Review of the *Water Industry Competition Act 2006* and regulatory arrangements for water recycling under the *Local Government Act 1993*

IPART’s response to the Urban Water regulation review Position Paper

*Water — Submission*
March 2014
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1 Introduction

The Independent Pricing and Regulatory Tribunal (IPART) welcomes the opportunity to respond to the Department of Finance and Services’ (DFS) Position Paper (Urban Water Regulation Review – Position Paper) on its joint review of the Water Industry Competition Act 2006 (the WIC Act) and regulatory arrangements for water recycling under the Local Government Act 1993 (LG Act).

IPART currently administers the licensing of water industry infrastructure schemes in NSW captured under the WIC Act. We also have a role in arbitration, access undertakings and pricing in the WIC Act. Further, we have broader regulatory functions addressing water pricing, energy pricing, and local government, and we provide advice to the NSW Government in relation to its regulations. This makes us well-placed to provide comments on water industry regulation.

The introduction of the WIC Act has delivered benefits by introducing competition into parts of the water industry. The proposed changes to the WIC Act further refine the licensing framework. We generally support these reforms and consider that, if adopted, they would lead to greater efficiency and the reduction of red tape for industry.

While, in principle, we consider a more centralised framework for the regulation of the water industry in NSW would have been preferable; we support the majority of the proposed reforms to the WIC Act set out in the Position Paper. These reforms can be considered as an important step towards better industry regulation.

In particular, we support a risk-based approach to determine which regulatory framework, if any, should apply to a particular scheme or operator. Under the proposed approach, small schemes and operators under the threshold limits are excluded from the WIC Act.1 For schemes or operators that exceed the threshold limits2, we support using a matrix to assess them, with the lower-risk schemes (eg, stormwater reuse irrigation schemes) being subject to lighter-handed regulation under the WIC Act. More risky schemes should be subject to the full WIC Act provisions.

IPART offers its assistance in further developing the light-handed framework under the WIC Act.

In addition to this risk-based approach, we generally support the following recommendations discussed in the Position Paper:

- introducing state-wide entity licensing
- giving IPART regulatory responsibilities for both licensing and scheme approvals
- removing some barriers to competition (eg, repealing section 10(4)(d) of the WICA Act, developing deeming provisions for customer contracts)

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1 These schemes will be subject to no regulation or regulation by local government or health, depending on their circumstances.
2 Or are high risk recycled water or stormwater harvesting schemes.
• increasing the accountability of the scheme owner in scheme design and the commissioning and ongoing management of assets

• introducing more comprehensive last resort provisions under the WIC Act, particularly step in powers to maintain essential services to small retail customers.

The following section provides comment on the recommendations made in the Position Paper.
2 Response to the Position Paper’s recommendations

The following comments are provided on the Position Paper recommendations.

Position Paper recommendations

1 Amend the WIC Act to allow metropolitan councils to apply for a licence(s).
2 Certain metropolitan council–led schemes are regulated under the WIC Act.

We support these recommendations subject to:

- appropriate transitional arrangements to enable the numerous schemes operated by metropolitan councils to be transitioned to the WIC Act over time (we recommend a 3 year transition period)
- the risk-based approach to applying the framework, outlined above (ie, assessing the risks of each scheme), and
- subjecting some schemes to a lighter form of regulation under the WIC Act.

Stormwater reuse irrigation schemes represent the bulk of schemes currently operated by Metropolitan Councils. Schemes operated by Metropolitan Councils are currently not captured under any legislation, but will, under the recommendations set out in the Position Paper, be subject to the risk-based assessment and may be captured by the WIC Act.

Many of these schemes were funded by government grants and are not commercially operated. They often provide public benefit in the form of increased community amenity (ie, irrigating public playing fields during periods of drought). The application of the threshold and matrix tests should ensure that the most appropriate regulations apply to these schemes.

The level of regulation should relate to risk. We therefore recommend that for lower risk schemes, a lighter form of regulation within the WIC Act be applied. IPART can assist DFS in developing more light-handed provisions for these types of schemes.
Position Paper recommendations

3 An objects clause is included in the revised Act with the following objectives:

a. protect public health and safety, the environment and the interests of consumers, including in the longer term
b. facilitate competition by allowing access to significant water industry infrastructure
c. facilitate the efficient, reliable and sustainable provision of water, recycled water and wastewater services, having regard for financial, environmental and social costs and benefits
d. promote compliance with government policies and plans relating to the management and sustainable use of urban water and wastewater resources.

We support the inclusion within the WIC Act of clear objectives as set in the Position Paper.

