

# Northern Territory Water Regulatory Reform

## Directions Paper

October 2018

## Purpose

This Directions Paper outlines proposed reforms to the water resource regulatory framework and shows how different elements might fit together to provide a comprehensive and contemporary management framework.

This paper is seeking feedback on the broad suite of issues for reform and the possible responses identified. This paper does not seek to provide the solutions to the reform issues, but rather it outlines issues in order to seek feedback from the community on the broad directions of reform, prior to formulating the detail of the solutions.

Following this public consultation on the broad directions of reform, a series of policies and position papers will be developed on specific reform proposals for further consultation over coming months.

## Introduction

Our water resources drive and sustain our environment, our lifestyle and our economy. The regulatory framework that governs water resource protection, allocation and management in the Northern Territory must be able to meet contemporary environmental and economic challenges, to support fair, effective and transparent allocations and to foster efficient water use.

The Department of Environment and Natural Resources (DENR) has developed this Directions Paper on the range of proposed reforms to the regulatory framework guiding water resource protection, allocation and management in the Northern Territory. It has been prepared to provide the community with the overall purpose, rationale and expected outcomes from reform, and to facilitate community and stakeholder consultation and input. It summarises a range of identified gaps and issues with the current *Water Act 1992* and *Water Regulations* and presents proposed changes to water management legislation and policy.

The paper has been shaped by previous consultations undertaken on water reform in the Northern Territory, including:

- The views and resource allocation issues identified through Water Advisory Committees and the development of Water Allocation Plans.
- Outcomes of the 2017 Independent Review into Water Extraction Licences in the Northern Territory.
- The objectives of the Northern Territory Government promoted through the *Economic Development Framework* and the *Healthy Environment Strong Economy and Sustainable Water Use Policy* papers.

This Directions Paper is focused on improving the regulatory framework through legislative amendment to the *Water Act* but recognises that some reforms can be progressed through policies to be developed concurrently with a legislative reform program.

This Directions Paper:

- Provides an overview of the existing water regulatory framework (pages 2-3).
- Makes the case for reform (pages 3-5).
- States the goal, objectives and outcomes which frame the reform program (page 6).
- Outlines the proposed areas for reform (pages 6-18).
- Next steps (page 19).

Consultation with key stakeholders and the broader community will test and develop these proposals further and generate discussion and assessment of other options where necessary.

Detailed position papers on specific proposals will also be developed in coming months to aid consideration of more complex or inter-related policy issues. These papers, and the reform program overall, will consider the lessons learnt from regulatory reform in other Australian jurisdictions in relation to the Northern Territory context.

## The current framework for water resource allocation

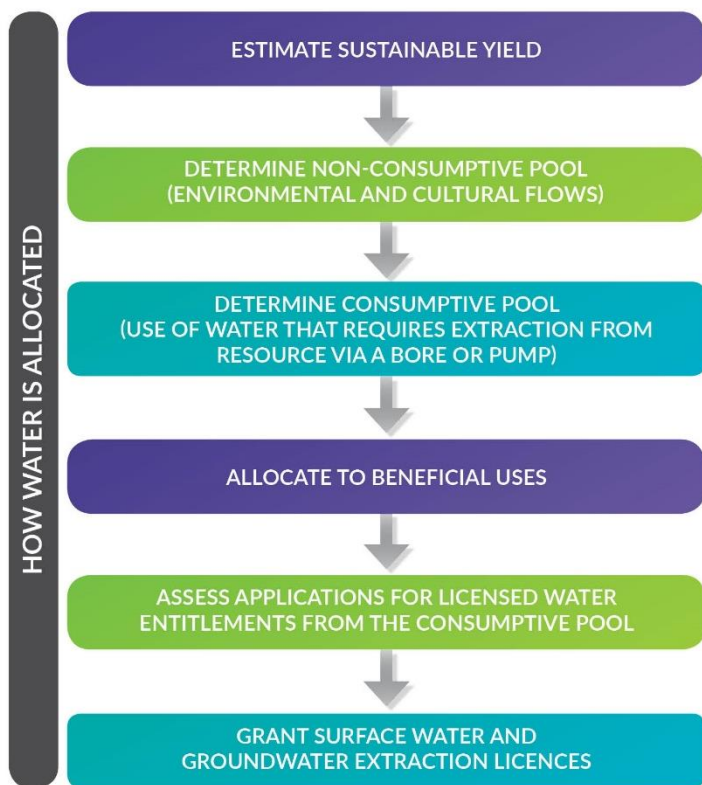
The Northern Territory's *Water Act 1992* ('the Act') is the principal legislation for the allocation, management and protection of its water resources. The Act is supported by Regulations and a small number of established Northern Territory Government policy positions (currently limited to the 'First-in-first-served' Policy, the *Northern Territory Water Allocation Planning Framework* (the '80:20 Rule'), the Strategic Aboriginal Water Reserve Policy Framework and the Darwin Rural Area Licensing Policy).

The primary purpose of the Act is to provide for the assessment, management and allocation of water resources. Water resources in the Northern Territory are the property of the Territory. The Act establishes the Minister and the Controller of Water Resources ('the Controller') as the principal decision-makers for the allocation of water resources, as well as the local planning and associated rules which may govern those decisions.

