of Alpururulam has been engaged for over 12 years in negotiations with the NT Government to secure safe and palatable drinking water. Despite support from all stakeholders to implement the necessary changes and funding from both the community's own leasing income (\$150,000) and Aboriginal Benefit Account (\$5,205,757), the NT is yet to provide the infrastructure required to deliver safe drinking water to the community (and has contributed in the vicinity of \$750,000 through IES).

Further and notwithstanding recent breakthrough talks between PWC and the local pastoralist, around the nature of the agreement to access water there is still considerable work to be done to confirm and finalise funding arrangements and agreements for the outstanding \$874,803 required to complete the infrastructure project.

For the children of Alpururulam, this process has spanned their infancy and primary school years, the precise period when bones and teeth are most vulnerable to excessive levels of fluoride in local drinking water.

This case study is indicative of the deep structural problems which have given rise to water access and quality issues in remote Aboriginal communities and is particularly egregious given that the community itself has dedicated significantly more capital to the project than the NT Government itself. It is also a clear example of why the Draft Plan must provide far more detail as to how the NT Government will, in concrete terms, rectify this and similar examples of water injustice.

Recommendations

Drinking water in remote communities

20. The Draft Plan commits to the introduction of safe drinking water legislation and the establishment of safe drinking water management plans. While these initiatives are supported the Draft Plan requires further detail on:

- How the transparency requirements under the new legislation will link to the reporting requirements of PWC and IES neither of which are subject to FOI and with respect to IES, it is not which is not overseen by the NT Utilities Commission.
- What role the Department of Health will play in supporting community consultations over Safe Drinking Water Management Plans as distinct from just administering and reporting on the legislation.

III. Protection of environmental and cultural values

Environmental values

31. The future of the Territory's rivers, wetlands, floodplains and groundwater depends to a significant extent on the adoption of new legislation that, *inter alia*, takes into account the current and future impacts of climate change. To that extent, please refer to our comments in Part 3.I of this submission, and in particular our recommendations regarding best-practice water laws and governance.
32. Relevantly, the recommendations regarding climate-ready water laws include indispensable governance mechanisms designed to maximise transparency and accountability, as well as the likelihood of any new laws being enforced. This reflects the now well-accepted principle that best-practice laws, whilst necessary, are in-and-of-themselves insufficient; they must also be supplemented by, *inter alia*, well-resourced regulators with a mandate to enforce the law, the use of technology (where appropriate) and provisions to avoid any perceived or actual conflict of interest.
33. As a related point, and given the risks posed to the Territory by a changing climate, the CLC would have expected the Draft Plan to include considerably more detail regarding the proposal to undertake a 'Territory-wide climate risk assessment and adaptation plan for water security, and to commence climate adaptation pilot projects.' At a very basic level, it would be useful to understand how this assessment will be used to inform the legislative reform proposed by Government and the likely nature of – and rationale behind – future climate adaptation pilot projects (and how Traditional Owner will be involved any such pilots).
34. While the CLC certainly supports a precautionary approach with respect to water management (particularly in a changing climate), we are somewhat concerned by the Draft Plan's vague coupling of this principle with 'adaptation planning'.²³ While adaptive water management is used in other jurisdictions, notably in relation to available water determinations,²⁴ we are concerned by the ease with which this concept is used to justify approval of large-scale developments in circumstances where scientific data is lacking and environmental and cultural impacts are likely to be significant (as per the Singleton Station case study below).²⁵ We are also cognizant of the fact that adaptive management, while in theory appealing, is rarely applied well within the context of groundwater management.²⁶ To that end, we would like to see far greater detail regarding the NT Government's understanding of this term, and whether and how it will be inscribed in law. Critically, adaptive management plans agreed between government and proponents should be independently reviewed by relevantly qualified experts and made publicly available.
35. Best-practice water laws must also be supported by scientific data and cultural knowledge. To that extent, the CLC supports the proposed 'accelerated water science program' referred to in the

²³ Draft Plan, p. 31.

²⁴ See for example: *Water Management Act 2000* (NSW), ss. 59, 60.