Position Paper recommendations

4 The entity licensing process is separated from scheme approval.

5 The Independent Pricing and Regulatory Tribunal remains the regulator of entity licensing and scheme approval under the revised WIC Act.

6 Licences are broadened to be entity-wide.

We support these recommendations. In particular, we support the proposal to introduce entity based licensing together with a risk based scheme approval process. This will enable an entity to supply retail or provide operational services (as permitted on its licence) under a single licence anywhere in NSW. An entity will only require one licence to provide a particular service, provided it has demonstrated its capability to do so in its initial licence application. We consider that this change has the potential to reduce costs and red tape for both proponents and IPART.

As part of the licence assessment process, it is also important to assess whether an operator has adequate systems to manage assets, water quality, sewerage services and environmental impacts. We also support generic licence conditions regarding the need to maintain adequate insurance and reporting obligations.

IPART has the capability to undertake the required licensing functions. The use of only one regulator will ensure better coordination of compliance and auditing functions between licensees and scheme owners. We will continue to use a cost effective risk based systems approach in respect to compliance and auditing functions of licences and scheme approvals.
Position Paper recommendations

7 An objects clause regarding licensing is included in the Act with the following objectives:
   a. protect consumers (including in the longer term)
   b. ensure the safety, reliability and security of drinking water, recycled water and wastewater services provided to the community
   c. facilitate competition, improved efficiency and innovation in the urban water industry
   d. promote policies set out in any prescribed water policy or planning document
   e. promote the equitable sharing among participants in the drinking water market of the costs of water industry infrastructure that significantly contributes to water security.

We support the inclusion in the WIC Act of clear licensing objectives as set out in the Position Paper.

Position Paper recommendations

8 The scope of the WIC Act’s current licensing regime is narrowed to the following:
Retail supplier’s licence is required to supply:
   • drinking water, recycled water, harvested stormwater or wastewater services (metering and/or billing) to 30 or more individually metered residential/small commercial premises
Operator’s licence is required to operate:
   • a scheme that supplies drinking water, recycled water, harvested stormwater or wastewater services to 30 or more individually metered residential premises/small commercial premises
   • a high risk recycled water or stormwater harvesting scheme
   • a drinking water facility that has the capacity to treat/supply more than 500 kL/day
   • a wastewater facility that has a design capacity of more than 750 kL/day.
We support the proposed thresholds as set out in the Position Paper. We consider that it would impose an excessive regulatory burden to capture low-risk schemes. We consider that these thresholds, in conjunction with the matrix (see response to recommendation 25), will provide for proportionate regulation and avoid unnecessary regulatory burden.

We recommend that these thresholds should not apply cumulatively for a retailer managing multiple sites around NSW, unless the proponent volunteers to be subject to licensing.

We note that many schemes have not yet required a WIC Act licence because of the transitional arrangements that are in place until June 2014. We understand that these arrangements will be further extended until such time as the new licensing regime is established. We support this transition.

Finally, we note that subject to an operator being captured by the thresholds for licensing which are discussed above, licenses will be granted under broad service categories including:

- drinking water - small retail customers
- drinking water - bulk
- recycled water - harvested stormwater, greywater and/or sewage (as specified)
- wastewater - small retail customers
- wastewater - bulk.

We consider that the above service categories are appropriate.

However, we recommend that provision be made for IPART to apply a limitation on licences for smaller new entrants who do not have the capacity or capability to operate larger, more complex schemes. To implement such an approach, IPART could develop a framework to assist in forecasting resource requirements for various types of schemes to facilitate assessment of an operator’s capacity.

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**Position Paper recommendations**

9 Metropolitan councils are able to apply for a licence.

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3 See p 20 of the Position Paper.
We support schemes operated by Metropolitan Councils being assessed under the risk-based approach to determine which regulatory framework, if any, should apply. We consider that higher risk schemes (ie, third pipe systems) should be subject to full licensing and scheme approval requirements. Lower risk schemes (ie, stormwater reuse irrigation schemes) could be subject to a lighter form of regulation (see our response to recommendations 1 and 2 above).

Further, we note that Metropolitan Councils could avoid licensing requirements by:

- engaging WICA licensees to operate any high risk schemes that they own, or
- redesigning schemes to reduce public health risk.

### Position Paper recommendations

**10 In future, authorised persons will no longer be listed on a licence.**

We support this change, in principle, subject to new standard licence conditions being developed.

Currently, some licensees rely on other persons to provide licensed activities. Without such assistance, these licensees would not have satisfied the technical capacity assessment to be granted a licence. For this reason, third parties have been named as authorised persons on licences. In these circumstances, if a licensee ceases to have access to the services of the authorised person, we need the ability to reassess the technical capacity of the licensee.