In general terms, the Minister sets the strategic framework for planning and licensing (including by declaring Water Control Districts and associated Water Allocation Plans) and the Controller makes licensing decisions (which can be subject to review by the Minister).

The Act provides for the declaration of Water Control Districts and for Water Allocation Plans to be developed within those districts. This is generally done where increased management of water is required. Water Allocation Plans establish how water will be shared. Each plan describes the area and water resource within the plan area, outlines monitoring programs (to evaluate the performance of the plan, address knowledge gaps and to inform plan reviews) and details the objectives, rules and operating mechanisms to ensure water is shared among beneficial uses in the plan area.

Beneficial uses are a legal recognition of the values of a water resource and determine how water may be used, managed and protected. The Act currently provides for the following non-consumptive beneficial uses: environment, cultural; and the following consumptive beneficial uses: rural stock and domestic, public water supply, aquaculture, industry and agriculture. New consumptive beneficial uses of mining, petroleum and Strategic Aboriginal Water Reserves are currently being incorporated by proposed amendments to the Act.



Water resource management is broadly focused on understanding the water resource and defining the 'estimated sustainable yield'. The sustainable yield is the level of water extraction from a particular system which, if exceeded, would compromise key environmental assets, or ecosystem functions, and negatively impact the productive base of the resource. Establishing a sustainable yield ensures that water resources are distributed to **non-consumptive** (environmental and cultural flows) and **consumptive** uses (use of water that requires extraction from the resource via a bore or pump, for private benefit or for public water supply). The distribution to non-consumptive and consumptive use is important for ensuring that cultural flows, environmental flows

and water-dependent ecosystems are maintained, for ensuring that water quality is suitable for identified 'beneficial uses' and for establishing the amount of water which can be allocated for drinking water and sustainable economic development.

Once the sustainable yield is estimated, a process for assigning the consumptive pool across different water uses is undertaken. These allocations are based on assessments of current water use and projected demand by licence holders and exempt usage (e.g. rural stock and domestic use).

### The case for reform

Over 26 years has passed since the *Water Act* commenced. There have been some amendments over this time, with the most significant in 2007, which included the introduction of Part 6A (governing the public notification requirements for water licensing decisions). More recently, there has been a commitment to amend the Act to remove the limitation on licensing and permit requirements for water extraction by mining and petroleum activities.

Established water resource management policy is limited. There have been no significant water licensing or resource management policies developed or endorsed in the Northern Territory since the introduction of the NT Water Allocation Planning Framework over 15 years ago, with the exception of: the 2017 introduction of the Strategic Aboriginal Water Reserves Policy Framework; the publication of the minimum flow thresholds for the Daly River; and the July 2016 revocation of the exemption from water licensing for water users in the Darwin Rural Water Control District. Other policies relating to the 'first-in-first-served' approach, water trading and the management of under-utilised water have been operationalised through licence conditions and management arrangements in declared Water Allocation Plans.

A range of licensing and permit exemptions apply, both regarding Water Control Districts as well as to specific industries (such as road construction and mining and petroleum) to minimise the regulatory burden on emerging economies or growth areas. While some of these exemptions continue to be sound, others are dated and were declared at a time when it was rare for public water supply and other water users to be in direct competition for a single water resource and when the likelihood of unsustainable levels of use was low.

The reinvigoration of engagement with the community in the water planning process through Water Advisory Committees, has led to the careful examination of aspects of the current Act that limit best practice management of our water resources and impede effective decision-making about water resource allocations. These planning processes have identified limitations within the Act, including the inability to protect future drinking water supply, impediments to efficient trade in water entitlements and limited capacity to align water allocations with the progress of a development.

The Productivity Commission's most recent triennial inquiry into national water reform (released in early 2018) found that, despite progress against many of the reform commitments under the 2004 National Water Initiative (NWI), the Northern Territory should now consider enacting legislation to create secure, NWI-consistent water access entitlements (rather than the current ten-year licence tenure under the Act). In reforming the Act, the Northern Territory will need to consider the objectives of the NWI and determine to what extent the policies and arrangements proposed under the NWI are applicable to our current context. In the past, some of these policies, such as a move to perpetual licences, have not been seen as appropriate for the Northern Territory. The framework for a new NWI is currently being discussed by States/Territories.

The grant of water extraction licences generates community concern and interest and are decisions open to public scrutiny. As the Territory's economy has grown, the number of water extraction licences issued has increased significantly in the past few years and demand for larger volumes of water under individual licences has also grown. This has led to community concern about risks to the environment and to the security of supply for other water users. Water users are seeking appropriate security of water entitlements in terms of both quantity and quality.

There are currently no fees or charges for licence and permit applications or for administrative variations to licences or permits, with these transaction costs met by Government (and ultimately the public). The only costs recovered at present are the advertising costs associated with the public notice of intention provisions in Part 6A of the Act.

A water licence will generally increase the value of a property or enterprise, especially in areas of high competition for water resources. Licence holders can trade water (within water allocation plan zones) and a water licence is deemed to have transferred with the sale of a property when the land title is transferred.

Concerns have been raised about the capacity of the current water regulatory framework to transparently manage the balance between public good and private gain when allocating the Territory's resources, as individuals or companies can reap significant benefits without being required to provide recompense to the Territory.

