

Submission on the Northern Territory's strategic water plan directions paper

March 2022



Preamble

The Aboriginal Areas Protection Authority (the Authority / AAPA) is a statutory body established under the *Northern Territory Aboriginal Sacred Sites Act 1989* (NT) (Sacred Sites Act) and is responsible for overseeing the protection of Aboriginal sacred sites on land and sea across the Northern Territory.

The protection of Aboriginal sacred sites is recognised by the Northern Territory Government and the broader Territory community as an important element in the preservation of the Territory's cultural heritage for the benefit of all Territorians. The Authority seeks to strike a balance between the protection of sacred sites and development in the Northern Territory.

Submission

The Authority welcomes this opportunity to comment on the Directions Paper and contribute to the development of a strategic water plan for the Northern Territory.

Waterways and water places are fundamentally important in Aboriginal culture and spirituality. This is illustrated by the fact that almost one third (~ 5,000) of all sacred site records held by the Authority (15,720) are water-related. Protection of these sacred sites and the values associated with them is paramount to protecting living Aboriginal culture in the Territory.

The Authority understands that development of the Territory is important. To increase certainty for developers, it is essential to increase knowledge and understanding of the relationship between water and sacred sites, both in a scientific and cultural way. It is equally important to achieve certainty for custodians in the protection of their sacred sites across the Territory.

Set out below are comments in relation to specific sections of the Directions Paper.

Principles

The Authority agrees with the six 'Principles' outlined in the Directions Paper and considers that they are reasonable, well founded and generally encompass NT interests in water.

The Authority recommends the inclusion of an additional principle for 'free prior and informed consent' in relation to water decisions that affect Aboriginal Territorians and their cultural values. As stated above, the relationship between water and sacred sites is profound; sacred sites are protected by statute in the Northern Territory; and more broadly the livelihoods of Aboriginal people in the Northern Territory are explicitly related to the sound management of water.

Water in the Territory

The Authority agrees that a 'new era' is upon us in terms of water management and water use in the Northern Territory, and that current and future challenges must be informed by clear knowledge of the resources. The Directions Paper acknowledges that there are significant gaps in our knowledge of some water systems and these gaps compound challenges to water management.

The Authority posits that a significant gap is Aboriginal knowledge of water systems across the Northern Territory. It is the Authority's experience that many Aboriginal people possess knowledge of the relationships between seasonal rainfall and groundwater behaviour. This knowledge is not necessarily commonplace, but in some parts of the NT such knowledge could inform future management of water resources.

To this end the Authority recommends that a significant study be undertaken to document Aboriginal knowledge of water to inform future water management regimes in the Northern Territory (see below under Direction 6).

Direction 1. Water Governance is contemporary and coordinated

The Directions Paper raises limitations in the coordination and comprehensive forward planning on water due to current governance arrangements in the NT. The Paper discusses an approach for centralisation and coordination of water management policy and legislation, whilst maintaining independence in relation to critical responsibilities.

The Authority supports this and posits that consideration should be given to the manner in which legislation and multiple regulatory processes and decisions interact for projects relating to water. In some cases, these processes can result in competing decisions.

For example, in addition to standard water regulatory mechanisms (e.g. water-use licencing under the *Water Act 1992*), particular projects relating to water may be subject to additional regulatory approvals (e.g. environmental approvals under the *Environment Protection Act 2019* and an Authority Certificate under the Sacred Sites Act). This can be problematic for developers when one process may enable the project, but another regulator effectively restricts the project in such a manner that the project cannot proceed.

The Authority recommends that the enabling of a project should only occur after all other regulatory requirements have been met. This issue has been addressed for projects regulated under the *Petroleum Act 1984* and the *Petroleum (Environment) Regulations 2016*, which require the issuing of an Authority Certificate under the Sacred Sites Act prior to the approval of an Environmental Management Plan for a petroleum activity.

The Authority supports the establishment of a separate entity for the controller of water resources, as this would be consistent with the Principles as stated in the Discussion Paper. The Authority asserts that consideration should be given to the establishment of a statutory body for the management and allocation of water resources, and that the mandate of such a body should be to balance the interests of all stakeholders, and preserve the legal rights of custodians of sacred sites, in any given decision to allocate water.