We envisage that some proponents (particularly small new entrants) are likely to engage specialists, where they lack in-house expertise/experience (ie, a third party could be engaged to provide customer billing services). In these circumstances, we consider there should be a standard licence condition requiring key persons engaged to be appropriately qualified. Further, a licensee should be required to:

- notify us if it proposes to change a third party that has been previously used to satisfy the technical capacity assessment
- stipulate what new arrangements will apply.

We would then assess whether the licensee still maintains the technical capacity to hold a licence. This notification requirement would also inform our audit process.
Position Paper recommendations

11 Mandatory referrals to government agencies are removed from the licensing application process.

We support this recommendation, based on the proposed separation of the licensing and the scheme approval processes.

Position Paper recommendations

12 Certain licensees will need to demonstrate their ongoing financial capacity by providing an annual accounting statement.

We support this recommendation.

Under existing licensing arrangements, we conduct a 2 part financial assessment of all licence applicants, comprising a financial capacity assessment of the applicant and a financial viability assessment of the proposed scheme. With the separation of licensing and scheme approvals, we would only need to conduct a financial capacity assessment of the operator at the time of licensing.

We consider it is appropriate for certain licensees to demonstrate their ongoing financial capacity through periodic reporting. We therefore support annual financial capacity reporting by licensees, based on similar reporting in the UK water industry.

We envisage this statement would need to be certified by the licensee’s accountants and its CEO or equivalent. This reporting could provide some forewarning of any financial capacity concerns and give rise to increased monitoring of the licensee.

Position Paper recommendations

13 Repeal section 10(4)(d) and insert a new provision empowering the Minister to impose a licence condition requiring retail suppliers to provide services only in connection with a scheme approved under Part 5 of the Act.

We support repealing section 10(4)(d) of the WIC Act. However, we do not support the proposed new provision for a licence condition.

Section 10(4)(d) requires retail suppliers to supply water of sufficient quantities from sources other than from a public water utility.
We consider that this requirement represents a significant barrier to entry, preventing competition both in and for the market.

We do not support the introduction of licence conditions requiring retail suppliers to provide services only in connection with a scheme approved under Part 5 of the Act. This type of condition aims to preserve some of the original intent of section 10(4)(d). Under the proposed approach, retailers would effectively only be able to provide retail services to residential and small commercial customers where a new entrant has invested in water infrastructure (ie, new greenfield and infill development areas), but not in areas where no new investment has occurred.

This allows for competition for the market (ie, competition to service a new greenfield or development area), but it restricts retail competition in the market to the servicing of large non-residential customers. That is, it prevents new entrants from competing purely for the provision of retail services to residential and small commercial customers by using access arrangements or wholesale services from existing suppliers (both public and private).

We consider that there should be opportunities for competition in the market, where efficient and viable to do so. We also note that access and wholesale pricing methodologies can be designed to prevent ‘cherry picking’ and market entry that is not in the interests of customers.

We do not consider that greater levels of retail competition would necessarily encourage unsustainable levels of water use and reverse the significant efficiency gains that have been delivered by the Government’s Metropolitan Water Plan over the past decade. Nor does greater competition in water markets prevent the Government from continuing its integrated approach to resource planning and managing demand where required, particularly through drought restrictions and/or pricing.

We also note that full retail competition in the water industry is emerging in the UK. In 2006, retail competition for the non-domestic water sector was introduced in Scotland, through the creation of a market operator and a licensing scheme. If legislation is passed, the Scottish model will be introduced in England by 2017.\textsuperscript{4,5} This phased approach to retail competition could be replicated in NSW.

\textsuperscript{4} Department for Environment, Food and Rural Affairs (UK), Water Bill, Reform of the water industry: retail competition, November 2013, p 4.
\textsuperscript{5} As of 10 March 2014, the Water Bill has passed the House of Commons and the report stage of the House of Lords is due to commence on 25 March 2014, site accessed 10 March 2014: http://services.parliament.uk/bills/2013-14/water.html.
According to Business Stream, Scotland’s publicly owned non-domestic water utility, retail competition with private utilities has led to a reduction in water consumption. Business Stream estimates that 16 GL of water has been saved in 5 years from non-domestic water customers. The CEO of Business Stream is quoted as saying “Competition is an effective motivation for water retailers to work with customers to achieve efficiencies, through driving down cost and water use.”\(^6\) This demonstrates that retail competition does not necessarily lead to increased water consumption.

