

**SUBMISSION TO IPART**

**RE:** **END-OF-TERM REVIEW OF THE *WATER NSW OPERATING LICENCE***  
 ***2022-2024***

**TO:** **IPART (INDEPENDENT PRICING AND REGULATORY PRICING**  
 **TRIBUNAL OF NEW SOUTH WALES)**

**FROM:** **DR JOE McGIRR, MP**  
 **Member for the State Seat of Wagga Wagga**

**DATE:** ***12<sup>th</sup> October 2023***

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## OVERVIEW OF MY SUBMISSION TO IPART

1. The thrust of my Submission to IPART is that **IPART should recommend** that the current Operating Licence be amended, and conditions imposed, and that the new Operating Licence contain conditions, in each case directed to addressing:
  - (a) The need for a short definition of the phrase “undertake flood mitigation and management”, which is one of the “listed functions” of Water NSW in the Water NSW Act and in the Operating Licence.
  - (b) The need to specify that Water NSW *must* carry out its “listed function” to “undertake flood mitigation and management” in specified areas of regional NSW (outside of the Sydney catchment area), with each such specified area defined in a series of Schedules (B, C, D, and so on) of the Operating Licence, with the terms of Schedule B already drafted and set out later in my Submission to IPART.
  - (c) The need to define the “Murrumbidgee Area of Concern” as the first of such specified areas, such definition to be set out in the new Schedule B of the Operating Licence.
  - (d) The need to specify that Water NSW has newly defined “Flood Protection and Control Duties”, such duties to be set out in the new Schedule B of the Operating Licence, and that Water NSW *must* carry out that function.
  - (e) The need to provide more balance in the Operating Licence by requiring Water NSW:
    - (i) in relation to its function “to capture and store water and to release water”, to consider safety first, and then consider both the effects on each community in which it operates and the benefit to water users and other customers; and
    - (ii) to have regard to the interests of the community in which it operates and, in particular, to require it to establish and maintain Community Advisory Groups.

## INTRODUCTION

2. **My NRC Submission.** On 29 June 2023, I lodged with the Natural Resources Commission (“**the NRC**”) my 116-page Submission (“**my NRC Submission**”) in relation to the NRC’s review of the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2016* (“**the WSP for the M**”). For the reasons which I

give further below, my NRC Submission forms part of my Submission to IPART, and I **attach** a copy of it.

3. On 29 June 2023, I sent a copy of my NRC Submission to the NSW Minister for Water (“**the Minister**”); the DPE Water Group; Water NSW; the Acting Director, Water Law, at DPIE; Wagga Wagga City Council; and IPART.
4. In Part 14 (paras 123 to 130) of my NRC Submission, I discussed aspects of the Operating Licence and set out the matters that I submitted that the NRC should advise and recommend, in relation to the Operating Licence, in making its report to the Minister.
5. **Circumstances since my NRC Submission was lodged.** Since 29 June 2023, the following circumstances have occurred which have meant that there is a need for me to both **vary and go beyond** what I submitted in Part 14 of my NRC Submission in relation to the Operating Licence. Those circumstances include:

(a) On 8 August 2023, IPART announced that it was conducting its end-of-term review of the current Operating Licence, which is due to expire on 30 June 2024, and stated that “IPART’s review will consider potential improvements in the new licence.”

(b) On the same day, IPART issued its 88-page “Issues Paper” (“**the Issues Paper**”).

(c) On the same day, IPART issued its 27-page “Information Paper” providing IPART’s approach to the cost-benefit analysis in conducting its end-of-term review (“**the CBA Approach Paper**”).

(d) Since 29 June 2023, I have received no substantive response from any of the individuals or bodies specified in **para 3** above.

(e) I have paid much closer attention to the Operating Licence, and I have now identified some deficiencies in it and some of the reasonable improvements that might now be made to it.

6. **My rejection of IPART’s preliminary position with respect to flood management in regional NSW.** In the Issues Paper, on pages 27 to 29, and to lesser extent on pages 33 and 35, IPART raises issues with respect to “flood mitigation and management”. IPART makes it clear on those pages that its preliminary position is to not impose conditions on Water NSW that would mandate any specific activities with respect to its “listed function” of “flood mitigation and management” in regional NSW. I strongly disagree with that preliminary position by IPART, and I believe the people of NSW would likewise disagree with IPART on that. Rather than address each statement by IPART in those pages of the Issues Paper in a piecemeal fashion, in my Submission to IPART I have set out below a cohesive set of specific clauses for the Operating Licence – some being amendments of existing clauses and others being new clauses – that I believe provide a better and more reasonable position which IPART should adopt. While the justifications for most of my new clauses and amendments are self-evident and should be unobjectionable, in some parts of my Submission I have also set out

some relevant arguments and other matters for IPART to take into account in support of the need for it to change its preliminary position.

