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# Racialized water governance: the ‘hydrological frontier’ in the Northern Territory, Australia

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## **Abstract**

Increased scrutiny and contestation over recent water allocation practices and licencing decisions in the Northern Territory (NT) have exposed numerous inadequacies in its regulatory framework. Benchmarking against the National Water Initiative shows that NT lags behind national standards for water management. We describe key weaknesses in NT’s water law and policy, particularly for Indigenous rights and interests. NT is experiencing an acceleration of development, and is conceptualised as a ‘hydrological frontier’, where water governance has institutionalised regulatory spaces of inclusion and exclusion that entrench and (re)produce inequities and insecurities in water access. Regulations demarcate spaces in which laws and licencing practices provide certainty and security of rights for some water users, with opportunities to benefit from water development and services, while leaving much of NT (areas predominantly owned and occupied by Indigenous peoples) outside these legal protections. Water allocation and planning, as well as water service provision, continue to reinforce and reproduce racialised access to (and denial of) water rights. Combining an analysis of the law and policies that apply to water for economic development with those designed to regulate domestic water supply, we present a comprehensive and current picture of water insecurity for Indigenous peoples across the NT.

## **1 Introduction**

The Northern Territory, Australia, is experiencing an acceleration in water extraction and water-related development. On November 15, 2021, the Northern Territory Government (hereafter NTG) issued a groundwater licence of 40,000 ML to Fortune Agribusiness to enable horticultural development at Singleton Station, 400km north of Alice Springs (Jonscher, 2021). The unprecedented size of the water licence, including its potential to damage groundwater dependent sacred sites, increased scrutiny of the licencing process and precipitated a formal challenge by Traditional Owners. Documents brought to light during the ensuing review revealed that the NTG had been in negotiation with Fortune Agribusiness for months in advance of the initial licence application in 2020, and it had subsequently introduced a new rule to allow up to 30 per cent of groundwater dependent ecosystems to be ‘impacted’ by the development (Bardon, 2021). At no time were Traditional Owners consulted as part of this process.

The Singleton Station licence, although of a record size, is merely one of the controversial water licencing decisions recently made by NTG and contested in the Northern Territory (hereafter NT) courts or internal governmental reviews. Since the federal government released its white paper on developing northern Australia (Australian Government, 2015), there has been heightened interest in exploiting the region's water resources (including involvement with large scale gas production in the Beetaloo Basin). Media attention on problems of water insecurity, including cases of poor water quality in remote communities, has also increased (Kurmelovs and Moore, 2021).

In examining specific water law and policy failures in the NT, we have identified some clear trends:

1. compliance with the national policy, (the National Water Initiative, hereafter NWI) remains low;
2. human rights protections for safe, accessible drinking water are inadequate and highly variable;
3. water allocation planning is poorly resourced and proceeds at a glacial pace that lags behind water licencing;
4. water licence decisions are increasingly controversial and contested;
5. potential conflicts of interest persist in water policy decision-making; and,
6. despite a recent commitment to grant water rights to some traditional Aboriginal Owners through a Strategic Aboriginal Water Reserve, this process has so far delivered a nominal (zero) allocation in all but two cases (one of which is currently under review).

Furthermore, despite a national water policy of cost recovery (and unlike other Australian states) water use regulated under the *Water Act 1992* (NT) remains free of government fees and charges throughout the NT. In this and other important ways, the regulatory framework enables hoarding and speculation. In combination these features of the NT's water governance regime constitute a hydrological frontier and it is this concept we use to frame our analysis.

### 1.1 The hydrological frontier

It has long been appealing to draw comparisons between the NT's development trajectory and settler ideology to models of frontier development, not least because of continuing focus on resource extraction at the expense of other activities (Rose, 1997, Carson, 2011). Almost 20 years ago, Langton (2002, 43) compared moves in northern Australia to capture water on a large-scale to a 'new hydrological frontier', one that was exacerbating the vulnerability of Indigenous peoples and their waterscapes to the 'colonial appropriation of water sources'. In this paper we conceptualise the Northern Territory as a frontier for similar reasons, although we focus more closely on the current role of water governance in institutionalising regulatory spaces of inclusion and exclusion that entrench and produce anew racial inequities and insecurities in water access. For this reason, we specify these acts of inclusion and exclusion as racialized.

The concept of a frontier draws attention to spatial processes and patterns that are charged with settler-colonial relations of power (Evans, 2009). Our analysis will show how regulators have carved out or demarcated spaces or zones in which laws and licensing practices provide certainty and clarity for some water users, while leaving much of the NT outside these legal protections and privileges. The existence of spaces 'outside' or beyond the frontier reflect differences in regulation and the effects on different populations. This hydrological frontier is a racialized regime that provides favoured economic treatment to the settler society and seeks to increase that population through *inter alia* agricultural and mining projects (Carson, 2011), while disregarding the jurisdiction's remote communities which are majority Indigenous. As Langton noted: 'as usual, Aboriginal groups are those who lose the most and gain the least' (Langton, 2002, 43). Twenty years later, the extent to

which the NTG supports extraction of groundwater for commercial ventures while 72 remote Aboriginal communities endure problems with drinking water quality that falls below the national guideline in many cases reveals plainly its water apartheid practices (Grealy and Howey, 2020).