It is noted in the Directions Paper that there is considerable dissonance between the multifarious elements of water management in the NT. Such dissonance relates to the management and provision of drinking water to remote communities and associated agencies as compared to urban centres; initiatives and strategies for the recycling of water resources; and industrial allocation of water resources – particularly in remote regions of the Northern Territory.

The Authority suggests that clear principles for resolving these dissonances should be a key object of a future water strategy for the NT, and should specifically reference custodians of water related sacred sites in the Northern Territory.

Direction 2. Drinking water is Safe

Equality in access to drinking water across the Northern Territory and in accordance with international standards is paramount. Consistency in the application of drinking water standards and governance should be a key aim and outcome of any future NT Strategic Water Plan.

From the Authority's perspective, consultation with custodians of sacred sites about industrial scale developments entailing water extraction or use are significantly influenced by the water security of local communities. Such considerations are always balanced by the Authority against the impacts of such development on sacred sites – noting that data on water impacts is typically scant or indeterminate. However, the apparent or perceived inequity posed by some developments is often profoundly felt by Aboriginal people when considering the protection of their sacred sites. Many examples have arisen in the context of hydraulic fracturing where potential impacts on groundwater and downstream sacred sites are indeterminate.

Where custodians reside in communities where water security is questionable (e.g. Laramba and Yuendumu, but also the Roper, Daly, Fitzmaurice and Wildman regions) use and impacts on water supply are paramount and concerning questions.

Direction 3. Water Use is efficient and productive

The Authority supports a user pays system for the allocation, use and trade of water resources, noting that such allocations are often contested by Aboriginal stakeholders who may hold no land rights, or in some cases coexisting native title rights. Impacts on sacred sites may be a factor in such contestation, or broader perceived impacts on cultural landscapes may motivate objections to water licensing decisions in the NT.

The Northern Territory Strategic Water Plan must anticipate and account for Aboriginal rights and interests in water. The plan must also address perceived or actual inequities in the water licensing regime.

The future of water rights must be considered by the Northern Territory Strategic Water Plan in all its legal ramifications, present and future. As the Directions Paper contemplates, the strategy must be informed and supported by the community it will serve, both now and in the future. Aboriginal people in the NT possess a myriad of land rights through the *Aboriginal Land Rights Act (NT) 1976* and the *Native Title Act 1993*. Approximately 53% of the Northern Territory is Aboriginal Land, and significant parts of the NT are subject to native title determinations. In addition the Sacred Sites Act protects all sacred sites on all tenure types in the NT, whether they are documented or not, and the existing record of sacred sites is undoubtedly a small proportion of sacred sites that exist in the Northern Territory. The protection of sacred sites is increasingly a point of complex development conflict in the allocation of water resources in the NT.

In this increasingly complex and contested space the Authority supports a user pays framework for the allocation of water resources to assist in resolution of competing interests and in the anticipated compensation of stakeholders who may exercise current or future rights in water.

More immediately the Authority considers that the assessment of water allocations and subsequent decisions would benefit from greater resourcing funded by a user pays system.

Direction 4. Water supports jobs and economic growth

Economic development of the Northern Territory must accommodate Aboriginal values in landscapes, including the protection of sacred sites.

Many industries are water-intensive and water-reliant, including irrigated horticulture and cropping, aquaculture, manufacturing, mining, on-shore gas production and associated downstream processing and value adding, commercial and recreational fishing, and tourism. Development of these industries must account for Aboriginal interests and rights in an upfront and inclusive manner in order to achieve the desired outcomes of the objectives set by the Territory Economic Reconstruction Commission. Failure to do so will result in controversy, project failure, and lack of attainment of economic development objectives. This can be avoided by giving paramount consideration and recognition of the land interests of Aboriginal people in the NT and the rights and interests that such interests entail, alongside the statutory protection of sacred sites.

Water initiatives focused on increased water productivity will necessarily be assessed by Aboriginal stakeholders in terms of the protection of sacred sites, and in terms of the preservation of their livelihoods. Any rules and regulations pertaining to harvesting wet season flows and groundwater management must account for Aboriginal prerogatives in the management of their traditional estate. Failure to do so will be a failure of public policy and a failure of the Northern Territory Strategic Water Plan.

The Authority advocates that maximum efficiency in the allocation of water resources be achieved through governance measures and that water allocation plans and regulatory and policy frameworks adequately reflect Aboriginal decision making rights and interests in water.