7. **My NRC Submission went beyond the WSP for the M.** In my NRC Submission, I set out specific matters which I asked the NRC to advise and recommend to the Minister. Understandably, most of those matters were directed to the WSP for the M, as this was what the NRC called for submissions on. Given that the NRC had a wider statutory remit in the circumstances, I also set out in my NRC Submission specific matters which I asked the NRC to advise and recommend to the Minister in the associated framework applicable to Water NSW in operating under the WSP for the M. That associated framework included: the “NSW Water Strategy” (released in August 2021); the “NSW Water Strategy Implementation Plan 2022 to 2024”; the *Water NSW Act 2014* (NSW) (“**Water NSW Act**”); the Operating Licence; the “Water NSW Reporting Manual 2022-2024”; and the *Water Management Act 2000* (NSW).
8. **My NRC Submission must be read.** For ease of reading, I do not repeat in my Submission to IPART the lengthy reasons and issues raised in my NRC Submission. Despite that, my NRC Submission forms an intrinsic part of my Submission to IPART and the latter can only be understood by a reading and understanding of those lengthy reasons and issues in my NRC Submission.
9. **Meaning of “Operating Licence”.** Water NSW has been subject to the *Water NSW Operating Licence 2017-2022* for the period 01/09/2021 to 30/06/2022, and the *Water NSW Operating Licence 2022-2024* for the period from 01/07/2022 onward. As there are only minor differences between those 2 licences, and my concerns in relation to flood mitigation and management as set out in my NRC Submission address the period from the present back to well before 01/07/2022, in my Submission to IPART I treat the 2 licences as if they were the one Operating Licence. For ease of reference, in my Submission to IPART in most circumstances I refer to “**the Operating Licence**” on the basis of both the current licence and the new one which will need to commence on 1 July 2024. In some places, I differentiate between the “current” Operating Licence and the “new” Operating Licence, and the “current” clause or “new” clause within each.
10. **IPART’s long role.** In relation to the role of IPART and the lack of specific obligations to be undertaken with respect to Water NSW’s mandatory flood mitigation and management duty in regional NSW, it is relevant that IPART has been responsible for that inadequacy for many years prior to 2017. IPART has been conducting reviews since 1992. The more recent history, directly connected to the Operating Licence defined in **para 8** above, is that:
  - (a) On 01/07/2004, Water NSW was established, under the name “State Water Corporation”.
  - (b) From 01/07/2004 to 31/12/2014, IPART’s regulatory functions included making recommendations to the portfolio Minister with respect to the granting of the operating

licence to State Water Corporation, and the imposition or amendment of conditions in relation to the operating licence.

(c) On 01/01/2015, State Water Corporation's name was changed to "Water NSW".

(d) On 01/01/2015, the Sydney Catchment Authority was abolished, and its assets, rights and liabilities were transferred to Water NSW.

(e) Under the transitional arrangements arising from para (d) above, on and from 01/01/2015, Water NSW operated under the *2013-2018 State Water Corporation Operating Licence* (in respect of regional NSW) and the *2012-2017 Sydney Catchment Authority Operating Licence* (in respect of the Sydney catchment area).

(f) In addition to IPART's role from 01/07/2004 to 31/12/2014 under para (b) above, IPART has been making recommendations to the portfolio Minister in relation to the granting of and conditions within the 2 earlier operating licences specified in para (e) above, as well as the *Water NSW Operating Licence 2017-2022* which was the consolidation of those 2 earlier licences.

11. **Meaning of "regional NSW"**. In my Submission to IPART, I use the phrase "**regional NSW**" to refer to that part of Water NSW's "area of operations" (s 15(1) Water NSW Act) which is outside "the Sydney catchment area" (s 3, clause 17, Schedule 2, Water NSW Act). My Submission to IPART is concerned only with regional NSW. I choose not to make any submissions to IPART with respect to conditions in the Operating Licence which would operate in relation to the Sydney catchment area.
12. **Meaning of "IPART should recommend"**. In various places in my Submission to IPART, I use the bolded phrase "**IPART should recommend**" to introduce each of my statements of those specific matters about which I ask IPART recommend to the Minister as part of IPART carrying out its regulatory function under s 56 of the Water NSW Act (conferred by s 24F(e) of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW)). I also use the bolded phrase "**IPART should**" not followed by "recommend", to introduce other matters that I submit IPART should do.

## FLOODING EVENTS IN NSW

13. **IPART's statement about the recent numerous flooding events**. On 8 August 2023, IPART stated:

"We acknowledge that in recent times NSW has experienced numerous flooding events. These events provide learning opportunities which should be considered as part of this Licence review. The Act allows for the licence to authorise flood mitigation and management functions, but does not require mandatory obligations to be included in the Licence in relation to these functions.

...While the current Licence authorises flood mitigation in regional NSW it does not require Water NSW to undertake any specific activities related to flood mitigation or management.” (Issues Paper 27).