The NT has the highest proportion of Indigenous people of any Australian jurisdiction (28.3 per cent, Markham and Biddle 2016), but its settlement pattern is spatially and racially uneven (Carson, 2011). Around 76 per cent of the NT's Indigenous population lives outside cities and towns, where they comprise over 80 per cent of the population in most NT remote communities (Zhao and Malyan, 2010). At the latest census (2016) 58 per cent of the Indigenous population lived in very remote areas compared to 6 per cent of the non-Indigenous population (ABS, 2017). Grealy and Howey (2020) demonstrated the effect of the NT's water law on access to drinking water across the NT's population. Boundaries imposed by the NT's water law carve out accountabilities and water supply responsibilities which are aligned with town boundaries. Outside these serviced regions the population is afforded extremely limited protections. Almost zero accountability for the provision of even minimal water services is expected of the water authority in the remote regions. In the next section, we will show how the water licencing arrangements under the water allocation framework follow a similar spatial logic.

In this paper, we argue that as interest in water development in the NT grows, it must be coupled with an equivalent commitment to recognise Indigenous rights and interests, act on Indigenous people's culturally specific development aspirations and develop models of water governance that can accommodate customary law and management institutions (Jackson and Altman, 2009, O'Neill et al., 2016). Building on Howey and Grealy (2021), we bring together the law and policies applying to water for economic development as well as those designed to regulate domestic water supply to present a more comprehensive picture of water insecurity for Indigenous peoples across the NT. We place the Aboriginal Water Reserve (AWR) into its historical, settler colonial context, and show how despite this crucial step towards water justice, the NT is plagued by serious weaknesses in water law.

## 2 Water allocation and planning in the NT

In the NT, water is managed under two main pieces of legislation: the *Water Act 1992*, and the *Water Supply and Sewerage Services Act 2000*. The *Water Act* provides for the 'investigation, allocation, use, control, protection, management and administration of water resources' (specified in the long title) and establishes a territory-wide water management framework. The *Water Act* provides for the issuing of licences to use surface water and groundwater, as well as water planning and management activities, including the declaration of water control districts (hereafter WCDs) and water allocation plans (hereafter WAPs). To date, there are eight WCDs and six WAPs in effect across the NT (with a further three under development, see Figure 1). Additional water licencing requirements are imposed in WCDs, and water trading is currently limited to WAPs (s22B). The *Water Act* also provides for the creation of the Aboriginal Water Reserve as part of the WAPs (see below). In areas outside WAPs and WCDs, contingent allocations are made for environmental and other public benefit water provisions (Hart et al 2019).

The *Water Supply and Sewerage Services Act* is intended to promote the safe and efficient provision of water and sewerage services and establish and enforce standards of service (s 3). However, it achieves these objects by defining geographically limited water supply licence areas, and the state-owned corporation, the Power and Water Corporation (hereafter PAWC), is the sole licensee. Although such geographical limits on the powers and responsibilities of a water service provider are a common feature in Australia, what sets the Northern Territory apart is the relatively tiny 'islands'

of water licence supply areas in which the PAWC is required to provide these services (Grealy and Howey, 2020).

Grealy and Howey (2020) note that although both the *Water Act* and the *Water Supply and Sewerage Services Act* nominally apply Territory-wide, 'water regulation in the NT is in fact spatially heterogeneous, producing different forms of responsibility, accountability, attention, procedure and intervention between contexts' (p. 342). The spatial disparity produced by this frontier mentality is particularly acute. Grealy and Howey (2020) identified 72 Indigenous communities which are not part of water supply licence areas, and which instead are serviced by a not-for-profit corporation, Indigenous Essential Services, wholly owned by the PAWC and not subject to the control of the NT's Utilities Commission. A further 600 Indigenous outstations are not serviced by IES or PAWC. The effects of the lack of clarity in terms of responsibility, and lack of mechanisms for accountability, have resulted in water quality problems, many severe, for Aboriginal communities across the Northern Territory (Howey and Grealy, 2021, 174, Productivity Commission, 2021, 174).

In just one example, in Laramba, the PAWC found there were 0.046 milligrams of uranium per litre (mg/L) in the town's water supply — close to three times the level recommended in national guidelines (Grealy, 2020). However, the NT Civil and Administrative Tribunal ruled against the Aboriginal community of Laramba in their case seeking compensation over the contamination of their water and the installation of tap filters to bring their water in line with national guidelines. The Tribunal ruled that water quality was not the Department of Housing's responsibility, and like many of the 72 remote Aboriginal communities in the NT, their appeals for safe drinking water were deferred again, and remain unresolved (Kurmelovs and Moore, 2021). As Grealy and Howey (2020) show, the lack of minimum standards, and the geographical limitations on PAWC's responsibilities, means that most remote Aboriginal communities are denied the protections afforded to the majority non-Indigenous population of the NT's urban centres.

The water law framework of the NT thus delineates racialized spaces where those on the inside have rights, protections, service standards, opportunities to benefit from water development, and where the state is obliged to regulate and manage water sustainably, while those on the outside receive few, if any, rights, or concomitant protections. It is a regime that services and predominantly satisfies white water consumers (as 'customers' in towns, or as developers in the regions) and under-services or excludes the majority of Aboriginal people (who do not even rise to the level of 'customers' as the water authority does not have an obligation to supply them with water outside towns).