Under the Act, licences are generally issued for a maximum 10-year period, with an option of renewal. This contrasts with other Australian jurisdictions, where many water entitlements are issued in perpetuity, particularly in areas where the knowledge of the water resource is sound. The security of licensed water allocations is fundamental to individual water-dependent enterprises (such as horticultural businesses) and to regional economic prosperity and growth, including the ability of Aboriginal people to realise opportunity from their land. The security of water allocated under a licence and the flexibility to move allocated water to its most effective and efficient use is an established principle of both the NWI and of this regulatory reform program, which will need to determine the tenure arrangements suitable for the Territory's current social and economic context.

In the Northern Territory, water entitlements have been allocated on a 'first-in-first-served' basis, with each decision based on its individual merits as well as the cumulative impact on the resource and on other users of the resource. This approach is a pragmatic one that is appropriate where there is limited competition for water. As a system nears full allocation, or where demand exceeds supply, there is a need to look at other alternatives, such as tendering for water or other competitive processes, and encouraging trade and water markets to ensure that allocated water is being optimally used.

The Northern Territory Government's *Sustainable Water Use Policy Paper* commits to the installation "of a 'water for purpose' principle within the allocation and licensing provisions [of the Act] to stop over claiming of water for profit only". A range of legislative and policy responses are needed to ensure that consumptive water is allocated to businesses with sound long-term plans and that this water is used for the purpose for which it is allocated.

Water Control Districts have defined beneficial water uses and Water Allocation Plans prescribe water management arrangements in a plan or zone areas and some mechanisms in the Act allow for planning for future public water use. However, there is a need to ensure that future public water supply is a clearer and more express object of the Act. Furthermore, there are limited regulatory and policy options to preference water allocation for strategically important key industries or economic development in a region.

The Northern Territory Government is committed to reforming the *Water Act* to ensure we have a strong framework for the sustainable and accountable management of our water resources now and into the future.

It is committed to modernising its policy approaches to water resource management to provide for greater certainty for water users, to encourage highest value and efficient use of water and to allow for an adaptive management approach to respond to changing circumstances and risk.

## The reform goal, objectives and outcomes

An effective sustainable water resource regulatory framework requires both legislative reform and comprehensive policy development. The reform proposals outlined in this paper are based on the following goal, objectives and outcomes:



## Reform Proposals

This Directions Paper outlines proposed reforms to the water resource regulatory framework and shows how different elements might fit together to provide a comprehensive and contemporary management framework. Elements or proposed areas of reform are grouped against the Objectives and Outcomes described above, with each proposed reform element underlined in the text.

### Existing Commitments

Some reforms have already been announced as Northern Territory Government commitments and will be progressed ahead of other proposals. These include applying licensing and permit requirements of the Act to mining and petroleum activities and amendments to the Act to ensure that its offence and penalty provisions are consistent with industry best practice. While the use of water for mining and petroleum activities has been regulated under other legislation, the removal of this exemption will ensure that this water use is now transparently managed and regulated in line with all water use in the Territory. In August 2018 a Bill was introduced to effect these changes.

In 2017, Government approved the Strategic Aboriginal Water Reserves Policy. This policy is now being implemented in new and revised water allocation plans. The process has commenced to amend the Act to provide for a new Beneficial Use category called Strategic Aboriginal Water Reserve (SAWR) and to require the inclusion of SAWRs in all new and revised Water Allocation Plans, where applicable.

Work is already underway to assess options for improved controls and interactions between the *Water Act* and the *Planning Act* in relation to future subdivisions and access to alternative water supplies. This issue is out of the scope of the broader water regulatory reform as this matter is being progressed separately.

There are minor administrative issues with the current Act which impede its operational efficiency. A process is underway to resolve these. Examples include:

- amending Part 6A of the Act to clarify that the public notification period of 30 days is only applicable to new or increased water licence entitlement decisions, to avoid unnecessary delays in licence processing where an existing entitlement is split, traded or transferred and there is no increase in total extraction or change in impact on a particular water resource and other users;
- updating the Act to allow for greater flexibility in the service of notices to include electronic communication;
- removing overly prescriptive requirements for members in regulation 12 which impede the operations of the Drillers Qualification Advisory Committee, while retaining an appropriately skills-based committee; and
- amending subregulations 15(2) and (3) to clarify wording regarding licence renewal periods and confirm that they refer to issue of renewed licences.

### Reforms under consideration

The water resource regulatory reform agenda is complex. As highlighted above, some commitments have been announced by the Northern Territory Government and are well advanced. Other areas are not yet underway but have been broadly supported by key stakeholders in previous consultations and there is good guidance from the NWI and the experience of other jurisdictions. There are, however, several areas which present a unique challenge for the Northern Territory and which will require a greater degree of consultation and assessment.

This Directions Paper is seeking feedback on the broad suite of issues for reform and the possible responses identified. This Directions Paper does not seek to provide the solutions to the reform issues set out below, but rather to outline issues in order to seek feedback from the community on the broad directions of reform, prior to formulating the detail of the solutions. Some elements of this reform program will be presented in more detail in specific position papers, to provide for more targeted stakeholder consultation over coming months.