14. **My statement about the devastating impacts of flood events.** To say the least, it is unfortunate that IPART, as set out above, has expressed the view that these numerous flooding events “provide learning opportunities”. In 2020 and 2021, there was above-average rainfall in eastern Australia. The wettest month on record was recorded in November 2021. The scene was set for what Water NSW must have known would be major flood events in NSW in 2022. Such flooding events in various parts of NSW caused: deaths of individuals; destruction or extensive damage to homes, personal property, buildings, infrastructure, and equipment; loss of stock; other losses of primary producers; evacuations and trauma to individuals; interruptions to, and in some case loss of, businesses; and massive amounts of money expended by all 3 levels of Government, and by charitable institutions, to provide disaster relief and otherwise help address some of those dreadful consequences of floods in NSW.
15. **NSW Government grants.** In the case of the 2022 flood events, 62 local government areas in NSW were disaster-declared, and many of those LGAs were disaster-declared a number of times as a result of flood events starting on 5 January, 22 February, 27 June, 4 August, and 14 September 2022 (AGRN numbers 996, 1001, 1012, 1014, 1025, 1027, 1030, and 1034). In respect of the flood events in NSW starting on 22 February and 4 August 2022, the NSW Government alone, as at 14/08/2023, has paid \$446.1 million in grants, and even now, one year later, many applications are still being assessed against the narrow eligibility criteria. See: NSW Government webpage ‘Natural Disaster Declarations’ at <https://www.nsw.gov.au/disaster-recovery/natural-disaster-declarations> and NSW Government webpage ‘Flood Disaster Grants – Statistics’ at <https://www.nsw.gov.au/emergency/floods/financial-support/grants-statistics>.
16. **Munich Re analysis of losses.** The grants by the NSW Government referred to in the preceding para are just a small fraction of the cost of the flooding events in 2022. Munich Re, through its NatCatSERVICE, has been analysing and providing, since 1980, evaluations and reports on losses caused by natural disasters in most parts of the world. In respect of the floods in south-east Queensland and in NSW in 2022, Munich Re reported that: the overall losses were US\$6.6 billion (A\$9.6b); the insured losses were US\$3.9 billion (A\$5.7b); and 22 individuals died. Even allowing for the fact that such losses are spread across both south-east Queensland and NSW, 41% of the losses are uninsured and the losses within NSW are truly massive.
17. In the case of the Murrumbidgee area, there were several flooding events in 2022, and flooding events in the Murrumbidgee area also occurred in 2010, 2012, and 2016.
18. In the case of other parts of regional NSW, the flooding events have been more severe, with worse outcomes, and in some areas they have occurred more often.
19. Though IPART’s 2 statements in **para 13** above about flooding events and flood mitigation and management are accurate, they are a terrible indictment of the state of affairs under the Operating Licence. Even worse, in the face of such notorious flooding events and their devastating outcomes, on 8 August 2023 IPART stated:

**“...we do not propose imposing any specific obligations or conditions for flood mitigation activities in regional NSW ...”** (Issues Paper 28) (emphasis added)

This position on the part of IPART is totally unacceptable.

20. **Issues Paper does not take into account recent DPE policies re flood mitigation.**

The 2-year extension of the Operating Licence in 2022 was done in unusual circumstances. On 22/09/2021, IPART announced: “The Tribunal has decided to defer the scheduled end-of-term review of the Licence. This is due to extensive ongoing policy work in the NSW water sector which could impact Water NSW during or shortly after the review.” In accordance with IPART’s recommendation, this led to the 2-year extension of the Operating Licence which now expires on 30/06/2024. Given these unusual circumstances, any objective observer would expect that the Issues Paper would point to all this new policy work in the NSW water sector. During those 2 years, policies have been published and in many respects they do deal specifically with either more significant steps that need to be taken in NSW with respect to flood mitigation and management, or more extensive options that might be implemented in NSW to address the same issue. Inexplicably, the Issues Paper not only does not mention such policies or options but also records IPART as taking a preliminary position of no change or “business-as-usual” with respect to not imposing conditions in the Operating Licence that would require Water NSW to undertake any specific activities with respect to food mitigation and management. This is the opposite of the policies and options which have been published since 2021.

21. **IPART’s Framework for Tackling Climate Change.** On 28/10/2021, IPART issued a 3-page document “Our Statement and Framework for Tackling Climate Change”. The starting point of the “Framework”, IPART states:

“We will identify whether the regulated entity or industry needs to consider, mitigate or adapt to climate change risks. We will do this within the relevant statutory framework or the terms of reference that applies to our work.” (p2).

22. In relation to the risk of increased frequency, duration and intensity, of flood events arising from climate change, in the 7 pages comprising Chapter 4 of the Issues Paper IPART:

(a) starts acceptably, if only at a high level, in the first half of page 31; and

(b) on page 32, acknowledges the threats, but only in relatively low-key terms of “may increase flooding” and “being flooded”, in part of the first bullet point, and in the third bullet point; and

(c) on page 33, describes in 5 lines the minimalist and non-effective current arrangements applicable to Water NSW with respect to flood mitigation, and then, somewhat bizarrely, IPART states: “Given the above, our preliminary position is not to include any additional resilience and adaption obligations in the Licence.”



(d) on page 35, IPART records its preliminary position being to require Water NSW to have a “climate-related risk management program consistent with” the “Climate Risk Ready NSW Guide” published by the DPE in March 2021.

