

14 April 2022

Ms Liz Livingstone
Chief Executive Officer
IPART

By email: Liz.Livingstone@ipart.nsw.gov.au
CC: jonathan_hopson@ipart.nsw.gov.au

Dear Liz

Draft WaterNSW Operating Licence

Thank you for the opportunity to provide WaterNSW's views on the draft opening licence released for consultation by the Tribunal on 31 March.

I would also like to thank IPART staff for their engagement through the process so far.

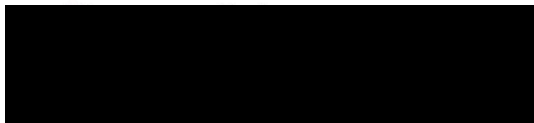
Consistent with my letter of 8 November, WaterNSW has approached this review with two overarching themes in mind:

1. Ensuring that the operating licence provides the necessary empowerment, accountability and clarity for WaterNSW to discharge its duties in a manner that is consistent with legislative intent, and community expectations; and
2. That the operating licence is appropriately focused on those matters, and only those matters, necessary for delivering the outcomes that will achieve that legislative intent and will meet community expectations.

I am pleased to note that IPART has taken the opportunity to remove several redundant clauses in the operating licence.

Attachment 1 sets out WaterNSW's responses to the small number of proposed changes where WaterNSW believes that further consideration is warranted and the reasoning for these concerns.

Yours sincerely,

A black rectangular box redacting the signature of Andrew George.

Andrew George
Chief Executive Officer

D2021/118259

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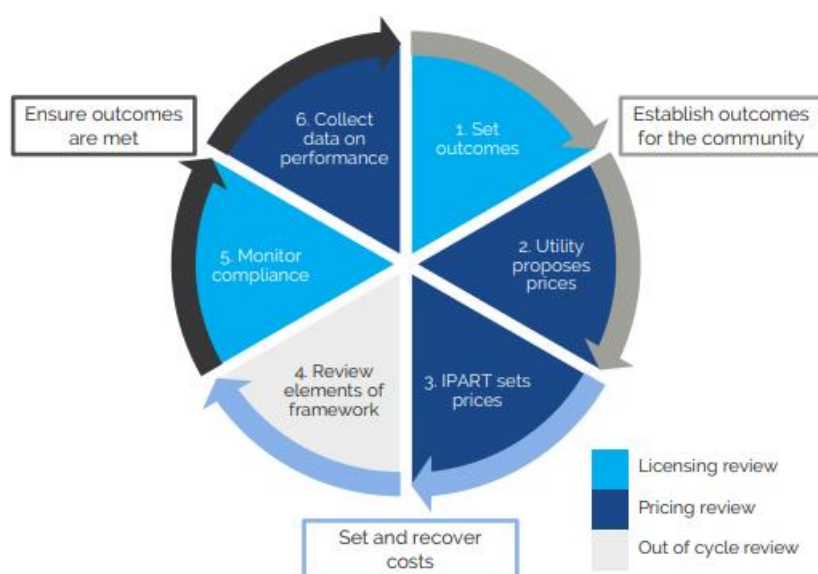
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Attachment 1: WNSW submission to IPART on draft Operating Licence

1 Clauses 1.3 & 1.6 – Operating Licence Period and end of term review

WaterNSW seeks to integrate the timing of the end of term review of the operating licence review with the whole regulatory cycle. This would allow us to establish the appropriate interrelationship between the operating licence, service outcomes and resultant costs.

This approach is reflected in IPART's regulatory documents, including the IPART Guidelines for Water Agency Pricing Submissions



Source: IPART's current water regulation model, Water Pricing and Licensing Regulating Water Businesses Special Review, Position Paper September 2020

For example, during the WaterNSW Price Review, IPART directs its efficiency consultants to have regard to:

- Legislative requirements and responsibilities and any other drivers or determinants of its monopoly services; and
- The extent to which the proposed services are mandatory (e.g. a clear legislative requirement) versus discretionary

The existing sequencing issues between the WaterNSW regulatory determinations and the operating licence review has the potential to create unintended outcomes in which WaterNSW is potentially unfunded/overfunded to meet its regulatory obligations.