Stakeholders are asked to consider whether there are:

- Other issues, not included here, that need to be addressed to meet the goal, objectives and outcomes of reform (page 6); and
- Potential solutions to the issues identified that need to be considered by the reform program.

Additionally, stakeholders are asked to provide feedback on the relative importance of the proposed reforms.

The diagram on the following page shows the stages of proposed reform, indicating when it is expected that community consultation and the development of recommended positions will be completed.

## Proposed stages of reform:

### WITHIN 6 MONTHS

- Include mining and petroleum industries
- Inclusion of Strategic Aboriginal Water Reserves provisions
- Minor administrative improvements
- Trade policy
- Management of Unused Water policy
- Fit and proper person test
- Revised Review provisions
- Controller's function

### WITHIN 12 MONTHS

- Revised stock and domestic provisions
- Alternative (to FIFS) allocation approaches
- Ministerial reserves
- Staged allocations
- Pricing framework
- Protections for future public water supply
- Surface water harvesting

### WITHIN 18 MONTHS

- Expanded NT Water Allocation Planning Framework
- Clearer guidance on adaptive management
- Risk assessment framework
- Power not to assess an application
- Management of interconnected systems
- Licence tenure
- Unbundling
- Include an Object (objectives) in the *Water Act*

# 1. Security of water supply for the future

## 1.1 Protection of water-dependent ecosystems and cultural flows<sup>1</sup>

### *Improving the NT Water Allocation Planning Framework*

The NT Water Allocation Planning Framework (the Framework) provides the policy basis for determining the 'estimated sustainable yield' in connection with a water allocation plan, which in turn determines the volume of water that can be allocated for consumptive use. The Framework was implemented in 2000 and since then has provided the guiding principles for water allocations in the Northern Territory.

The Framework accommodates the different climate zones of the Northern Territory and is based on contingent allocation rules, which means that in instances where there is not sufficient science to determine the allocation for a specific system or aquifer, the following rules apply:

- In the northern zone, it requires at least 80 per cent of surface water flow (at any time in any part of the river) or annual groundwater recharge to be allocated for environmental and other non-consumptive uses (the so-called '80:20 Rule'); and
- In the arid zone where surface water flows and recharge are sporadic, at least 95 per cent of surface water flow must be reserved for non-consumptive purposes. Furthermore, total groundwater extraction over a period of at least 100 years is not to exceed 80 per cent of the total aquifer storage at the start of extraction and there are to be no deleterious change in groundwater discharges to dependent ecosystems.

The Framework has meant that regulated water use has generally been controlled at sustainable levels in the Top End, with the exception of the Darwin Rural Area. The Darwin Rural Area has had limited regulation of water extraction as a result of longstanding exemptions applicable in the area, and as a result many groundwater systems in this area are over-allocated against the '80:20 Rule'.

For the arid zone, where consumptive water is supplied from groundwater resources, the Framework allows for groundwater to be progressively extracted through storage depletion, or 'mining', over a defined period, providing there is no detrimental impact on groundwater-dependent ecosystems. Storage depletion currently only occurs to support the town of Alice Springs, with the public water supply for Alice Springs sourced from the non-renewable Amadeus basin aquifers via the Roe Creek Borefield. Supply from this aquifer is expected to last at least another 250 years.

The Framework is a key policy supporting the regulation of water resources. The addition of further detail to the Framework could support more consistent decision-making in relation to water allocations. The following issues have been raised by stakeholders involved in the water planning process and could be considered, among other issues, in a review of the policy, to be further developed in a detailed position paper:

- What is the 'sustainable' use of water resources;
- How climate zones are classified under the Framework;

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<sup>1</sup> This paper acknowledges that while the allocation of water required to protect cultural flows is not necessarily the same as the allocation of water required to protect the environment, these outcomes are linked here by the reforms proposed to better identify and manage these two separate but often inter-related requirements.

- Clarification on the use of conservation buffers/zones to prevent degradation of water quality and/or water-dependent ecosystems;
- How cultural water values are considered;
- How are water-dependent ecosystems classified and what are their values; and
- Revision of the Framework as it applies to the arid zone, possibly requiring water available for consumptive purposes such as public water supply, industry or agriculture being based on maintaining storage.

## 1.2 Fair allocations across consumptive use

### Protecting future water supply

There is currently no specific power for the Minister or Controller of Water Resources to set aside water resources for future public water supplies outside of a water plan area, even in cases where there is an identified risk that the relevant water resource may be allocated to other consumptive users prior to an application being lodged by the relevant water utility. This means that there is a risk that water resources needed to support anticipated growth of our communities, towns and cities will be allocated to other uses and not be available when needed, and/or that any available water may not be of suitable quality for public water supply. This issue could be addressed by the introduction of a power to specifically reserve water for future public water supply security. An assessment of approaches taken in other jurisdictions will inform the further development of proposed reforms to address this risk.