For the reasons given in my Submission to IPART (and in my NRC Submission), **I totally reject the preliminary position on the part of IPART in paras (c) and (d) above.**

23. **CBA Approach Paper.** IPART’s CBA Approach Paper seems to have been prepared as if there never were any recent flooding events which devastated large sections of regional NSW. The CBA Approach Paper ignores that such flooding events were by far and away the biggest economic events in 2022 in which Water NSW was not just intimately involved but to which it materially contributed. **The lack of the necessary conditions in the Operating Licence which would have imposed mandatory duties on Water NSW to undertake specific activities, auditable by IPART, in regional NSW with respect to flood mitigation and management was a material factor in the extent of the flooding events and the extent of the consequential damage. In that regard, IPART itself must take some responsibility not recommending such conditions with respect to mandatory specific activities auditable by IPART.** As to IPART’s earlier history back to 01/07/2004, see **para 10** above.
24. Despite the CBA Approach Paper being concerned with the approach to cost-benefit analysis and discussing 9 major topics across 27 pages, the biggest economic event of 2022, the flooding events in regional NSW and their devastating consequences, is hardly mentioned by IPART. In relation to that:

(a) The nearest to addressing the issue of the flooding events in 2022 and in prior years is the few words from IPART under the heading “Flood management”, which occupies just one-third of a page on page 9. In the circumstances, it is very disappointing to find that under that heading the only matter discussed is whether to retain what must be current clause 6.4.1, which requires Water NSW to maintain an effective system to provide advance notification of any significant changes to flow release patterns to customers and others. Current clause 6.4.1 is the sole minimalist mandatory provision in the Operating Licence which requires Water NSW to undertake a specific activity that comes under the broader function of “to undertake flood mitigation and management”. In any event, that minimalist clause proved deficient in 2022 in respect of the Murrumbidgee River and Tumut River below the Burrinjuck Dam and Blowering Dam, and I set out in paras 97 to 102, and 166 to 168, of my NRC Submission some circumstances that call for further investigation by the NRC. **IPART should do likewise and, in furtherance of IPART’s investigation, IPART should exercise its power under clause 1.6.2 of the current Operating Licence.**

(b) IPART, having addressed on page 9 that sole minimalist current clause in the perfunctory manner of keeping it (the factual) or getting rid of it altogether (the counterfactual), then asks: “Are there are any other costs and benefits that we need to consider when deciding the net benefit of maintaining the current (sic) about advanced

notification of changes to flow release patterns?” The implication is that IPART supports the retention of current clause 6.4.1 in the Operating Licence to which it must be referring.

(c) In respect of “Flood management”, why does IPART favour “business-as-usual” in the Operating Licence? From the point of view of basic economics, such a “business-as-usual” approach makes no sense whatever. In respect of Water NSW’s existing listed function “to undertake flood mitigation and management”, the continuance of a lack of mandatory **specific activities**, auditable by IPART, makes no economic sense whatever – as well as failing to exhibit a sense of social responsibility. If IPART maintains its position of a lack of mandatory specific activities with respect to flood mitigation and management, it will be irresponsible and continue to prove a material contributor to disastrous consequences in some parts of regional NSW.

25. In sections 1.2 to 1.4 of the CBA Approach Paper, IPART states that it intends to undertake the cost-benefit analysis of not only each condition but also the Operating Licence as a whole on the basis of providing “a net benefit to the people of NSW” or “net financial benefits to the State as a whole” (pp 1, 3). I submit that such an *in globo* approach disregards the fact that it was – and will continue to be until things change – the large numbers of individuals, businesses and other bodies, in those communities in regional NSW, downstream of water storages operated by Water NSW, who actually bore, and still bear, the cost of such flooding events, while the great majority of the population of NSW (and businesses) remained unaffected. Accordingly, **IPART should** adapt its cost-benefit analysis of each condition concerned with imposing flood mitigation and management duties in regional NSW to be on the basis of comparing:

(a) the cost to Water NSW in relation to having that flood mitigation and management duty condition apply to operating the particular water storage in question on a standalone basis; and

(b) the benefit comprising the gross financial and non-financial costs (disregarding insurance recoveries and governmental grants) to the individuals, businesses and other bodies reasonably likely to be affected by one or more repetitions of the worst-case flooding event that has occurred downstream of the particular water storage in question within the period from 1 January 2010 and 30 June 2024.

26. **Cost-benefit analysis of flood mitigation duties in respect of the Murrumbidgee Area of Concern.** On the basis of the more nuanced approach to cost-benefit analysis of particular conditions suggested by me in the preceding para, I feel confident that IPART will find that the benefit far exceeds the cost. Even without that more nuanced approach, I feel the result will be that the benefit materially exceeds the cost.