## 2.1 Benchmarking water law and policy in the NT

In Australia, water allocation and planning by states and territories is assessed against the National Water Initiative (NWI). Developed in 2004, it was intended to deliver a 'nationally-compatible, market, regulatory and planning based system of managing surface and groundwater resources for rural and urban use that optimises economic, social and environmental outcomes' (COAG, 2004, clause 23). To do so, states and territories committed to (1) developing statutory, secure, nationally-compatible water access entitlements; (2) transparent, statutory-based water plans; (3) provision of environmental and other public health benefit outcomes, including return of over-used systems to environmentally sustainable levels of extraction; (4) recognition of Indigenous needs in relation to water access and management; (5) removal of barriers to trade; (6) water accounting that meets information needs for water planning, monitoring, trading, environmental and on-farm management; (7) cost recovery pricing for urban and rural water, as well as other policy settings to increase efficiency and drive innovation; (8) recognition of connectivity between surface water and

groundwater and manage connected systems as a single resource; and (8) clarity around risk assignment and future adjustment issues (clause 23).

Although it has shaped the national standard, the NWI is far from perfect. The emphasis on unbundling land and water has directly contributed to the dispossession of Aboriginal water rights (Hartwig et al., 2020, Marshall, 2017). The NWI (and settler state water law enacted to give effect to national policy) also continues to deny Indigenous laws and cultural protocols for water management (Moggridge and Thompson, 2021), relegating a complex system of water governance to one of mere recognition of essentialised and narrowly defined water needs (e.g. traditional, customary and non-consumptive purposes).

The Northern Territory has not yet reached compliance with the NWI on multiple grounds (Hart et al., 2019, Productivity Commission, 2017, Productivity Commission, 2021). Water access entitlements remain in the form of time-limited licences that are linked to land on which the water will be used, and water trading is limited to areas within WAPs. Only 28% of water licences occur in WAP areas (Productivity Commission, 2021). There are only six WAPs, and a single WAP can take an extremely long time. For example, the Howard River WAP has been in development since 2010 (Jackson et al., 2012), although concerns about environmental impacts of water management practices in the region have been publicly aired since 1998 (Cook et al., 1998, Straton et al., 2008, Jackson et al., 2012). Similarly, the Mataranka WAP has been in preparation for 13 years (Jackson and Barber, 2013), and all 22 groundwater licences have been issued while the plan has been under development.

As other user groups stake out their claims in the vast spaces of the NT that are not governed by a water allocation plan, including the semi-rural regions of Darwin where horticulture has expanded enormously, this process is clearly inadequate for sustainable water management. It is also inequitable in failing to meet the needs of vulnerable Indigenous peoples who are dependent on water for subsistence, social identity, cultural practices, and economic development.

A key gap in the NT is the lack of a cost recovery program for water management. The NWI required signatories to commit to either requiring water users to pay the full costs of water services, or where this was not feasible, to transparently report these costs and how they were met (COAG, 2004, clauses 64-66). In the NT, no fees are applied to water extraction licences, which means that there is no dedicated funding stream to support water planning, metering, or monitoring, or to supplement limited research budgets. Poor quality water data affects both commercial water users, the environment and those who rely upon its health. Lack of transparency in reporting costs and investment in water management also undermines water services in remote communities (Howey and Greal, 2021). Applying a blanket policy of cost recovery would seriously impact access to water services in remote communities, but in these cases, it would increase transparency for the NTG to report on the costs of water services and how they are being met, as well as the standard of service provision. This would also help to highlight the gaps in the water law framework described above.

The NWI also required signatories to separate 'the roles of water resource management, standard setting and regulatory enforcement and service provision' (COAG, 2004, clause 74). This is essential to prevent potential conflicts of interest from undermining public confidence in water resource management. Although there is some formal degree of separation between the decision-maker for the issuing of licences (the Water Controller) and the policy and standard setting role (the Department of Environment, Parks and Water Security), in 2021, the same person occupied the position of Water Controller and CEO of the Department (O'Donnell et al., 2021a). In addition, this same person is a member of the board of the Northern Territory Land Corporation, which is a holder

of water licences. These ‘multiple hats’ inevitably create a perception of a conflict of interest, and objectively leave the decisions of both the Water Controller, and the Department, open to criticism, even where the decisions might be well based.

Water data is frequently estimated rather than measured (Hart et al., 2019). The paucity of water data has been identified as a key factor inhibiting planning for climate change impacts, and limiting the ability of the Water Controller to lawfully issue water licences (Water Resources Review Panel, 2021). Water metering for all water licence holders is now required, including monthly reporting on water use. However, in December 2021, no data on water use or metering compliance was publicly available on the NTG website. The Productivity Commission noted that the NT does not publicly report on compliance activities (Productivity Commission, 2021).

The NTG has also failed to ensure safe and secure drinking water for Indigenous communities in the Territory, ‘where drinking water remains largely unprotected and water services unregulated’ (Howey and Grealy, 2021, p. 1). The NWI has not been a terribly effective tool for securing safe access to critical human water needs, but as Howey and Grealy (2021) point out, ‘the NT has nonetheless failed to implement numerous NWI reforms’ (p. 2).