## 2. Certainty and confidence in allocations

### 2.1 Water allocated for best and highest value

#### Water for purpose principle

The Northern Territory Government's *Sustainable Water Use* policy paper commits to the installation of "a 'water for purpose' principle within the allocation and licensing provisions [of the Act] to stop claiming of water for profit only". While a range of reforms proposed below would support this principle, including the proposal to identify alternative allocation approaches (page 11), this reform program could also consider how to better account for strategic factors in licensing decisions. An assessment of how other jurisdictions consider the merits of a potential allocation from the perspective of broader community or regional benefits (in consideration of agreed local economic and social goals and objectives) could be undertaken as a starting point.

### 2.2 Streamlined and accountable regulation

#### Longer licence tenure for some circumstances and systems

Water licences are currently issued for a period of 10 years, with an option of renewal. This practice accommodates uncertainties about the water resource and provides flexibility in responding to changing circumstances (e.g. climate change, or increased knowledge of the resource). In regions where licences have been in place for some time and where a body of evidence exists about the impact of those extractions - and where development is likely to be long-term - there may be a case for increased licence tenure beyond 10 years. There also appears to be a case for longer licences for some beneficial use types, specifically for public water supply, where water extraction will be required for a longer period.

Harmonisation of licence tenure with the period of non-pastoral use permits issued under the *Pastoral Land Act*, could support the commercial viability of projects developed on the pastoral estate. Consideration of increased tenure could be regionally specific (noting this has the potential to add commercial complexity). Such licences may need to be subject to increased transparency due to their potential longer-term impact on water resources and dependent ecosystems.

### Perpetual entitlements untied to land in some systems

While some other jurisdictions do have 'permanent' water licences, which is an instrument with perpetuity which can be mortgaged or bequeathed (i.e. a permanent water entitlement) this is not currently available in the Northern Territory. In the longer term, the Territory could, in line with the NWI, consider statutory-based entitlement arrangements in fully allocated systems that provide for water-access entitlements that are not tied to land, and are tradeable. The rationale for this reform is that the automatic coupling of licences to land, and the deemed transfers associated with transfer of interests in land, could limit the development of an efficient market in water entitlements. An unbundled water entitlement becomes an asset which can be mortgaged in line with other property rights (e.g. land).

Other Australian jurisdictions, with more mature water markets, have introduced similar reforms, generally in regulated river systems. Detailed consideration would need to be given to whether the conditions in the Territory are currently suitable for a move to perpetual entitlements and to ensure that such a move considers the 'water for purpose' principle, to avoid the risk of 'water for profit'.

In the Territory, this 'unbundling' of water licences from land could be limited to particular water resources that are fully allocated and are subject to high demand for trade. These systems would need to be identified through a clear risk assessment process (e.g. specific surface water systems which are well understood by science). Equally, it could be linked to the introduction of charges for water where the cost of water is offset by longer-term security of tenure. Relatedly, longer licence tenure (see above) could be considered as an alternative to perpetual entitlements – or as a pathway to 'unbundling' in the future.

## 3. Highest value and efficient use

### 3.1 Water allocated for best and highest value

#### Alternative allocation approaches

Demand for increasingly scarce water resources poses challenges for the existing 'first-in-first-served' process for considering water licence applications. 'First-in-first-served' does not always lead to water being granted to uses that will provide the largest benefits to the Territory. While the 'first-in-first-served' approach is a pragmatic one, for new resources and for systems at risk or near maximum allocation alternatives to the 'first-in-first-served' approach should be considered. Some stakeholders have suggested that a strategic 'expression of interest' process should be explored as an alternative approach to granting licences.

Legislative and policy changes would be needed to define when and how alternative processes would be applied – for instance, to newly released water and in line with a broader economic development framework so that water allocations more strongly support the strategic priorities of the Territory.

A new power to declare Ministerial Reserves could provide flexibility in allocation approaches, so that newly identified water resources are subject to an alternative approach to licence application assessment to 'first-in-first-served'. Further work is required to assess the fairness and efficiency of alternative approaches to allocation, including through an examination of systems already implemented in other jurisdictions.

### Staged allocations linked to development milestones

The management of licensed water entitlements could be improved through requiring development milestones to be met before further entitlements are released. Some water-dependent developments, generally of a larger scale, may require smaller volumes of water to commence development, with larger volumes required in subsequent years to support the development at or near maturity. These larger developments can provide significant regional economic and social benefits, including transforming towns and regions.

However, as setting aside large volumes of water for the future use of these developments would prevent other users from accessing the resource in the short-term, a clear mechanism is needed to ensure the water is used according to an approved schedule. This will reduce the possibility of licensed water entitlements being obtained for speculative reasons, while providing the security that large-scale and/or expanding developments require. The introduction of clearer guidance for staged allocations could support this aim. Other jurisdictions, such as Western Australia, have included this approach in their regulatory framework and an assessment of the lessons learnt elsewhere would assist in the development of such guidance.

### Management of unused water

The Act has some provisions that support the management of unused water, so that where a licensee has no current genuine need for or capacity to use the water entitlements they have been granted, water can be returned to be allocated to other beneficial uses. There are conditions in current water extraction licences to prevent the practice of water 'banking' and usage is regularly reviewed against licensed entitlements in areas with high competition for groundwater resources. In practice, amendments to licence conditions to reflect changing development plans are not easily achieved.