## WIDTH OF IPART’S REGULATORY FUNCTION RE OPERATING LICENCE

27. **Width of IPART’s regulatory function.** IPART’s regulatory function referred to in **para 12** above, in the present context, includes making recommendations to the Minister with respect to:
- (a) The granting of the new Operating Licence and the conditions in that licence (s 56(2)(a) Water NSW Act).
  - (b) The imposition of conditions, or amendment of conditions, in the current Operating Licence (s 56(2)(b)).
  - (c) Reporting on compliance by Water NSW with the Operating Licence (s 56(2)(c)(d), and (3)).
28. **IPART can impose additional “functions” on Water NSW.** It is important to note that:
- (a) The 11 “listed functions” of Water NSW set out in s 7(1) of the Water NSW Act are imposed on Water NSW by the combination of the actions of IPART (under s 56(2)), the Minister (under s 12 or s 13) and the Governor (under s 11). In practice, this is invariably done and, to the extent that the Operating Licence does not also add conditions which make mandatory a particular aspect of one or more of the 11 “listed functions”, Water NSW cannot and does not have any objection.
  - (b) Water NSW also has, by virtue of s 7(4)(c), “such other functions as may be conferred or imposed on it ... (c) by an operating licence.” This is an important matter in the present circumstances.
  - (c) Relevant to both paras (a) and (b) above, the Act states: “*function*” includes a power, authority or duty, and *exercise* a function includes perform a duty.” (s 3(1)).
29. **“Function” includes “duty”.** I am not a lawyer, but it is clear that each of the 11 “listed functions” of Water NSW, imposed on it in the way set out in **para 28(a)** above, imposes a duty on Water NSW to perform that listed function and, even though Water NSW may have a discretion as to the manner in which it discharges that duty, Water NSW does not merely have discretion whether or not to perform that listed function. Taking the listed function of Water NSW in s 7(i) of the Water NSW Act “to undertake flood mitigation and management” as an example, that this is a mandatory duty on Water NSW seems obvious from:
- (a) The clear statement in the Water NSW Act set out in in **para 28(c)** above that “function” includes “duty”.
  - (b) It promotes the purpose or object of the Water NSW Act, particularly in the context that:

(i) In the Water NSW Act, s 6 headed “Objectives of Water NSW” and s 7 headed “Functions of Water NSW” are the only 2 sections in “Division 2 Objectives and functions” which is within “Part 2 Constitution and functions of Water NSW”.

(ii) The 11 “listed functions” in s 7 clearly promote the purpose and objects of Water NSW specified in s 6.

(iii) In relation to the ninth “listed function” in s 7, namely, “to undertake flood mitigation and management”, it clearly promotes the following parts of the purpose and objects of Water NSW specified in s 6:

A. “to capture, store and release water in a...safe...manner” (s 6(1)(a)).

B. “to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates” (s 6(2)(b)).

30. The approach taken, and the conclusion reached, in **para 29** above with respect to “listed functions”, is also consistent with s 33 of the *Interpretation Act 1987* (NSW) which states:

“In the interpretation of a provision of an Act..., a construction that would promote the purpose or object underlying the Act... (whether or not that purpose or object is expressly stated in the Act...) shall be preferred to a construction that would not promote that purpose or object.”

31. **End-of-Term Review.** Clause 1.6.1 of the current Operating Licence states:

“It is anticipated that a review of this Licence will commence in the first quarter of 2023 to investigate:

a. whether this Licence is fulfilling its objectives; and

**b. any issues which have arisen during the term of this Licence, which may reduce the effectiveness of this Licence.”** (emphasis added).

32. **The time to address “flood mitigation and management” is now.** As set out in paras 4 to 7 of my NRC Submission, in relation to flood mitigation and management, these things must be attended to when things are quiet – when neither flood nor drought is prevailing in regional NSW – so that Water NSW is fully armed and able to effectively carry out flood mitigation and management when the heavy rainfall events return with a vengeance. It will be during the 5-year term of the new Operating Licence which starts on 01/07/2024 that the BoM ENSO stages of “La Niña WATCH”, or “La Niña ALERT” or “La Niña event declared and underway” will return and flooding events in regional NSW become a danger – unless something to manage that danger is done now. Because the lead times are short, it will be too late for IPART to impose improved

functions – read duties – with respect to flood mitigation and management in the Operating Licence.

33. **Order in which clauses are addressed.** In my Submission to IPART below, I address particular clauses in the Operating Licence in the sequence in which they appear, or places where new clause might be suitable to insert, in the Operating Licence, as opposed to their importance. That said, where clauses, whether in the current Operating Licence or proposed by me to be added to the new Operating Licence, interact or operate together I address them together.

### **CLAUSE 1.1.1: OBJECTIVES OF LICENCE**

34. **IPART should recommend** that the heading to clause 1.1, and clause 1.1.1, of the Operating Licence be amended to read:

#### **“1.1 Objectives and purpose of this Licence**

1.1.1 The objectives of this Licence are:

a. to provide transparent, auditable terms and conditions for Water NSW to both lawfully exercise its functions and lawfully undertake its other activities, in each case in accordance with at least Good Industry Practice; and

b. to require Water NSW, in relation to its function “to capture and store water and to release water”, to consider safety first, and then consider both the effects on each community in which it operates and the benefit to water users and other customers.