## 2.2 Aboriginal Water Reserve

Although several Australian jurisdictions now recognise and allocate rights to water to Aboriginal people in various ways (Godden et al., 2020), the Northern Territory is the only jurisdiction in Australia to legally require the allocation of water for Aboriginal economic use as part of water planning (where there is eligible Aboriginal land, s4B *Water Act 1992*). The Aboriginal Water Reserve (hereafter AWR) does not include drinking water supplies (which are addressed separately as part of the water allocation plan process) and is limited to economic or commercial use, which is at odds with the expressed desires of both the Central and Northern Land Councils, which wanted to see customary non-consumptive uses included (Nikolakis and Grafton, 2021, Jackson and Altman, 2009).

The AWR is ‘a reserve of water allocated in a water allocation plan (WAP) for Aboriginal economic development in respect of eligible land’ (s 4, *Water Act 1992*). This requirement creates an immediate barrier to the implementation of the AWR, as WAPs take many years to complete, and currently only cover 5 per cent of the Territory (Nikolakis and Grafton, 2021). Further, the AWR will not exist in water allocation plan areas in which there is no eligible land at the time of the WAP. Defining eligible land is a two-part test, firstly depending on a definition that requires exclusive possession (in various ways, see s4B), and secondly requiring the area of eligible land in a WAP to be more than 1 hectare, with water resources on, under, or adjacent to the land (s22C).

Once the existence of eligible land has been established, the AWR volumes increase in a stepped scale, so that ‘in an area with more than 0 per cent but less than 10 per cent of eligible land, 10 per cent of the consumptive pool will be reserved for Aboriginal use. If there is between 10 per cent and 30 per cent of eligible Aboriginal land in the plan area, then the reserve will correspond with the actual percentage. The reserve is capped at 30 per cent in an area containing greater than 30 per cent of eligible Aboriginal land’ (Godden et al., 2020, 676).

The 30 per cent cap is hard to justify. In the case of the Draft Mataranka WAP, over 80% of the land is eligible Aboriginal land, yet the AWR will continue to be capped at 30% and it is unlikely that the water will be available due to the current level of water allocation (NT Government, 2019, page 41). In 2017, 46 per cent of the Northern Territory land mass was held by Aboriginal people as freehold land (mostly freehold title under the *Aboriginal Land Rights Act 1983*), 0.6 per cent exclusive native title, and a further 18.2 per cent as non-exclusive native title (NLC and CLC, 2017) (Figure 1). Despite

the advocacy of the Northern and Central Land Councils, non-exclusive native title holders are not eligible for the AWR. Aboriginal organisations advocated for a AWR of a larger magnitude, with a minimum of 50 per cent based on land tenure, as well as population, disadvantage, and other factors (Nikolakis and Grafton, 2021, Jackson and Barber, 2013).