**Position Paper recommendations**

14 The current licence conditions will remain and that the following conditions are added:

- a licensee must immediately inform IPART when it has been engaged to provide services for an approved scheme
- a licensed operator must employ competent staff to operate a scheme before it begins to operate and maintain such staff while the scheme is operating
- a licensee (excluding metropolitan councils) wishing to provide services to small retail customers must provide an annual accounting statement
- a licensed operator must maintain asset management and environmental management systems
- a licensee must maintain quality management systems.

We support this recommendation. Further, we agree that the requirement to maintain competent staff should be subject to periodic audit and reporting, based on risk.

We agree that a licensee should develop and maintain management systems for assets, protection of the environment and quality management. Further, it is essential that a licensee develops a water quality management system based on the Australian Drinking Water Guidelines (ADWG) and the Australian Guidelines for Water Recycling (AGWR).

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Position Paper recommendations

15 Provisions are added to the WIC Act to allow for deemed contractual arrangements, similar to sections 54 to 59 of the Sydney Water Act 1994.

16 Information regarding who will provide water and wastewater services is included in a planning certificate under the planning legislation so that customers are informed, prior to purchasing land, as to who provides the water and wastewater services.

We support these recommendations.

The introduction of deeming contracts for WICA licensees is a further step towards a more level playing field between public and private water authorities.

Further, the adoption of deeming provisions will require a regulation addressing the development of prescribed minimum customer service conditions. This could be adapted from similar provisions applying to companies operating in the national energy market and include requirements relating to billing, concessions, hardship arrangements and debt recovery. IPART can assist in developing these provisions.

We also consider it important that, prior to any purchase of property, people are informed which utility services the property and what charges apply. We therefore support the inclusion of requirements to make this material being reasonably discoverable to conveyancers and potential purchasers.

Position Paper recommendations

17 An objects clause is created for the Part of the WIC Act that considers scheme approval.

The objects of the Part will be:

• protecting public health and safety
• promoting the sustainability of water resources
• mitigating the potential for adverse financial implications for small retail customers generally arising from the activities proposed.

We support the inclusion of the objects clause within this Part of the WIC Act and consider the above objectives are appropriate.
Position Paper recommendations

18  Thresholds to trigger scheme approval under the WIC Act are:

- a new scheme that supplies drinking water, recycled water, harvested stormwater or wastewater services to 30 or more individually metered residential premises/small commercial premises
- a new high risk recycled water or stormwater harvesting scheme
- a new drinking water facility that has the capacity to treat/supply more than 500kL/day
- a new wastewater facility that has a design capacity of more than 750 kL/day.

We support the proposed thresholds for scheme approvals.

We consider it important that thresholds for scheme approval and licensing are the same for compliance purposes. Further, we recognise that the proposed capacity and supply thresholds have been set to avoid excessive regulatory burden and are set based on current resourcing levels within government.

We consider that it will be necessary to provide an appropriate definition of ‘new’ within the Act to ensure that system upgrades are adequately captured.

Further, clarity on the definition of ‘capacity’ will also need to be provided to ensure that the early stage(s) of a scheme for which the ultimate capacity exceeds the triggers is adequately captured.

Finally, we also support the maintenance of current exemptions within the legislation.

Position Paper recommendations

19  Proponents are provided with guidance about the WIC Act at the development application stage.

We support this recommendation.
We currently provide guidance to proponents in the form of fact sheets and a Q&A section on our website. We also encourage proponents and developers to meet with us prior to lodging any licence application. We envisage a similar approach would continue under the new arrangements, with IPART being responsible for development of this material.

We also support the proposal that material be included on the Department of Planning and Infrastructure’s (DPI) website (ePlanning), since this would provide developers with information regarding WICA requirements early in the planning process. IPART would welcome the opportunity to contribute to any joint process with DFS and DP&I in developing appropriate guidance material for this site.

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**Position Paper recommendations**

20 IPART will assess all schemes that require approval under the WIC Act.

21 Scheme approval is divided into two stages - design approval and operation approval.

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We understand that under the proposal IPART would apply the risk matrix to determine whether a scheme would be subject to regulation under the WIC Act.

We recommend that the matrix also specifies where a lighter-handed application of the WIC Act could apply.

We support a 2 stage scheme approval process assessed by IPART.

We provide the following comments regarding the design and operational stages of the scheme approval process.

**Design Approval**

Further clarification is required regarding what material is required to support the approval application and at what stage a design approval application is lodged.

We consider that, if the intent is to require a proponent to lodge an application for design approval close to the time of lodging a DA for the scheme, the proponent should provide a concept design plus other documents including a “basis of design document” (requirements for this document should be outlined in a guideline to be produced by IPART).
We consider that detailed designs would be completed later in the construction process and it would be unreasonable to require this level of information at the WICA design approval stage. We also note that it is common for changes to occur between concept design and the detailed design stage.