However, while these licence conditions are already in place to address under-utilised water, there is a need for an overarching policy to guide consistent decision-making in relation to this issue. DENR has developed a draft Management of Unused Water Policy, to provide clearer guidance on the application of the policy in relation to unused water, including ensuring that licence holders who have legitimate reasons for not being able to utilise their entitlements can trade that entitlement either temporarily or permanently.

### Developing a robust and efficient water trading system

The *Water Act* currently requires water trading be facilitated under a Water Allocation Plan (WAP) with the declared plan establishing the trading rules and arrangements for trade. Plan areas are where a market for water trading is most likely to develop. However, there are circumstances where licensees outside a WAP area may wish to trade. In some cases, a plan is declared in relation to part of a Water Control District. As the Act currently only allows trade within a WAP area, introducing the ability to trade in areas without a declared water allocation plan would mean that trade could occur when 1) a plan has lapsed or is in draft form, or 2) in areas outside of a plan area.

Government has considered legislative reforms to significantly improve the administrative efficiency of trading under the current Act. Part 6A was included as an amendment to the *Water Act* in 2007 to improve the transparency and accountability provisions of the Act. These provisions require a non-discretionary public notification and comment process to be applied to water extraction licence decisions that lead to new licences and to licences that involve an *increase* in the quantity of water to be taken under an existing licence. The policy rationale for this is to ensure that the public can comment where there is potential for *increased extraction* from a specific water resource. As an unintended consequence of this provision, licences that result from transfers and trades have been subject to the provisions of Part 6A, despite there being no overall increase or impact in extraction from the resource. This reform will mean that once an entitlement has been granted under a licence, that entitlement whether transferred, traded or renewed is not subject to Part 6A. Licences granted that do not increase a licensed water entitlement (in terms of quantity taken and impact on a resource or other users) are not proposed to continue to be subject to Part 6A.

DENR has also developed a draft Trade Policy, which in conjunction with WAPs, provides clarity for water users and regulators in the application of the existing Act. A policy will support consistent decision-making and the development of robust and efficient procedures to deal with applications for trade in water.

### A pricing framework for water

There are currently no fees or charges for licence and permit applications or for administrative variations to licences or permits, with these transaction costs met by Government (and ultimately the public). The only costs recovered at present are the advertising costs associated with the public notice of intention provisions in Part 6A of the Act. The recovery of reasonable costs for administrative fees and charges are applied in other jurisdictions and it is appropriate this is considered in the Northern Territory.

Nationally, the sustainable management of water resources has been impeded by inefficient pricing frameworks. The development of water resources in southern Australia was historically characterised by the use of water allocations to promote the expansion of European settlement and economic development. A focus on economic development combined with limited scientific knowledge and poor regulation led to high levels of over-allocation and enormous water infrastructure liabilities arising from governments undercharging for water use.

The National Water Initiative supports the user-pays principle such that the beneficiary pays for the cost of receiving that benefit – i.e. access to water for commercial purposes. The NWI suggests that fees should go towards the cost of water management and administration and should therefore be based on the cost of providing these services. This is reflected in the current *Water Act* but has not been fully implemented

The challenge for the Northern Territory is to continue to learn from what has and has not worked in other jurisdictions and to implement a pricing framework that ensures that the management and regulation of water resources are supported by adequate financial and other resources, and that the development of water-dependent enterprises are not impeded by perverse or unintended pricing outcomes.

Over the longer term, contribution to the significant and growing costs of environmental research, monitoring and planning could be made by those benefiting from economic use of the water extracted. These costs are currently funded by Government.

The *Scientific Inquiry into Hydraulic Fracturing in the Northern Territory* recommended in its *Final Report* that Government introduce a charge on water for all onshore shale gas activities. Options to implement this recommendation are currently being developed by Government. The development of a pricing framework needs to consider that the economic inputs of developing projects in remote areas can be significantly higher than urban areas.

## 4. Responsive to changing circumstances and risk

### 4.1 Protection of water-dependent ecosystems and cultural flows

#### Adaptive management

While there is a significant body of knowledge about the Territory's water resources, and the ecosystems that depend on our water, there are areas where there are gaps in this knowledge. In many cases, extraction from the resource will help inform these knowledge gaps. Adaptive management could allow for extraction to be altered (e.g. increased or decreased) either at the plan level or licence level if there is enough scientific evidence to suggest that these changes will not cause deleterious effects. Under this approach, as new scientific knowledge about specific resources and water-dependent ecosystems is developed, whether through extraction or through monitoring and assessment activities, this knowledge is integrated into plans as well as licence decisions and licence conditions.

Adaptive management considers the precautionary principle while enabling economic development that is supported by a careful expansion of the scientific knowledge of a water resource. The proposal to introduce staged allocations (see page 12) is an example of integrating an adaptive management approach into the conditions of some licences. Clearer guidance about the adaptive management of water resources would likely lead to increased confidence in licence decisions.

#### Interchange of ground and surface water extraction in inter-connected systems

Many water resources in the Territory are inter-connected. Both groundwater and surface waters can be replenished from rain events, and river flows are often sustained by groundwater between rain events. In some areas there is a very strong relationship between groundwater and surface water (such as the Katherine, Daly and Roper Rivers within the Tindall Limestone aquifer).