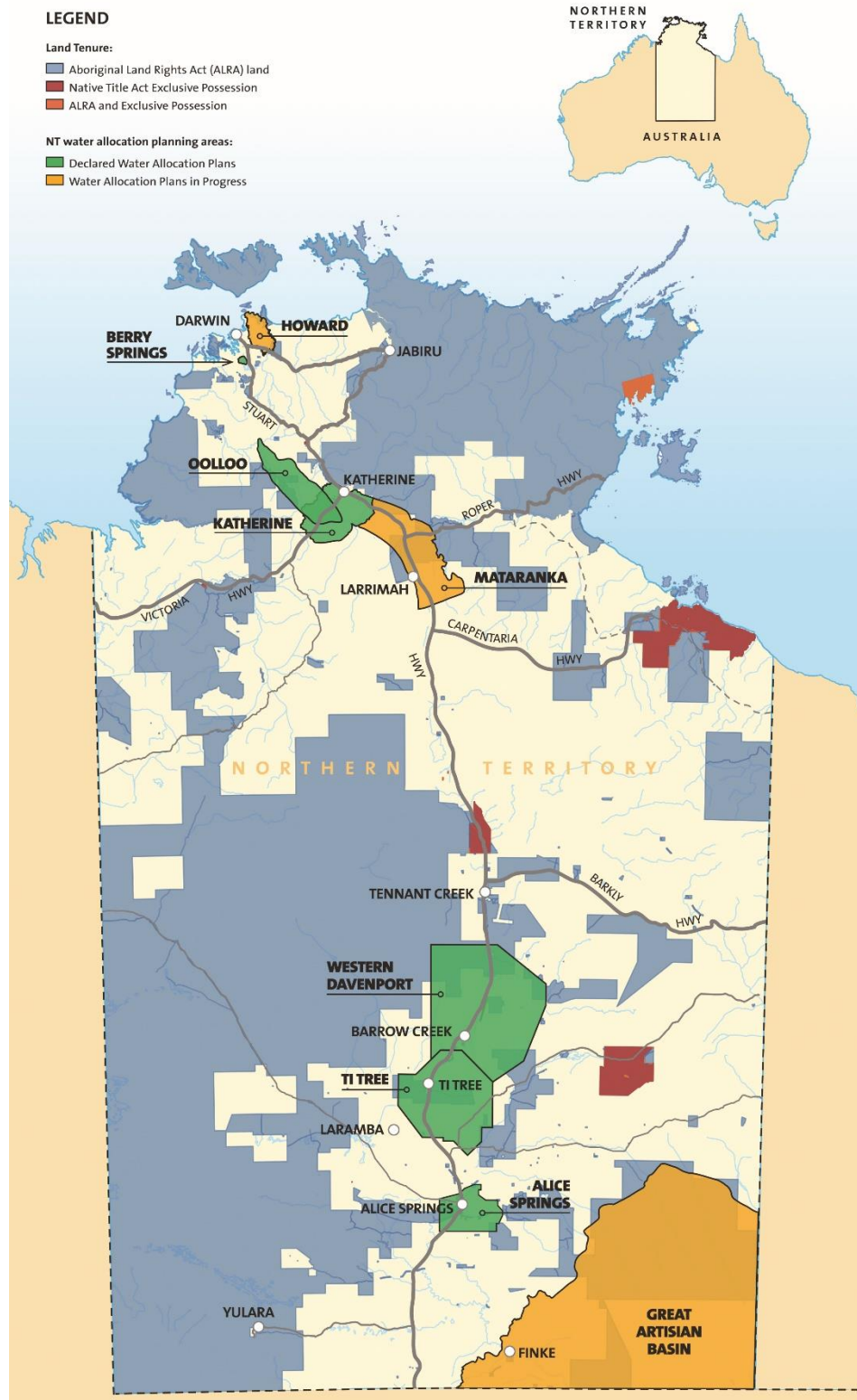


Figure 1. Aboriginal Land Tenure and Water Allocation Plan areas, Northern Territory, 2021



Where a water allocation plan is created for an area that is already fully or over-allocated, the AWR in that area remains as a ‘notional’ (in real terms, zero) allocation, and requires water recovery from existing users before water licences can be issued from the AWR to Aboriginal people (Godden et al., 2020). The AWR strategic policy framework released by the NTG in 2017 notes that the ‘Controller of Water Resources will not cancel, refuse to renew or reduce existing licence entitlements for the primary purpose of provisioning a [AWR]’ (NT Government, 2017, 6). But WAPs are only prepared in areas where ‘there are competing demands for water, there is risk from water use on significant environmental or cultural values, or a need to manage the whole system (surface water and groundwater reserves) due to their significant inter-connection’ (Department of Environment Parks and Water Security (NT), 2020). In other words, WAPs are most likely to be developed in regions that already experience competition for water, increasing the likelihood of a ‘notional’ (zero actual) allocation to the AWR (Table 1).

*Table 1 AWR allocations in declared Water Allocation Plans (WAPs)*

<b>Water Allocation Plan</b>	<b>Aboriginal Water Reserve</b>
Ti-Tree 2020	22% notional allocation (southern groundwater management zone only) 0% actual allocation
Katherine (Tindall Aquifer) 2019	10% notional allocation 0% actual allocation
Ooloo Dolostone Aquifer 2019	20% notional allocation 10% actual allocation (zero in northern groundwater management zone)
Western Davenport Ranges 2018 (under review)	24% actual allocation
Alice Springs 2016	No AWR (plan predates 2019 law reform)
Berry Springs 2016	No AWR (plan predates 2019 law reform)

Once a WAP is in place and the AWR has an allocation, water licences can be issued from the AWR. Doing so requires consent from the members of eligible Aboriginal organisations (the land holders), with consent processes to be detailed in regulations that are still under development. Until these regulations are issued, even where a AWR exists, it remains very difficult for Aboriginal organisations to access the AWR.

### 3 Indigenous rights, economic development, and water

Water is vested with great cultural and symbolic significance as well as economic importance by Indigenous groups who hold customary rights of ownership and custodianship of water sources, or waterscapes. Water is a sacred and elemental source and symbol of life in the cosmologies of Aboriginal people (Langton, 2002), and aquatic resources constitute a vital part of the Indigenous customary economy of the NT (Fletcher et al., 2021, Jackson and Altman, 2009). Opportunities to ensure that access to water is provided to Indigenous communities for commercial activities is now a key element of the water policy agenda (O'Donnell, 2013, O'Donnell et al., 2021b). In this paper, we focus on water access for human consumption (including economic development, as well as drinking water and sanitation), although the environmental and socio-cultural impacts of water resource development are clearly a major concern for Indigenous communities who seek to sustain their own traditional governance of resources in the face of re-regulation and redefinition in institutions far away from their homelands (Langton, 2002, Jackson, 2006). We note that the demarcation between economic and other fields of life is an especially problematic heuristic in this context. We similarly

note that treating water rights separately to land tenure also represents a cultural distinction that is not made by Indigenous peoples (Jackson and Barber, 2013, Langton, 2002).