²⁵ See also peer reviewed literature on the challenges associated with implementing effective adaptive management, including Lee, Jessica. 2014. Theory to practice: Adaptive management of the groundwater impacts of Australian mining projects. *EPLJ* 31: 251 – 287.

²⁶ Thomann, Jason & Werner, Adrian & Irvine, Dylan & Currell, Matthew. (2020). Adaptive management in groundwater management: A review of theory and application. *Journal of Hydrology*. 586. 124871. 10.1016/j.jhydrol.2020.124871.

Draft Plan,²⁷ but again suggests that further detail is required to better understand the nature and scope of the proposed program, opportunities for Traditional Owner involvement and the ways in which this research will interact with (or underpin) water allocation planning and the development of evidence-based extraction limits for each of the NT's catchments, water control districts and licensing decisions (noting that best-available science should inform all of these elements).

Cultural values

36. Despite 22.9 % of the NT being covered by native title determinations and 46.2% being controlled by Indigenous Australians under ALRA,²⁸ Aboriginal people continue to experience water dispossession on their Country. This manifests in licensing decisions which fail to respect the principle of free, prior and informed consent (**FPIC**)²⁹ on land that is subject to non-exclusive and exclusive native title determinations or native title claims, and which impact on sacred sites, as well as the high level of discretion and therefore uncertainty underpinning the establishment of SAWR's.

Case Study 2: Singleton Water Licence

Mpwerempwer Aboriginal Corporation (**MAC**) is the prescribed body corporate for the native title holders of Singleton Pastoral Lease (**Singleton Station**). The rights of the native title holders include:

- a) the right to hunt, gather, take and use the natural resources of the land and waters, including the right to access, take and use natural water resources on or in the land; and
- b) the right to the right to access, maintain and protect places and areas of importance on or in the land and waters.

On 15 November 2021, the Minister for Territory, Families and Urban Housing (**Minister**) decided to grant a water licence to Fortune Agribusiness Funds Management Pty Ltd (**Fortune Agribusiness**) to take up to 40,000ML of groundwater per annum (**Singleton Water Licence**) from aquifers located beneath Singleton Station and beyond (with the drawdown area extending beyond the boundaries).

After the CLC successfully sought review of the initial licence decision made by the Controller of Water Resources on behalf of MAC, the matter was referred to the Review Panel pursuant to s 30(3)(b) of the Water Act. The Minister substituted the decision of the Water Controller and granted the Singleton Water Licence on the same basis with amended conditions. The amended conditions to the Singleton Water Licence included:

- a requirement for Fortune Agribusiness to undertake a detailed assessment of the water resources for Singleton Station; and
- a requirement by Fortune Agribusiness to undertake a cultural values impact assessment.

The taking of water pursuant to the Singleton Water Licence is modelled to significantly lower the water table across a large area of Singleton Station and beyond. The CLC has consistently argued that this will reduce the accessibility of water, damage sacred sites and affect the availability of habitat for animal species.

²⁷ Draft Plan, p. 32.

²⁸ <http://www.nntt.gov.au/assistance/Geospatial/Pages/DataDownload.aspx> (Accessed 17 November 2022).

²⁹ Failure to comply with FPIC is inconsistent with the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**), Art 32.2.

On 28 January 2022, MAC commenced proceedings in the Supreme Court of the Northern Territory challenging the validity of the Singleton Water Licence and seeking an order to quash the Singleton Water Licence. In the alternative, MAC is seeking a declaration that the Singleton Water Licence is invalid insofar as it provides any entitlement to take water in excess of 12,788 ML/year.