35. My proposed revision of paras a and b of clause 1.1.1, as set out above, improves matters in a self-evident way and should be unobjectionable. In the case of para a above, my definition of “Good Industry Practice” is provided in **para 37** below. As clause 1.1.1 only sets out the objectives of the Operating Licence, clause 1.1.1 remains a non-auditable provision. Nevertheless, using the phrase “Good Industry Practice”, together with a definition of what that entails, is an appropriate objective. Arguably, the objective being set not just at “Good” but at the higher objective of “Best Industry Practice” can also be justified, particularly as one of the 8 objects of the *Water Management Act 2000* (NSW) is “to encourage **best practice** in the management and use of water.” (s 3(h)) (emphasis added). See **para 37** below for that alternative higher objective.
36. Para c of current clause 1.1.1 needs to be deleted. Further, Principles 4 and 5 on page 9 of the Issues Paper need to be significantly modified in the light of the following. The expressed aim of the current Operating Licence in clause 1.1.1 c, namely to “impose the minimum regulatory burden on Water NSW by avoiding duplication or conflict with other regulatory instruments”, is inappropriate for a number of reasons:
- (a) First, the aim in current clause 1.1.1 c “to impose the minimum regulatory burden” by itself is objectionable as it implies that this is an aim in and of itself and that the

phrase “by avoiding ...” is merely an example of when to lower the burden and does not restrict the width of interpretation of when to lower the burden. There is a good argument that, in the matter of the Operating Licence and its implications for the people of NSW, the regulatory burden should not be anchored in the “minimum” at all. What matters is that the regulatory burden be appropriate, regardless of whether that is well in excess of the minimum.

(b) Second, even if conditions imposed by the Operating Licence were to duplicate terms of some other regulatory instrument, there is a strong argument for maintenance of such duplication as it is in the interests of the people of NSW that Water NSW be made more accountable, with such accountability arising from IPART being able to:

(i) prepare and provide to the Minister an operational audit which now extends to such duplicate conditions (s 57 Water NSW Act, clause 7.1.1 Operating Licence);

(ii) otherwise monitor and report to the Minister on the compliance by Water NSW with the Operating Licence which now includes such duplicate conditions (s 56(3));

(iii) recommend to the Minister, among other things, actions to be taken, and sanctions to be applied, in respect of a contravention of the Operating Licence which now includes such duplicate conditions (s 56(2)).

(c) Third, to the extent that one or more conditions in the Operating Licence duplicate conditions in a Water Sharing Plan (usually made under s 50 of the *Water Management Act 2000* (NSW)), that is a good thing as it leads to the accountability referred to in para (b) above.

(d) Fourth, if theoretically conditions imposed by the Operating Licence were to materially conflict with the terms of some other regulatory instrument, then it may be that compliance with one will automatically be compliance with the other by virtue of one in practical terms being a subset, so far as compliance is concerned, of the other.

(e) Fifth, the conflict in para (d) above is, in the present circumstances, quite theoretical as the additional conditions that in my Submission I call upon IPART to recommend are designed to work with and not conflict with the terms of other regulatory instruments to which Water NSW is subject. Such additional conditions are merely specific activities that come under the broader function of “to undertake flood mitigation and management” and those specific activities are designed to not conflict with duties imposed on Water NSW by other regulatory instruments.

(f) Sixth, Part 5 of new Schedule B in **para 60** below is a specific example of where any conflict between the new specific duties in Parts 2, 3, and 4 of Schedule B with respect to the “Murrumbidgee Area of Concern” and the duties that Water NSW has under the WSP for the M or other Management Plan for the Murrumbidgee area is resolved: the new duties only operate within available discretions, and where duties conflict the Management Plans prevail.

37. **IPART should recommend** that the following be added to the definitions in clause 8.1 of the Operating Licence:

“**function** includes a power, authority or duty, and **exercise** a function includes perform a duty. Each Listed Function, each Ministerial Function, and each other function conferred or imposed on Water NSW by this Licence, is in this Licence a “function”.

“**Good Industry Practice** means standards, practices, methods and procedures, conforming to the law and the degree of skill and care, diligence, prudence, foresight and judgement, which would reasonably and ordinarily be expected of a skilled body engaged in a similar type of undertaking under the same or similar circumstances.”

“**Ministerial Functions** means those specified functions of the relevant Minister or the Ministerial Corporation conferred on Water NSW under s 12(4) of the Act, as set out in Schedule A.”

38. If IPART considered that, in lieu of “Good Industry Practice”, the higher objective of “Best Industry Practice” was more appropriate, then the new definition of that in clause 8.1 might be:

“**Best Industry Practice** means standards, practices, methods and procedures, conforming to the law and the degree of skill and care, diligence, prudence, foresight, and judgment, which would reasonably and ordinarily be expected of a leading body engaged, anywhere in the world, in a similar type of undertaking under the same or similar circumstances.”

39. My proposed definition of “Ministerial Functions” set out in **para 37** above is needed so that there is a differentiation between, on the one hand, the particular type of function that constitutes the lengthy list of functions set out in Schedule A, and on the other hand, the other “functions” conferred on Water NSW ultimately by s 7(4)(c) of the Water NSW Act.

#### **CLAUSE 1.1.2: PURPOSE OF LICENCE**

40. **IPART should recommend** that clause 1.1.2 of the Operating Licence be amended by replacing the opening and first 3 paras with:

“1.1.2 The purpose of this Licence is to:

- a. specify the listed functions of Water NSW and confer or impose other functions upon Water NSW;
- b. authorise Water NSW to carry out each of the functions referred to in para a;
- c. specify the areas and circumstances in which each of the functions referred to in para a may be exercised under the authority of this Licence;”.