The NT's statutory water management systems privilege 'mainstream' management approaches, normative frameworks, and values over those of Indigenous peoples (O'Donnell, 2013, Jackson and Altman, 2009, Jackson, 2006, Howey and Grealy, 2021). Further, the ability of Traditional Owners to exercise their cultural rights and responsibilities, and to access cultural water sites for customary purposes, has been impaired as a result of the history of non-Indigenous alienation and exclusive use of land (O'Donnell, 2002). Land rights legislation, for instance, which has returned approximately 50 per cent of the NT to Indigenous control, generally makes no mention of ownership of or rights to inland waters and until very recently there was not any recognition of Indigenous rights to water for commercial purposes in any laws affecting the NT, including the federal *Native Title Act 1993* (O'Donnell, 2013).

However, according to Jackson and Altman (2009, 40), 'the various statutory and common law regimes for the recognition of customary rights in land and sacred sites have given rise to an expectation on the part of traditional owners that they now have a legitimate basis in terms of recognised rights and interests'. There is a sense amongst Traditional Owners that this recognition gives, or should give, a position of negotiating parity with non-Indigenous decision-makers and landowners over access to water (NAILSMA, 2009).

This expectation was influential in shaping water policy within Northern Territory Indigenous organisations during the 2000s. At that time, Indigenous leaders across north Australia looked to the experience of southern Australia where water rights are inequitably distributed, and water use is now mostly capped, especially in the Murray-Darling Basin (Godden et al. 2020; Hartwig et al. 2020). Through the Indigenous Water Policy Group, convened by the North Australian Indigenous Land and Sea Management Alliance in 2006, advocates pointed to the risk of excluding Indigenous communities from water allocations, especially those groups who were in the process of claiming land and/or may not had developed plans to use water commercially. Reserving water came to be seen as a critical means of advancing current and future Indigenous business enterprises that require an entitlement. Additionally, reserves provide a means of accessing potential revenue streams derived from trading water to non-Indigenous enterprises, as water trading increases.

The research and lobbying efforts of the Indigenous Water Policy Group resulted in a change to NTG policy by providing for Strategic Indigenous Reserves (SIR) of water to be included in some new water plans (Jackson and Barber, 2013, O'Donnell, 2013). The approach was endorsed by the Northern Land and Water Taskforce which in 2009 in its *Final Report* recommended that '[t]he allocation of water rights under statutory water plans should explicitly recognise Indigenous Peoples' rights and interests in water.' In the absence of a legislative requirement compelling the executive to recognize Indigenous rights to water for commercial purposes, officials of the NT's water agency first included a SIR in the Katherine (Tindall aquifer) Water Allocation Plan in 2009 that would be available if native title was determined within the five year life of the plan (Jackson and Barber 2013). However, by the time the WAP was enacted in 2019, the claim had not been resolved, and so no water was available for the AWR (Table 1). Soon after, the NTG included reserves for Indigenous use in two other draft water plans in neighbouring water resource areas (Mataranka and Ooloo). In the Mataranka Plan, it was proposed that 25 per cent of the consumptive pool be set aside for Indigenous commercial development and in the Ooloo draft plan it was proposed to set aside 24 per cent of the maximum extraction limit for Indigenous use (O'Donnell, 2013). The policy was abandoned in 2014 following a change of government but in 2017, the NTG formally adopted its policy on what were called Strategic Aboriginal Water Reserves and amended the *Water Act 1992*

(NT) to create the AWR in 2019. However, water allocation and planning in the NT have not delivered on the promises of the AWR to create substantial water rights for Aboriginal people. Most Aboriginal people remain limited in their ability to access water, as they are not eligible to access a Aboriginal Water Reserve until a water allocation plan has been declared (it is open for Aboriginal people to apply directly for water licences, but without well-developed plans for how the water will be used, this option is also extremely limited).

### 3.1 Water licensing impacts on the AWR

The processes by which water licences have been allocated in the NT have been closely scrutinised during the past decade. In 2017, the Labor government initiated a review of water licensing decisions, following community concerns about the fairness of decisions made by the former Country Liberal Party government (Dyson and Davison, 2017). The purpose of the review was ‘to assess if processes and legislation were followed correctly and without interference in the assessment and decision making of licences’ during 2012-16 (Dyson and Davison, 2017). The reviewers found no evidence of political interference during their investigations and did not recommend any current water licences be revoked, but they did find fault in the handling of licence applications (procedural flaws) and also criticised the system used to calculate sustainable water allocations based on 30 years of data, rather than the full historical record. The panel recommended more improvements be made, noting that those changes will require extra resources. The report also found fault with the broad way in which the Water Controller had interpreted the Indigenous reserve policy:

‘The [Water] Controller was not necessarily bound to give any particular weight to commenter concerns about Indigenous access to water resources, or issues about equity more generally. He was, however, obliged to take them into account, *and not dismiss them* by applying a policy that was not relevant.’ (Dyson and Davison, 2017, 72, emphasis added)

This dismissal, or lack of consideration of the potential impact of water extraction licences on the AWR, remains a problem today. A review of data available in the NTG Water Licensing Portal (the subject of a future publication)<sup>1</sup> identified several problems, including one recent decision in the Darwin Rural area explicitly acknowledged that water was already overallocated to the extent that the AWR received zero water allocation, yet, inexplicably, this was then used to justify granting the water extraction licence, as there would be ‘negligible additional impact on the provision of a future AWR’ (see water licence HGSC10340, emphasis added).