The Strategic Aboriginal Water Reserves must be enshrined in legislation, and the framework must be broadened to include Aboriginal cultural values in water.

Direction 5. Cities, towns and communities use the whole water cycle

As noted above, water equality should be an essential criteria for the Northern Territory Strategic Water Plan.

The Authority notes that there should also be equality between domestic users of water and industrial users of water. User pays frameworks as contemplated in Direction 3 should subsidise a broader framework of water governance.

Direction 6. Aboriginal connections to water are valued.

The Authority agrees that Aboriginal connections to water are important. The strategic plan must make clear that the Territory is committed to protecting water-related cultural values and knowledge. These values should be protected for reasons including:

- Cultural aspects are included in the definition of the environment, and are to be protected in accordance with the *Environment Protection Act 2019* and other NT legislation (e.g. *Waste Management and Pollution Control Act 1998*, *Mining Management Act 2001*)
- There is an obligation to protect water-related sites if they are sacred sites in accordance with the Sacred Sites Act
- The protection of sacred sites also protects the community from consequences (including death) that may result from disturbing/damaging highly sensitive sacred sites.

The Authority considers that the four proposed pathways on this Direction set out in the Directions Paper are broadly appropriate. Specific comments are provided below.

1. Meaningful engagement with Aboriginal people about water is more than an opportunity for the NT, rather, it is required in order to protect cultural values and give certainty for decisions on future developments.
2. Using a risk assessment approach does not work well for protecting sacred sites, as any damage to a sacred site is both unacceptable and unlawful.
3. Involving Aboriginal Territorians in forums and meetings is a good step towards fairer governance and more informed decisions relating to water. Consultations should ensure that the right people speak for the right country.
4. It is important for the Territory to partner with Aboriginal people and their representatives to co-design methods to identify and prioritise water-dependent cultural values. There is currently a huge gap in information around cultural water values and the ways in which these could be impacted by water decisions. Addressing this gap is absolutely fundamental to protecting cultural values in accordance with international standards, i.e. addressing the 'informed' in 'free, prior and informed consent'¹. This is consistent with the findings and recommendations of the Juukun Gorge Inquiry²

The Authority considers there is a need for an in-depth study to record Aboriginal knowledge in relation to water values/sites and understand the connections of sites with water, the potential impacts of water decisions, thresholds of impact, and how monitoring and adaptive management may address such impacts. This will require:

- Recognition that cultural values of a water-related place may not be related to its environmental significance, and that cultural values can change over time.
- Recording of Aboriginal cultural knowledge about water.
- Increasing scientific (biophysical) understanding of water-dependencies and potential pathways of impact

¹ Free, prior and informed consent (FPIC) is a key principle for the protection of cultural values/heritage, consistent with the United Nations Declaration on the Rights of Indigenous peoples (UNDRIP) to which Australia is a signatory, and the convention on Biological Diversity and the International Labour Organisation Convention 169.

² A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukun Gorge. Joint Standing Committee on Northern Australia, Parliament of the Commonwealth of Australia. October 2021, Canberra.

- Linking scientific and cultural understanding of water and water places to define thresholds of impact (in general and at specific sites) and options for monitoring and adaptive management.
5. There is also a need for the Territory to promote the importance of protecting cultural values among developers and service providers. Due to competing values, in some instances increased investment will be required so as to protect cultural values while providing essential services or meeting development needs. It is important that people have the right information, and a sense of options, in order to make such decisions. In some cases there may be a need for consideration of compensation for prior water-related decisions that have negatively impacted cultural values.
 6. The Authority supports the creation of opportunities for Aboriginal people to be involved in managing water resources. This will need a strong commitment from the Territory and should include education, training and capacity-building of Aboriginal people to facilitate this involvement at various levels (e.g. monitoring, management, decision-making, etc).

The above comments also apply to many of the other ten Directions, particularly the following:

- **Direction 7: Water-dependent environmental values are protected.** Increasing scientific and cultural understanding of water will enable better-informed decisions for environmental protection (including cultural values).
- **Direction 8: Water science, knowledge, skills and innovation are enhanced.** This fundamentally requires addressing the gap in information around cultural water values and how they may be impacted by water decisions.
- **Direction 9: Territorians are engaged in water stewardship.** An increased scientific and cultural understanding of water will contribute to better water and cultural literacy, which is required for broad engagement in water management and water stewardship.

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