41. The reasons for the changes sought in the preceding para and the definition of “function” being added to clause 8.1 are, first, it simplifies matters in clause 1.1.2 and, second, it allows the Operating Licence to recognise, in the way set out further below, the 3 main types of functions, which the provisions of the current Operating Licence are somewhat unclear about, and to differentiate such functions from other terms and conditions. The 3 main types of functions are sourced separately in the Water NSW Act as follows:
- (a) the “listed functions” of Water NSW, from s 7(1);
  - (b) specified functions of the Minister or Ministerial Corporation, conferred on Water NSW under s 12(4). These are set out across 22 pages in Schedule A of the Operating Licence;
  - (c) other functions as may be conferred or imposed on Water NSW by, among other things, the Operating Licence, from s 7(4)(c), and derived from the recommendation of the Minister under 13(1) which in turn is upon the recommendation of IPART under s 56(2).
42. It is problematic and misleads the reader when there are already 2 types of functions “conferred” on Water NSW – see paras (b) and (c) above – and yet the Operating Licence uses the term “Conferred Functions” to refer to only one type of conferred function.
43. The definition “Conferred Functions”, which I am suggesting be renamed as “Ministerial Functions”, may in fact be better suited to being renamed as “Ministerial Powers”. I have not reviewed any of the numerous legislative provisions listed across the 22 pages of Schedule A, but I suspect that they may be characterised as powers, not duties. I leave that review to IPART or Water NSW. Even if some of them were characterised as duties, the fact that the great majority are only powers, would justify the umbrella term “Ministerial Powers”.

## **CLAUSE 1.2: LICENCE AUTHORISATIONS**

44. **IPART should recommend** that the heading to clause 1.2, and the first 2 lines of clause 1.2.1, which appear at the bottom of page 1 of the Operating Licence, be replaced with:

**“1.2 What this Licence authorises**

1.2.1 Subject to clause 1.2.2, this Licence authorises Water NSW to carry out:

- (a) each of the listed functions specified in clause 1.3.1; and
- (b) each of the functions specified in clause 1.4.1; and



(c) each of the Ministerial Functions specified in Schedule A, which are hereby conferred on Water NSW; and

(d) each of the other functions specified in clauses 1.6.1, 1.7.1, 1.8.1, 1.9.1, 1.9.2, 1.10.1, 1.10.2, 1.10.5, 1.11.1 and 1.11.2, and where applicable functions specified in Schedules B and following, and each of such other functions are hereby conferred and imposed on Water NSW; and

(e) each of the other functions specified in clauses beyond those identified in paras (a) to (d), with a function identified in the clause by use of either the word “function” or the word “duty” or, in the absence of both those words, the activity is made mandatory by use of the word “must”, and each of such other functions are hereby conferred and imposed on Water NSW.

1.2.2 In respect of each function in paras (a) to (e) of clause 1.2.1, the function is subject to any terms and conditions, areas and circumstances specified in this Licence. Unless specified otherwise, Water NSW may carry out each such function in respect of its Area of Operations.”

45. **IPART should recommend** that the entire balance of clause 1.2, starting at the top of page 2 of the Operating Licence, be amended by adding a number of subheadings (for ease of reading), and making minor changes to current clauses 1.2.1 a to k (to correspond with the order in the “listed functions” as given in 7(1) of the Water NSW Act), and making minor changes to and reordering of current clauses 1.2.2 to 1.2.7 (for ease of reading), and adding substantive new clauses (for reasons given further below), and renumbering clauses, all as follows:

#### “1.3 Listed functions

1.3.1 The listed functions of Water NSW are as set out in s 7(1) of the Act, which are as follows (and in some cases paraphrased) are:

a. to capture and store water: ... [then as per paras a to h of current clause 1.2.1.]

i. to undertake flood mitigation and management; [based on current clause 1.2.1 k, and now using the same 6-word phrase in s 7(1)(i) of the Water NSW Act].

j to undertake research on catchments generally, and in particular on the health of declared catchment areas; and [same as current clause 1.2.1 i].

k to undertake an educative role within the community. [same as current clause 1.2.1 j].

1.3.2 The listed function of Water NSW under para i of clause 1.3.1 is to be carried out in all areas of New South Wales, except for the Sydney catchment area as defined by the Act. [based on current clause 1.2.1 k, and in respect of the current exception I make

no submission, but subject to what IPART might recommend by way of change to extend the obligation to the Sydney catchment area.]

#### **1.4 Powers**

1.4.1 Water NSW may: ... [then as per paras a and b of current clause 1.2.2].

[current clause 1.2.3. is omitted as it is dealt with in proposed new clause 1.2.1 (c) set out in this **para 45** above].

#### **1.5 Area of Operations**

1.5.1. Pursuant to s 15(4)(b) of the Act, Water NSW may exercise any function of the type referred to in s 15(2) of the Act, but only with the agreement of the Relevant Body. [based on current clause 1.2.4].

1.5.2 Pursuant to s 15(4)(a) of the Act, Water NSW may carry out any of its functions outside of the State. [based on current clause 1.2.6.].