There would be an expectation that specific elements of the application should be prepared by a specialist designer or WICA licensee with the required skills. However, we do not consider that it is necessary for the legislation to mandate that a suitably qualified person should prepare the application.

Further, it should not be mandatory for an owner to have nominated an operator as a condition of design approval. For many owners, the precise details of the scheme, its operation and ongoing management requirements will not be known with sufficient certainty to include in a well-considered operating agreement/contract. Forcing the owner to have nominated its operator at such an early stage may present more risks than benefits to the owner.

Finally, IPART’s Audit Panel would need to be expanded to include specialists in design to undertake this new approval function (i.e., depending on the scheme, we envisage audits of the design may be undertaken by water quality and/or sewerage management and/or water infrastructure design specialists).

**Operational Approval**

We envisage that operational approval would be similar to the current arrangements relating to new infrastructure audits. The primary purpose of the audit would be to determine whether the scheme is safe to operate.

We note that there is an intention for the owner to have completed a Water Quality Management Plan (WQMP) as a part of this operational approval. We consider the intent should be to audit whether a scheme is consistent with the 12 elements of the framework within the AGWR and the ADWG. Neither the AGWR nor the ADWG make specific reference to requiring a WQMP.

We consider that changes to the Act and Regulation should not be so prescriptive as to detail the specific contents of the required WQMP beyond the intention that it must comply with the guidelines.

Flexibility in the WQMP’s content would enable IPART and its auditors to audit water quality management requirements for both the licensee and scheme together.

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7 As highlighted in IPART’s February 2013 submission on the Review of the WIC Act and Regulatory Arrangements for Recycled Water
Similar arrangements should also apply for asset, environmental and sewerage management. We would audit operators’ management systems in these areas together with implementation at the scheme level.

Position Paper recommendations

22 The proponent (owner of the infrastructure) has to seek all necessary approvals.

We support this proposal in respect to the design approval only. In respect to the operational approval, we consider a joint application from the owner and operator should be required.

It is important that the owner of the infrastructure has ultimate responsibility for the construction, ongoing management and operation of its own schemes. This is particularly important where the owner constructs elements of the scheme’s infrastructure. In these circumstances, the owner should be held accountable if construction standards are not met.8

However, we do not consider that the owner is the party best placed to remain entirely responsible for the operational approval.

Most owners do not have the required expertise and experience to operate water and sewerage infrastructure. In these instances, it is in an owner’s best interest to appoint, early in the planning process, a WICA licensee as an operator of its scheme. This would enable licensees to provide operational input into the detailed designs and to operate the system once approval has been granted.

We consider that the operator is better placed to deal with risk associated with the operation of the scheme and should be given responsibility to deal with that risk.

In addition, the operator’s role in commissioning the assets so that they can be safely operated into the future and deliver the required water quality is too critical to be managed purely through contractual terms.

Requiring the owner and operator to hold operational approval jointly is not onerous, as outlined in the table below. In addition, if the owner intends to change the operator of the scheme this would result in a variation to the approval. In these circumstances, many of the key operational documents would likely need to be reviewed to ensure that the scheme can be operated in a way that satisfies the new operator. Requiring a variation of the approval is therefore not viewed as a deterrent to requiring joint approval.

8 For example, it is common practice for developers to construct the water and sewerage reticulated networks within their developments and, once completed, hand over control of these assets to the private or public water utility providing the service.
The table below sets out the key responsibilities in the design, construction and commissioning of typical infrastructure delivered under the WIC Act. This information is based on our experience from undertaking new infrastructure audits and recommending infrastructure for commercial operation.

<table>
<thead>
<tr>
<th>Approval</th>
<th>Key documents required / activity</th>
<th>Key party responsible for actions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Design approval(^9)</td>
<td>Concept Design</td>
<td>Owner - with input from an operator or suitably qualified designer</td>
</tr>
<tr>
<td></td>
<td>Basis of Design</td>
<td>Owner - with input from an operator or suitably qualified designer</td>
</tr>
<tr>
<td></td>
<td>Procurement and commissioning plan</td>
<td>Owner - with input from an operator or suitably qualified designer</td>
</tr>
<tr>
<td>Operational</td>
<td>Detailed design and construction</td>
<td>Owner – possibly in collaboration with operator though a suitable contract</td>
</tr>
<tr>
<td>approval</td>
<td>Design changes justification(^10)</td>
<td>Owner - with input from operator</td>
</tr>
<tr>
<td></td>
<td>Validation and verification results(^11)</td>
<td>Operator</td>
</tr>
<tr>
<td></td>
<td>Water Quality Management Plan(^12)</td>
<td>Operator – with input from owner</td>
</tr>
<tr>
<td></td>
<td>User agreements</td>
<td>Owner</td>
</tr>
<tr>
<td></td>
<td>Infrastructure Operating Plan(^13)</td>
<td>Operator – with input from owner</td>
</tr>
<tr>
<td></td>
<td>Asset Management Plan(^14)</td>
<td>Owner – with input from operator</td>
</tr>
</tbody>
</table>