Where surface water and groundwater resources are inter-connected, they need to be managed as an integrated system because extracting groundwater may have an impact on the availability and quality of surface water and vice versa. Recognising this connectivity in future planning is important for long-term sustainable use of both surface and groundwater. Where environmental and cultural values associated with this water can be maintained and protected there may be a case for enabling trade or other transfers of water between inter-connected water resources.

Similarly, where a licensee has both groundwater and surface water entitlements from inter-connected systems (under two or more separate licences), some flexibility could be introduced so that the Controller has a power to increase extraction from one source where extraction from another source has decreased. This is a particularly relevant consideration for public water supply. For example, working within the overall entitlement, but allowing for increased surface water extraction offset by decreased groundwater extraction, in situations similar to Katherine in response to PFAS contamination.

## Surface water harvesting

There are a number of proposals for surface water harvesting and capture of Wet season flows across the Top End for agriculture, mining and public water supply. These proposals seek to realise an opportunity to make use of abundant water in the Top End during the Wet season by storing it for use in the Dry season when less water is available. The challenge is to determine how, when and where water can be taken during the Wet without having an impact on groundwater recharge, surface water base flows, and environmental and cultural values associated with water, especially during the Dry season. Clear and transparent regulatory mechanisms are required to schedule the take of water so that users do not over tax the environmental limits of the system. These mechanisms should be referenced in the *NT Water Allocation Planning Framework*.

## 4.2 Fair allocations across consumptive uses

### Definition of stock and domestic use

The Act establishes a right for the owner and occupier of land to take water from a waterway on or adjacent to the land (section 11) and groundwater from beneath the land (section 14) for 'stock and domestic' purposes. Stock and domestic purposes are described in sections 11 and 14 of the Act as water for:

- The use of the owner, occupier or their family and employees for domestic purposes;
- Drinking water for the grazing of stock on the land; or
- Irrigating a garden, not exceeding 0.5 hectares, which is part of the land and used solely in connection with the dwelling. (0.5 hectares is 5,000 square metres).

All Australian States/Territories allow for largely unregulated stock and domestic water use, which is not subject to controls on use in the same way as licensed water extraction. The definitions that exist in other water legislation interstate are very similar to the definition used in the Northern Territory.

Reform of the stock and domestic provisions in the Act is required to revisit and assess the relevance of the definition of stock and domestic use. Further, it is important that the Act prioritises protections for those stock and domestic water users who have no other options for their potable water supply. The feasibility of mechanisms for doing this requires investigation.

There is increasing concern in peri-urban areas of the Northern Territory about long-term water security, with the volumes extracted by stock and domestic users perceived as threats to water supplies in the outer areas of towns and cities. As an example, the Darwin Rural Area has around 5,000 blocks with water bores supplying household use in the area. This figure could double if all land owners exercised their statutory rights to access groundwater for stock and domestic use, which is provided for in the Act, or should further subdivision occur. Areas surrounding Katherine are also affected by this issue, on a smaller scale.

The description of stock and domestic use in the Act has been subject to community commentary and concern because it describes the way the water is used rather than establishing volumes or limits on the take of water. For example, there have been concerns raised by rural residents who are reliant on stock and domestic use for their household water supply that the definition of stock and domestic water in the Act does not discern between careful and excessive uses (e.g. on gardens). As demonstrated by this example, the concerns being expressed are not about the definition itself, but about the lack of utility in the definition to the wide range of stock and domestic uses.

Further subdivision of land, including that overlying over-allocated groundwater systems, is currently controlled by the provisions of the *Planning Act* and the NT Planning Scheme, which mandate that the consent authority must, where relevant, take information regarding access to water into account when determining a subdivision application.

The *Water Act* does not allow for limits to be placed on access to rural stock and domestic water use in situations where the owner or occupier is or can be connected to an alternative secure water source such as a reticulated public water supply. Similarly, the *Planning Act* and NT Planning Scheme, taken together, do not support subdivision of land overlying over-allocated groundwater systems or for subdivision of land where alternative sources of potable water are available, such as through public supply or rainwater harvesting.

As work is already underway to assess options for improved controls and interactions between the *Water Act* and the *Planning Act* in relation to future subdivisions and access to alternative water supplies, this issue is out of the scope of the broader water regulatory reform process outlined in this Directions Paper. This matter is being progressed separately.

## 5. Transparent and accountable decision-making

### 5.1 Streamlined and accountable regulation

#### Risk assessment of water resources

While it is recognised that some water resources in the Territory are subject to greater risks than others, all resources are managed and regulated according to the same rules. The current Act does not readily allow for risk-based licence assessment and reporting processes, all decisions are subject to the same process. A mechanism is required that provides for varying levels of management and assessment based on risk to the resource. This could be the introduction of a power to declare, based on a risk assessment framework, a schedule of areas that require a higher and/or different standard of management and regulation. This could improve the sustainable management of water resources and would mean that licensees would be subject to a level of regulation commensurate with the risk their extraction poses to a particular water resource system.

#### Fit and proper person test

The inclusion of a clear and objective 'fit and proper person' test in the licensing decision-making framework would ensure that the Territory's resources are allocated to persons or companies in line with public expectations about the responsible use of water resources. For instance, this test could preclude water entitlements being granted to persons found guilty of serious criminal offences consistent with the provisions in the proposed *Environment Protection Act*.