WaterNSW considers that the existing sequencing must be resolved in order for IPART to take into account all relevant considerations in preparing its Final Determinations, including consideration of the required costs of complying with WaterNSW's regulatory requirements. This will maximise the

benefits of economic regulation for the customer, as well as reduce IPART's cost of conducting the WaterNSW's price reviews.¹

With three out of four of WaterNSW's pricing proposals (Greater Sydney, Rural Valleys and WAMC) due in June 2024 this means that the operating licence requirements for the next pricing determination period should be agreed and set by June 2023.

This lead time is required to allow WaterNSW to undertake:

- costing of its regulatory obligations and service outcomes;
- review of those costs within the context of the whole regulatory proposal and engagement of expert advisors where relevant;
- appropriate governance review and challenge by management and the board; and
- engagement with customers and stakeholders.

The draft operating licence proposes a three-year term for the operating licence ending on 30 June 2025.

The draft operating licence also proposes that the end of term review for the operating licence commence in the first quarter of 2024.

The timing is particularly challenging recognising that there is currently no formal mechanism to revisit a regulatory proposal or regulatory determination where the regulatory or service standard obligations of WaterNSW change. Currently the regulatory proposal is the only opportunity for WaterNSW to ensure that its regulatory and service outcome obligations are fully considered.

While WaterNSW acknowledges IPART's rationale regarding the fluid operating environment and the risks of failing to develop the next operating licence prior to the expiration of this proposed operating licence; WaterNSW does not have comparable risk management tools at its disposal.

Therefore, WaterNSW requests that the operating licence term be limited to the two years that was initially proposed by IPART. WaterNSW also requests that the end of term review be initiated as soon as practicable to align with the operating licence ending on 30 June 2024.

Failing this, or the introduction of pass-through events to address changes in licence conditions within a regulatory period as noted above, we ask that IPART allow a formal mid-determination review to account for the required specific costs to meet the operating licence review outcomes.

2 Clause 2.6 – Reviewing the model for the System Yield

WaterNSW acknowledges that the next review of the System Yield model will not be required prior to the expiration of the draft operating licence.

¹ For example, in the recent 2021 WAMC and Rural Valley Determinations, WaterNSW lodged a supplementary (late) submission for IPART to consider the costs of meeting the Government's non-urban metering reform. The late timing was triggered by recent changes to both the NSW Government policy on non-urban metering and in particular, a recent change in WaterNSW's regulatory obligations prescribed in the IPART operating licence. The late change in regulatory obligations resulted in significant duplication of costs and effort for both WaterNSW and IPART in terms of preparing the price submission / issues papers / determinations and the costs of managing the IPART price review (for example, expanding the scope of works re the efficiency review, extending the timeframe in which to hand down the final determination, additional public consultation requirements including the need for an additional issues paper and draft determination to consult on the costs of non-urban metering reform.

Notwithstanding, WaterNSW is of the view that to support continuity of business planning, public confidence that the independent review process will continue and maintain transparency over IPART's intended plan to re-introduce the clause in a future Operating Licence, at least some reference to this requirement should be maintained.

There would appear to be three primary options for maintaining this public visibility. In order of preference these are:

- Maintain clause in the operating licence, including a note that the clause is subject to confirmation at the time the next operating licence is made;
- Substitute the clause with a note as to the intention to reintroduce the clause in the same or similar form at the time the next operating licence is made; or
- Provide a detailed explanation in the report accompanying the operating licence as to the removal and intention to reintroduce the clause at the time the next operating licence is made.

The need to maintain a clear and unambiguous expectation of requiring WaterNSW to undertake the review of the System Yield model in the future is also an important input into the requirements and resultant costs that WaterNSW will need to include in the next price review as discussed above.

3 Clauses 2.8.4 to 2.8.6 – Emergency Drought Response Plan

WaterNSW is broadly comfortable with the change proposed by IPART to separate the drought response plan from the long-term capital and operating plan.

However, as a point of clarity the Emergency Drought Response Plan has recently been renamed the Greater Sydney Drought Response Plan and this should be reflected in the final operating licence.

In addition, WaterNSW believes that clauses 2.8.5 and 2.8.6 could be simplified and merged to simply require WaterNSW to update the plan by 1 December each year. This would align with current expectations and provide greater clarity to external stakeholders as to when WaterNSW will be updating the plan.