The table illustrates that many of the activities required to be undertaken following a ‘design approval’ (or technology assessment under the existing WIC Act regime) are in fact undertaken by the operator, not the owner. In our experience, when an audit of the plans for the purpose of commercial operation occurs, most of the audit items are those which the operator is responsible for. These include data management, maintenance and operation strategies, contingency and continuity planning, skills and resourcing. Other items, such as the policies, strategies and life cycle analyses related to assets, will be the responsibility of the owner – however, in order to achieve optimal life cycle management, they should have the input of the operator.

\(^9\) During the design phase, the owner is primarily responsible for design development and firming up a concept. The owner should draw on the expertise of an operator/ specialist designer to ensure that operations, safety, risk management and water quality management are embedded in a practical way into the scheme concept.

\(^10\) Design changes may occur as a result of site changes and design development by the owner or as a result of input from the operator.

\(^11\) The operator will have the appropriate expertise to collate, review, analyse and report the validation and verification results to ensure that they are satisfied it can be operated as intended in future. The operator is often the lead contractor in construction.

\(^12\) The operator is the one with the appropriate expertise to prepare the WQMP and deliver the actions required under the WQMP.

\(^13\) The operator and owner play an equal role in developing the infrastructure operating plan.

\(^14\) While the operator is not responsible for whole of life asset management, the operator plays a key role in the maintenance of assets in order to maximise asset life. Often the owner relies on the expertise of the operator in the field of asset management.
We conclude that it is critical that the operational approval be jointly held by the owner and operator. Leaving the operator out of the operational approval presents a real risk that the critical interface between the asset procurement and ongoing operations will fail.

Position Paper recommendations

23 Timeframes for processing design and operational applications will be imposed.

24 IPART will consult with the public and key stakeholders prior to granting approval.

We support imposing timeframes to ensure timely licence administration.

We recommend that the processing timeframes not be set until the new WIC Act arrangements are established.

These timeframes could be established by Regulation, once the new arrangements are bedded down. We consider a delay in establishing these requirements is warranted due to uncertainty about the number of schemes and operators that will regulated under the WIC Act.

Position Paper recommendations

25 A risk matrix is used to define high risk recycled water schemes.

26 Wastewater schemes with a high risk water recycling element will be assessed as a recycled water scheme and not a wastewater scheme.

We support, in principle, the use of a risk matrix to determine which recycled water schemes are captured by the WIC Act. The matrix should be set out in a guide produced by DFS to enable it to be easily updated as required.
We consider that greater clarity is required to define recycled water schemes that should be regulated by IPART. The definition within the proposed licensing framework discusses recycling in terms of stormwater, greywater and sewage. However, the risk matrix presents a range of source water (including rainwater, swimming pool backwashing water and industrial water) and refers to them as high, medium or low risk. Not all groundwater sources are listed.\textsuperscript{15}

This raises a number of questions:

\begin{itemize}
  \item Does the matrix need to be expanded to include other source water?
  \item Do other source water schemes need to be regulated by WICA or are they effectively regulated elsewhere?
  \item If schemes with source water other than stormwater, sewage or greywater are to be regulated by the WIC Act, what guidelines/standards are to be used to assess compliance/performance and who will prepare them?
\end{itemize}

We consider that a number of scenarios within the matrix (such as wash down industrial and closed loop industrial) are possibly adequately regulated elsewhere (eg, under Occupational Health and Safety legislation). In such circumstances, this regulation should not be duplicated in the WIC Act.

Further, there is a large range of source waters and end uses that make it difficult to prescribe every condition under which the risk will be high and therefore captured by the WIC Act.

However, the Position Paper states that “to give proponents certainty there will be no discretionary powers under the Act to exempt schemes from requiring scheme approval or licensing on a case-by-case basis”.\textsuperscript{16} While this should offer certainty to proponents, it may result in schemes being inappropriately regulated depending on the definition used.

Due to the many and varied supply scenarios and changes to industry practices over time, some flexibility must be built into the process to enable IPART to determine whether a scheme is covered or not, particularly in circumstances where the application of the matrix is not clear.

Finally, to enhance clarity, the matrix should clearly indicate which scenarios are subject to the full WIC Act provisions or a lighter-handed approach. IPART would be happy to work with DFS and NSW Health to further refine the matrix.