## 4 Growing contestation at the frontier

Decisions by the Water Controller to issue water extraction licences that impact the AWR have also become increasingly contested; including the recent Singleton licence review in Central Australia (described in Part 1), and the two cases (which we refer to as *McFarlane* and *Larrimah*) in the high yielding Mataranka Tindall Limestone Aquifer. A water allocation plan has not yet been declared for the Mataranka Tindall aquifer, although water planning has been underway since 2008 when water extraction in the upper catchment zone encompassing the town of Mataranka placed pressure on the resource (Jackson and Barber 2013). The *McFarlane* case has a long history of contestation, dating back to an original licence application in 2006. Most recently, in 2013 (during the term of the CLP government), a 5,800 ML/year water licence was allocated to Ms *McFarlane*, (who was then the CLP candidate for the federal seat of *Lingiari*), more ‘than she would have been able to use at the

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<sup>1</sup> Available here <https://nt.gov.au/environment/water/water-information-systems/water-licensing-portal>

time' (Everingham, 2017). Ms McFarlane sold the property to a forestry company in 2015 but denied that she had done so because the licence had increased its value (Curtain, 2016). For several years, this case was very topical in the NT (Curtain, 2013), and was one reason for the 2017 review of water extraction licence decisions referred to above (Everingham, 2017).

The Larrimah case involved a decision to issue a 10,000 ML/year water licence from the Tindall Limestone Aquifer to the NT Land Corporation in 2020. In December 2020, the Northern Land Council, on behalf of the Wubulawan Aboriginal Land Trust and the Mangarrayi Aboriginal Land Trust, and the Environment Centre NT applied to the Minister for Environment to review the Controller's decision. The Minister engaged a Water Resources Review Panel, who recommended that the decision be overturned, finding that the Acting Controller erred in granting the licence. The many failings identified by the Panel included 'failure to apply the NT Water Allocation Planning Framework properly' and 'the incorrect assessment of the grant of the NT Land Corp licence on the [Strategic] AWR' (2021 p 18), observing that 'the grant of the NT Land Corp licence may result in no water being available for the [Strategic] AWR' (2021 p 17). In June 2021, a decision was made not to grant the licence (Brann, 2020).

The NT Land Corporation warrants particular scrutiny for both its opaque corporate structure and its controversial history of serving as a vehicle for the NTG to frustrate Aboriginal land claims. The establishment of the NT Land Corporation in the 1980s by the NTG operated to obscure NTG's transfer of land and other natural resources to commercial interests. Analysis of the actions of the NTG in land rights disputes over many decades show that it made 'immense areas of land and resources' (Crough, 1992, 1) available to commercial interests at virtually no cost. In doing so, these lands could not be claimed by Aboriginal people, some of whom were removed from their traditional lands. The NT Land Corporation was a major participant (and beneficiary) of the NTG's efforts to prevent land coming under Aboriginal control. It was described by Edgar as 'a legislative and administrative device' that was 'artificially separated from the public administration' as a land holding entity to subvert Aboriginal rights (2008, 160). By reducing land available to Aboriginal people, this policy directly impacts on Aboriginal water rights today, by reducing the area of eligible land for the AWR.

The extraordinary arrangements relating to land claims were the subject of litigation brought by Aboriginal parties, and its purpose and reach was reigned in. Yet the NT Land Corporation's powers and reach have been vastly extended by the new water laws (see Part 5), and we consider its history as particularly relevant to the political economy of water in the NT.

The potential for conflicts of interest identified in Part 2 was also a repeated problem in these contested decisions. In both the Larrimah case and the Singleton case, the original reviewer (the Minister for Environment) was required to step away. In the Larrimah case, this was because the Minister declared a conflict due to her 'oversight' of the NT Land Corporation, and the Health Minister made the decision to overturn the licence application (Brann, 2020). In the Singleton Station case, the Minister for Territory, Families and Urban Housing stepped in to make the decision (in this case, re-issuing the licence to Fortune Agribusiness with amended conditions), after concerns were raised that the Minister for Environment was the part of the original decision-making process and was therefore conflicted out of reviewing the original decision (Jonscher, 2021).

## 5 Shifting frontiers: ongoing water law reform

Water law in the Territory has been under a constant state of reform for over a decade (including a current engagement process on the Strategic Water Plan Paper until February 2022). Although open

processes of law and policy reform are essential for good governance, ‘weak laws and regulations, combined with ongoing consultation efforts and the publication of policy papers, can create the illusion of an effective regulatory regime’ (Howey and Greal, 2021, p. 2). The ongoing reforms have yet to deliver strong, effective water law and regulation, despite repeated rounds of public engagement.

The most recent round of law reform, the 2021 *Statute Law Amendment (Territory Economic Reconstruction) Act* (TER Act), can also be considered as part of a response from the NTG to the contested nature of the decision-making with respect to water licences. The TER Act amended the Water Act to specifically include the ability to issue ‘development licences’ in which the original licence applicant would trade both land and water to future water users in a designated development precinct. Although the licences must still identify a specific beneficial use, under this arrangement, it would be harder to challenge a licence decision on the grounds that the proposed water use is too speculative (a clear concern in the Larrimah case, see Water Resources Review Panel (2021)). These laws will make it easier for the Water Controller to issue water extraction licences to entities such as the NT Land Corporation, who in the Larrimah case intended to subdivide land and sub-lease water, thereby increasing competition for water. In the absence of consistent consideration of whether sufficient water remains in the consumptive pool to provide for the AWR when licences are approved, the ease of issuing licences may increase the likelihood of reaching the sustainable limit on extraction before the AWR even comes into existence.