37. The continued erosion of Aboriginal water rights has a negative impact on the overall wellbeing of Aboriginal peoples. This in turn infringes the right to physical and mental health and the right to take part in cultural life.³⁰ It also infringes several articles in the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) including the right of Indigenous peoples to practice and revitalise their cultural traditions; to have access to education in their own culture; and to maintain and strengthen their distinctive spiritual relationship with their traditionally owned waters.³¹
38. To begin to reverse these infringements and the associated water dispossession, the NT Government must clearly commit to the creation of new water legislation that is co-designed with Traditional Owners (in accordance with Article 32.2 of UNDRIP) and includes the following features:
- a. a requirement to provide land councils with sufficient information to understand the potential water drawdown of any proposed licence and in turn conduct an assessment of potential impact on water dependent cultural values;
 - b. guidelines for determining cultural water requirements in relevant plans and monitoring programs should be developed with the input of the relevant Land Councils and should be enforceable;
 - c. a requirement that water-dependent cultural values be assessed on a case by case (license by license) basis once an application is made and prior to any decision being made;
 - d. responsibility for cultural values assessments should lie with Land Councils, not the license proponent; and
 - e. all licences must have conditions that require the protection of water dependent sacred sites and other cultural values.
39. The Singleton Water Licence provides a clear example of the vital importance of engaging with Traditional Owners in relation to the likely impact of a water licence on cultural values.
40. By way of background, in May 2021 the CLC engaged a consultant anthropologist, Ms Susan Dale Donaldson, to identify the cultural values associated with the drawdown area for the Singleton Water Licence and to provide her expert opinion on how those values might be affected by the Licence. Based on a literature review and consultations with 80 traditional owners, Ms Donaldson identified a rich and complex Aboriginal cultural landscape across the drawdown area for the Singleton Water Licence and important cultural sites associated with groundwater dependent ecosystems. Specifically, Ms Donaldson's report identified 40 sacred sites in the drawdown area.
41. However, and despite the integrity of the work undertaken by Ms Donaldson on behalf of the CLC, the Singleton Water Licence included a condition requiring Fortune Agribusiness to undertake the cultural values impact assessment itself. Further, it did not include a requirement for Fortune Agribusiness to engage with the CLC or the relevant Traditional Owners in undertaking such an assessment (despite the CLC's statutory role to assist Aboriginals, in its area, to take measures that are likely to assist in the protection of sacred sites³²)

³⁰ ICESCR, Arts 12 and 15.

³¹ UNDRIP, Arts 11, 14 and 25.

³² ALRA, s. 23(1)(ba).

Recommendations

Environmental values

21. Please refer to our best-practice water law and governance recommendations in Part 3.1, above.

Cultural values

22. The NT Government ought to clearly commit to the creation of new water legislation that is co-designed with Traditional Owners (in accordance with Article 32.2 of UNDRIP) and which includes the following features:

- f. a requirement to provide land councils with sufficient information to understand the potential water drawdown of any proposed licence and in turn conduct an assessment of potential impact on water dependent cultural values;
- g. guidelines for determining cultural water requirements in relevant plans and monitoring programs should be developed with the input of the relevant Land Councils and should be enforceable;
- h. a requirement that water-dependent cultural values be assessed on a case by case (license by license) basis once an application is made and prior to any decision being made;
- i. responsibility for cultural values assessments should lie with Land Councils, not the license proponent; and
- j. all licences must have conditions that require the protection of water dependent sacred sites and other cultural values.

IV. Aboriginal engagement

42. Aboriginal people need to be formally empowered through Aboriginal designed and led structures to continue their stewardship of water resources and to ensure that impacts on culture and the environment are adequately considered in all water allocation decisions.

43. However, and as noted throughout this submission, Aboriginal people in the NT continue to experience the impacts of water dispossession. The CLC can only see a pathway through the plethora of challenges outlined above if legislation and governance mechanisms are co-designed with Traditional Owners and their representative bodies, as per the recommendations, below.

Recommendations

Aboriginal engagement

23. The NT government should work with Land Councils to develop Aboriginal designed and led structures for input into all levels of the regulatory regime including:

- a. policy, plans and actions that deliver benefits from Aboriginal rights and interests in water;
- b. meaningful engagement with Aboriginal Territorians;
- c. methods for best incorporating traditional knowledge into water-related matters; and
- d. making decisions about water allocation for commercial use on their land.

24. Land Councils should be involved in, and funded to, undertake consultation and assist to co-design representative structures where required for specific projects or water plans, and to ensure sacred sites are protected.

25. The Northern Territory Government to consult with land councils over the establishment of a Territory Aboriginal Water Reference Group which is an expert advisory group on water management. This group to provide advice and support to the NTG over implementation of the Territory Water Plans and provide support and representation for regional representative structures described in 24.