\textsuperscript{15} For example, Orica’s groundwater source is not listed in the matrix, but the Position Paper later indicates that Orica’s network operator’s licence will continue to be regulated under WICA.

\textsuperscript{16} Page 31 of the Position Paper.
Position Paper recommendations

27 The financial viability of schemes, particularly those involving the provision of essential services to small retail customers is assessed at the scheme approval stage, and guidance materials and templates are prepared to assist proponents.

We support further streamlining of this process to limit this assessment to only private proponents that supply essential services to small retail customers. This should reduce costs and increase efficiency in processing scheme approvals.

We consider that as well as assessing the viability of the scheme, the financial capacity of the proponent also needs to be assessed.

IPART currently has internal guidelines to assess the financial capacity of proponents and the viability of schemes. The existing WICA licence application form sets out the information that is required for this assessment. Further, IPART requires more financial information from schemes that provide essential services to small retail customers.

We are currently reviewing our guidelines for making these assessments to determine whether further improvements can be made. We consider that our guidelines can be adapted for the new licensing/approval processes.

Position Paper recommendations

28 Scheme approvals are granted indefinitely and are transferable on change of ownership

We support this proposal and note that scheme approvals would be subject to a compliance regime determined by IPART.

Position Paper recommendations

29 A sliding application and administration fee scale is established.

We support the proposal and recommend that the fee scale be simple, based on costs and easy to understand and predict.
Position Paper recommendations

30 All proponents will be required to comply with compliance monitoring and reporting conditions based on the type of scheme.

31 IPART will remain responsible for licence and scheme compliance.

We support these recommendations.

We note the proposed compliance regime is similar to current arrangements and would permit the integration of licence and scheme auditing requirements, to improve efficiency and reduce regulatory costs.

Position Paper recommendations

32 Existing LG Act section 68 schemes operated by WIC licensees could be transitioned over to the WIC Act, so long as the scheme triggers one of the scheme approval thresholds.

33 Existing metropolitan council-led schemes that are transitioned over to the WIC Act will be required to obtain an ongoing approval to operate.

34 Transitional provisions will apply to schemes that already have planning approval but are yet to commence construction.

We support the above recommendations.

The proposed transitional arrangements should be designed to reflect the available resources and capacity of the regulatory system (including IPART), while also ensuring that, based on risk, schemes are adequately regulated.

Further, consideration should be given to applying transitional arrangements to existing schemes that have not yet been licensed and are unlikely to be required to be licensed under the proposed new arrangements (for example, the Cabramurra scheme operated by the Snowy Hydro Commission).
Position Paper recommendations

35 Section 124 of the LG Act is amended to remove the reference to council owned water and sewer mains while still retaining the ability of councils to require connection where a service is available nearby (whether it be publicly or privately owned).

36 Similar provisions to the appeal provisions in the LG Act are included in the amended licensing and scheme approval regulatory regimes.

37 A tiered penalty system is introduced to reflect the relative seriousness of certain offences.

We support these recommendations.

Position Paper recommendations

38 A new Part on last resort arrangements is introduced into the amended WIC Act with the objective of ensuring continuity of the supply of essential services and, in doing so, protecting public health, the environment and customers, particularly small retail customers.

39 The retailer of last resort framework is strengthened with provisions for:
   • a more detailed appointment process
   • termination of the supply obligation
   • pricing
   • rights and obligations of customers of a failed licensee
   • cost recovery mechanisms
   • clarifying the legal consequences following a supply obligation being triggered
   • the transfer of customer data.

40 Rights to appoint an operator of last resort are introduced under the amended WIC Act, including the provision of step-in rights, with further consultation to be undertaken on the detail of the cost recovery mechanisms.

We support the Position Paper’s proposal to organise last resort arrangements under a new Part of the WIC Act. Further, we support the key objective for the arrangements – namely, the continuity of the supply of essential services and, in doing so, the protection of public health, the environment and customers, particularly small retail customers.
As water services become more contestable, additional consumer protection measures will be required to ensure continued supply to customers of essential water and wastewater services.

We consider that the best way to protect customers (particularly small retail customers) against failure of a private utility is to have in place effective and robust Retailer of Last Resort (RoLR) and Operator of Last Resort (OoLR) arrangements, complemented by an appropriate audit regime to minimise the likelihood and consequence (ie, additional costs to customers) of private utility failure.

In general, the last resort arrangements proposed by the Government should offer better protection to consumers than present arrangements and provide greater certainty to investors or developers (and help address some market barriers). We particularly support the:

- introduction of the an OoLR framework
- pre-appointment of RoLRs and OoLRs (where essential services are provided to small retail customers)
- nominated RoLRs and OoLRs having contingency plans in place
- details of the OoLR cost recovery arrangements to be subject to more consultation.