Further, the TERC Bill appears to take advantage of the NTG response to a COVID-related economic slow-down to pursue an agenda to remove ‘red tape’ from water licence decision-making. The title of the Bill emphasises economic reconstruction, but the main outcome of the water law amendments will be to make it even easier for entities like the NT Land Corporation to acquire more water, faster. The Review of the Larrimah decision noted that the Land Corporation’s application for a licence was ‘speculative in nature’, one made to meet government commitments to northern agricultural development (Water Resources Review Panel, 2021, 4).

In amending its water law, the NTG missed three major opportunities to actually improve water decision-making and economic development in the NT (and compliance with the NWI): (1) improving water service standards for remote communities in the NT, which would reduce health costs and increase living standards; (2) requiring all licensing decisions to be made in accordance with statutory based water plans and extending the WAP areas (which currently only include 28% of water licences); and (3) charging fees for water use that would provide a dedicated funding stream to support improved water resource planning, essential for maintaining and increasing economic uses of water across the Territory.

In 2021, the NTG also developed, then withdrew, two Environmental Law Omnibus Bills (scheduled for August 2021 and May 2022). Although the draft Bills were not publicly available for review before withdrawal, an information paper developed by the Department of Environment, Land and Water Security<sup>2</sup> provided some indication of the likely content, which included the following regressive steps:

- (1) removing the need to comply with WAPs when issuing a water licence, which would potentially enable future water licences to be issued in contravention of a WAP;
- (2) enabling water trade to occur outside WAPs, which would likely increase water trading in regions where water data remains of poorer quality;

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<sup>2</sup> This paper is no longer publicly available.

- (3) reducing public notification requirements, including for new dams, which would limit the opportunities of the public, including Traditional Owners, to provide feedback before decisions are made (Environmental Defenders Office, 2021).

The final form of these laws will be of immense importance to water management in the Territory. If passed as originally designed, they have the capacity to reduce transparency and scientific rigor in water allocation and further undermine public confidence in water regulation. In addition, the combined effects of these changes severely weakens the drivers for investing time and funding in the creation of WAPs, as they would no longer be binding on water licence decisions, or necessary to support water trading. In fact, the only water users still depending on WAPs would be Aboriginal people (who require a WAP to create the AWR), as well as the environment (which depends on a WAP to formally set an environmentally sustainable yield).

## 6 Conclusion

Water is a valuable resource, and ever more so in the arid and semi-arid zones of Australia. The new Singleton Station water licence, and the recent application on the Roper River (Fitzgerald, 2022) represents a new level of resource extraction at the hydrological frontier (Langton 2002) that rivals ore extraction in scale and economic significance. The excessive scope of the new water laws represent a new 'gold rush,' not dissimilar to the campaign by mining companies and the NTG itself to prevent the acquisition of property rights by Aboriginal peoples in the 1970s when the Aboriginal reserves of the colonial era were targeted for gold, bauxite and, notably, uranium mining, and arguments mounted to the effect that Aboriginal ownership of reserves would prevent mining. History is being repeated through the 'development licence' clause of the amended water legislation, and the continued efforts of the NTG to sideline water allocation plans that trigger the reservation of water for Aboriginal economic development, thereby protecting their interests as competition for water increases.

In this paper, we have demonstrated that although the AWR is an essential initiative designed to prevent Aboriginal exclusion from water rights and enable economic development, the implementation of the law and policy is flawed and vulnerable to further erosion. The AWR only formally exists in WAP areas, and inconsistent consideration of the future AWR in licence decisions further reduces the likelihood that any water allocation will remain for the AWR when any future WAPs are approved. When coupled with the ongoing deficiencies in safe and secure water access for Aboriginal communities, the NT provides another example of a global problem, in which 'jurisdictional and regulatory injustices along with the broader political and economic asymmetries advanced by settler colonial States (re-)produce water insecurity for Indigenous peoples' (Wilson et al., 2021, 783). Water allocation and planning, as well as water service provision, continue to reinforce and reproduce racialized access to (and denial of) water rights. Even the AWR itself, intended to be an equalizer in terms of water access for economic development, remains formally inaccessible to Aboriginal people while they wait for the necessary regulations to be released by the NTG.

Rather than seeing water regulation as 'red tape', we argue that the NTG should embrace the intent of the NWI: to create evidence-based, participatory water allocation and planning, for both rural and urban areas, with cost recovery mechanisms to provide secure funding for water data and management. The NTG is in danger of squandering its leadership in recognition of Aboriginal water rights by failing to give effect to these rights as part of a robust water planning and allocation framework.

Aboriginal people have a long history of sustainable management of water resources that have supported trade as well as environmental, social, and cultural well-being. The NTG needs to set aside its 'frontier' approach to water governance, and instead, genuinely work with all NT citizens to deliver just, sustainable, and equitable access to water.

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