4 Clause 6.16.3 – Memorandum of understanding with Natural Resources Access Regulator

WaterNSW and NRAR have been operating under the existing MoU for over three years. In that time the nature of the interactions between NRAR and WaterNSW have evolved and matured significantly. Moving from the largely operational activities as set out in the current MoU towards an increasing focus on more strategic issues of common interest within the context of the broader water sector activities.

As a result of the maturing and evolving relationship; it was agreed at the Strategic Group meeting in December last year that the current MoU is not reflective of the current focus and operating rhythms between the two organisations and needs to be reviewed.

In this context, the proposed changes to clause 6.16.3 appear:

- Redundant as the review of the MoU has already been jointly initiated by WaterNSW and NRAR;

- To provide inconsistent focus on administrative elements when the two parties have agreed a desire to elevate the focus of the MoU; and
- To intervene unnecessarily on the content of an agreement between two parties where there is no apparent imbalance in negotiating power for reaching a mutually agreeable outcome.

Consequently, WaterNSW submits that the draft operating licence clause 6.16.3 can be removed without weakening the accountability of maintaining an effective MoU with NRAR that is a living document reflective of the ongoing cooperative relationship as set out in the two preceding clauses.

5 Clause 6.17.2 – Online portal for lodgement of documents relating to metering equipment

WaterNSW understands that the proposed clause 6.17.2 (replacing the current clause 6.18.3) has been amended to address challenges that have arisen when seeking to assess compliance with the portal obligations.

WaterNSW submits that the better approach would be to delete this subclause in its entirety on the basis that:

- Corrective actions to address underlying shortcomings (development of the protocol) are already captured by virtue of the audit actions and will therefore be considered in subsequent audit reviews to ensure WaterNSW accountability to delivering on that action; and
- The requirement to retain documentation that WaterNSW receives in the performance of its functions is already a statutory obligation that it must comply with. Therefore, the previous wording of clause 6.18.3 had already strayed into duplicating pre-existing legislation and obligations.

In light of both of these points WaterNSW submits that this subclause can be safely removed from the proposed operating licence without reducing WaterNSW's commitment to developing the protocol, and without reducing the legislative obligations of WaterNSW to retain documents and records.

6 6.17.4 – Online portal for lodgement of documents relating to metering equipment

WaterNSW appreciates the clarification of the intended access to the portal and the intended data sharing provided by the proposed amendments to clause 6.17.4.

However, WaterNSW believes that this clause can be further refined so as to more clearly and effectively integrate with other clauses of the draft operating licence, specifically clause 6.19.1 that addresses data sharing. WaterNSW proposes that the draft clause 6.17.4 be redrafted as follows:

WaterNSW must provide DPE and NRAR with access to the portal and any reports available within the portal. The sharing of data stored following transactions in the portal is to be addressed by the data sharing agreements referred to in clause 6.19.1.

WaterNSW believes that this approach better clarifies that the mechanism and framework for data sharing is the data sharing agreements with DPE and NRAR. This clarification also confirms that DPE and NRAR can trigger reviews of those agreements as required to service their respective data needs, which is already provided for under those agreements.

7 Clause 6.19.3 – Data sharing and services agreement with DPE and NRAR – NSW non-urban water metering framework

WaterNSW has two separate bilateral data sharing agreements, one with DPE and one with NRAR.

While these agreements have a common base, each has been tailored to suit the requirements of DPE and NRAR. In addition, these agreements have been structured in a way that not only supports current needs but can be adapted to cater for future needs above and beyond the specific requirements of the non-urban metering framework.

In recognition that the process of defining and meeting data needs is a journey, the agreements catered for performance reviews and adaptations. The agreements opted for a quarterly review in the first year of their operation, reverting to a standard annual review thereafter.

While these pre-defined review periods provide a structure for reviewing the performance and adequacy of the agreements, it was also recognised that issues may be identified outside of the standard schedule. To cater for issues that required more urgent attention the agreements allow either party to trigger a review at any time.

On this basis it appears on face value that introducing a new subclause covering the matters set out in 6.19.3 is largely, if not entirely, redundant.

Finally, WaterNSW questions the need for IPART to intervene into the content of agreements between two parties in the absence of an apparent imbalance in negotiating power for reaching a mutually agreeable outcome.

WaterNSW submits that it is not evident that the necessary threshold for introducing the new subclause 6.19.3 has been met and should be removed for the final operating licence.