Establishing an OoLR scheme is particularly important as water markets open up to private sector participation and competition, given that servicing solutions for many greenfield areas could increasingly involve decentralised or stand-alone networks that are at a distance from public water utilities’ current networks and assets. These types of supply arrangements can increase the risks and consequences for consumers of any failure by such private network operators.

**Appointment processes for RoLR and OoLR**

We support the Position Paper’s proposal to pre-appoint RoLRs (and OoLRs) on a scheme by scheme basis, as each servicing area will have its own characteristics and this approach is a more practical and efficient response to potential failure by an operator.

At this stage of the market’s development, we also support the default position that the local incumbent public utility would be appointed either as the RoLR or OoLR. When it is not clear which local public water utility is best placed to undertake this role, IPART would undertake investigations prior to making a recommendation. While the RoLR/OoLR framework would appoint local public water utilities as a default, the framework would not preclude IPART from considering the appointment of a WIC licensee.
We recommend that the Government review this approach in 5 years. The default position currently provides a degree of certainty to the market regarding last resort arrangements. Later, when the market is more mature, consideration could be given to using a competitive expression of interest process to appoint RoLRs and OoLRs.

Further, individual appointments of RoLR and OoLR should be periodically reviewed to determine whether the arrangements are still required for each specific scheme and/or whether contingency plans need to be revised. This could also be undertaken every 5 years or in response to an earlier request either by the scheme owner/operator or the appointed RoLR/OoLR for the scheme.

Cost recovery process

We do not support some elements of the proposed cost recovery process; in particular with respect to ‘post event’ OoLR costs.

The design of cost recovery mechanisms (to cover future step-in costs) for last resort arrangements can be important in influencing or impeding private sector entry into markets. We support aspects of the Government’s proposed cost recovery model, particularly where it seeks to place the bulk of step-in costs ‘post event’, and therefore does not require WIC Act licensees to fund RoLR or OoLR activities upfront, but only if and when they occur.

We note that there are 2 types of RoLR and OoLR costs that need to be recovered:

- Contingency planning costs – ie, those incurred prior to the last resort event. To achieve efficiency and effectiveness in contingency planning, the licensed retailer or operator should be required to co-operate with the RoLR or OoLR and advise when changes occur which may impact on the contingency plan.

- ‘Step-in’ or ‘post event’ costs – ie, those incurred by the RoLR or OoLR following the last resort event.

We support the Government’s proposal that a RoLR and OoLR can charge a one-off fee to WIC licensees to recover the initial costs of establishing contingency plans. We note that planning costs should be minimal and that IPART would be given the role to assess contingency plans and review contingency fees.

We consider that the proposed ‘post event’ cost recovery models for both RoLR and OoLR events should allocate appropriate levels of business risk to WIC Act licensees. In particular, we support a tiered ‘post event’ cost recovery mechanism, where costs are recovered in the following sequence:

- First, as far as possible, costs should be recovered from the failed licensees.
- Then, if this is not possible or residual costs remain, costs should be recovered from either insolvency officials (for RoLR) or asset owners (for OoLR).
Then the customers of the failed retailer/operator should be charged if further funds are required. However, we consider that any funds collected from customers should be capped at a reasonable level, to be determined by IPART.

Finally, the Government should consider providing any residual funding.

We also note the following:

- we do not support customers of other private and public water utilities paying for costs of a failed operator for which they have no relationship
- we consider that the risks of costs being incurred by the Government are significantly reduced with the proposed audit regime, which aims to ensure that approved schemes are properly maintained
- IPART’s proposed tiered approach would not require the establishment of an industry fund
- to set the RoLR or OoLR fees, IPART would need the power to require data from water utilities we do not currently regulate.

**Roles assigned to IPART**

Overall, we support the last resort roles assigned to IPART. However, some aspects of these roles need to be defined more clearly and, where possible, made consistent across RoLR and OoLR events. For instance, it is not clear whether IPART recommends or determines charges for a RoLR when exceptional circumstances exist. It is also not clear why the RoLR fee imposed on the customers of the failed WIC Act licensee is determined by the Minister on IPART’s recommendation, but not the equivalent OoLR fee. We consider that both these fees should be determined by IPART.

We consider that investigations into which utility is best placed to be a RoLR or OoLR and assessment of contingency plans are a good fit with our current role in recommending WIC Act licenses to the Minister. However, clear legislative frameworks are needed to define our responsibilities and to provide us with the necessary information gathering powers for IPART to set last resort fees.