#### Ability not to assess applications

The current Act requires all licence and permit applications to be subject to the same assessment process. All complete applications must be accepted, considered and a decision made. This can make a relatively simple decision the subject of a long and protracted process at the expense of the applicant and Government and, in turn, the community. For example, in a system where water is not available, currently under the Act that application will still need to be subject to advertising for public consultation before the Controller can make a decision not to grant a licence.

There is a need to streamline the process of assessing licence applications that relate to resources at risk. Consideration could be made of the inclusion in the Act of a power to not assess licence applications for a particular system that is declared at risk. This would substantially streamline the current regulatory process whereby the Act requires the entire rigorous assessment process be undertaken for all completed applications lodged, even those for which there is a very limited prospect of a favourable decision because the knowledge of the resource indicates that an increased level of extraction is not sustainable. Clear guidelines would be required to ensure that there is consistent decision-making.

### Consistency for beneficial uses

Beneficial uses are currently declared under two different sections of the Act (sections 22A and 73), which has caused confusion and generated inconsistency in their declaration within Water Control Districts. Legislative reform is required to create a single point of reference in the Act for the declaration of beneficial uses; to ensure consistent reference to beneficial uses throughout the Act; and to improve the definitions of beneficial uses. This would in turn support a more comprehensive approach to managing water systems, where both volume and quality aspects are considered, and all water use is accounted for.

### Clarification of role of Controller

The powers and functions of the Act are vested in the responsible Minister (for Environment and Natural Resources). The Minister may appoint a Controller of Water Resources (Controller) under section 18 of the Act. The Controller can delegate her or his powers. The currently appointed Controller is also the Chief Executive Officer (CEO) of DENR.

The Controller has wide-ranging powers under the Act, including issuing water extraction licences, waste discharge licences, aquifer recharge licences, powers to grant a range of permits, powers to direct certain actions, obligations to undertake assessment and notification and advertising responsibilities (amongst others).

The challenge associated with the CEO holding the appointment of Controller is that the person responsible for approving policy advice is also the person responsible for considering that advice in their decision-making. While this current arrangement is functional due to careful adherence to the principles of administrative law, other relevant Government decision-making functions, such as liquor licensing and environment assessment, are undertaken with a clearer separation of powers.

An option for ensuring separation between Minister and the CEO and/or the agency advising the Controller is for the Minister to appoint a Controller as an independent statutory officer; or alternatively appoint an existing statutory authority such as Northern Territory Civil and Administrative Tribunal or the NT Environment Protection Authority - or an individual member of such - as the Controller of Water Resources. These approaches may mitigate any perception of a conflict of interest in decision-making.

Both options achieve separation and a singular focus on administrative law. In order to manage workload demands, the bulk of the more straightforward powers could be delegated back to the CEO or Executive Director Water Resources, leaving only the activities associated with water extraction licensing (for example) with the independent statutory body.

## Review provisions

The Act includes provisions for the review of certain actions and decisions made by the Controller or the Minister. Under the Act the Minister may refer a matter to a Water Resources Review Panel for advice. These review provisions have been determined by the Supreme Court to be in the nature of a merits review of decisions. However, the Act does not expressly state this, and consideration will be given as to what kind of review is appropriate for various decisions that may be made under the Act.

Reviews generally comprise of one of the following:

- internal review is the process where an officer not involved in the original decision-making reviews the merits of a decision made by a delegate of the Controller. The outcome of an internal review process is that the primary (original) decision may be upheld or replaced;
- judicial review, which is a common law right, which is undertaken by the Supreme Court and considers the lawfulness of a decision and the decision-maker's authority to make it; or
- merits review, which is a statutory process whereby a new decision-maker generally reconsiders all relevant facts and evidence and makes a new decision in place of the original decision-maker.

Reform of the review process could consider the Northern Territory Civil and Administrative Tribunal – which currently has broad responsibilities in the review of the merits of decisions by statutory office holders – as an appropriate reviewing body.

## Inclusion of Objects

The Act does not include an 'Object' provision which expressly articulates the underlying purpose of the Act. Following feedback from community members on this Directions Paper, a position paper will be developed on a proposed Object provision for the Act.

## Next steps

This Directions Paper has been prepared to describe the overall purpose, rationale and expected outcomes from the regulatory reform program so that community members can make informed contributions.

Contributions are encouraged through the [haveyoursay.nt.gov.au](http://haveyoursay.nt.gov.au) website and the opportunity to provide feedback will be promoted through social media and through briefings to Water Advisory Committees and other key stakeholders.

You are asked to consider:

- Whether there are other issues not already included in this Directions Paper, which need to be addressed to meet the goal, objectives and outcomes of reform (page 6).
- Which issues are the priorities for reform.
- Potential solutions to the issues identified that need to be considered as part of the reform program.

Additionally, stakeholders are asked to provide feedback on the relative importance of the proposed reforms.

Submit responses via the online feedback form at [haveyoursay.nt.gov.au](http://haveyoursay.nt.gov.au).

Feedback on this Directions Paper is requested by 31 March 2019 to inform the development of detailed position papers on the proposed reforms, which will be the basis of further consultation.