1.5.3 For the avoidance of doubt, where this Licence authorises a function, that function is intended to apply in respect of the Fish River Water Supply Scheme, to the maximum extent permissible by law. [based on current clause 1.2.7].

#### **1.6 Metering function**

1.6.1 Water NSW has the metering equipment functions in s 31(1) of the Act. [based on current clause 1.2.5].

#### **1.7 Duty to consider safety first, then community and customer**

1.7.1 In relation to its listed function “to capture and store water and to release water”, Water NSW must consider, separately with respect to each of “capture”, “store”, and “release”, safety first, and then consider both the effects on each community in which Water NSW operates and the benefit to water users and other customers.

#### **1.8 Duty to carry out flood mitigation and management**

1.8.1 In relation to its listed function “to undertake flood mitigation and management”, Water NSW has the duty to carry out that function, to at least within the terms of how “Flood Mitigation and Management” is defined in clause 8.1.

1.8.2 The duty of Water NSW in clause 1.8.1 is in addition to the Flood Protection and Control Duties of Water NSW.

#### **1.9 Flood Protection and Control Duties**

1.9.1 Water NSW has the Flood Protection and Control Duties specified in paras a and b of that definition in all areas of New South Wales.

1.9.2 Water NSW has the additional Flood Protection and Control Duties specified in para c of that definition in the areas of New South Wales specified in Schedules B and following.

#### **1.10 Duty to provide reliable notifications re water storages**

1.10.1 Water NSW must maintain an effective system to provide, to registered users referred to in clause 1.10.2, at the times described in clause 1.10.3, reliable notifications of at least the following types of information:

- a. storage volumes for a specified water storage;
- b. airspace volumes for a specified water storage;
- c. daily inflows for a specified water storage;
- d. release rates from a specified water storage;
- e. flow rate, for a specified river downstream of a specified water storage, at a specified river gauge;
- f. river level, for a specified river downstream of a specified water storage, at a specified river gauge;
- g. any material change, being a change by 5% or more, in any of types a to f above since the last notification of that type made to registered users generally;
- h. Water NSW's reasonable view of the possible effects of types a to g above, for a specified river downstream of a specified water storage, for a future period nominated in the notification.

1.10.2 Water NSW must enable persons to register to receive one or more types of the notifications referred to in clause 1.10.1, and to specify one or more water storages, and rivers and water gauges where relevant, and to at any time vary their registration.

1.10.3 The times for Water NSW to make notifications under clause 1.10.1 are:

a. During the BoM ENSO Outlook announced stages of "NEUTRAL" or "El Niño WATCH" or "El Niño ALERT" or "El Niño event is declared and underway":

(i) In respect of types of information in paras a to f of clause 1.10.1, the time is during the first week of each quarter.

(ii) In respect of types of information in paras g and h of clause 1.10.1:

(A) If the change will be primarily the result of actions planned to be taken by Water NSW, the time is at least 48 hours before those actions are to be taken and earlier than 48 hours if that is practicable.

(B) If the change is other than under para (A), the time is as soon as practicable.

b. During the BoM ENSO Outlook announced stages of “La Niña WATCH” or “La Niña ALERT” or “La Niña event is declared and underway”:

(i) In respect of types of information in paras a to f of clause 1.10.1, the time is during the first week of each month.

(ii) In respect of types of information in paras g and h of clause 1.10.1:

(A) If the change will be primarily the result of actions planned to be taken by Water NSW, the time is at least 48 hours before those actions are to be taken and earlier than 48 hours if that is practicable, and thereafter as often as Water NSW considers it necessary, including making intra-day notifications.

(B) If the change is other than under para (A), the time is as soon as practicable, and thereafter as often as Water NSW considers it necessary, including making intra-day notifications.

1.10.4 Water NSW’s function in clause 1.10.1:

a. is in addition to the duties Water NSW has with respect to making announcements of matters specified in Schedules B and following; and

b. is in addition to any duties or expectations to make notifications under any Act or instruments; and

c. must be carried out by Water NSW even where to do so may be a duplication of notifications made or to be made by the BoM, the NSW State Emergency Service, a local council, or otherwise.

1.10.5 Water NSW must retain, and make available on its website, for at least 5 years all such notifications made, but on the basis that personal information of the recipients of such notifications are not published.

### **1.11 Duty to review decision support systems and modelling tools**

1.11.1 Water NSW must, at least once during the term of this Licence, review each of its major decision support systems (such as “Computer Aided River Management”) and other modelling tools (such as “Integrated Quantity and Quality Model” or successor of it). The purpose of Water NSW’s review is to identify any material improvements that might be made to each of such tools and systems, or what changes to the parameters or weighting of datasets used by them, are appropriate, with a view to best achieving all of the following: addressing any issues of concern; making such tools and systems more effective and more reliable; ensuring that Water NSW is appropriately equipped to carry out its functions in accordance with this Licence and all relevant legislation and, to the extent that this Licence or such legislation do not require a different standard, to

at least Good Industry Practice; and ensuring that Water NSW is using tools and systems which take into account the extremes climate change.

1.11.2 Water NSW in its review under clause 1.11.1 must consider whether historical statistics may not sufficiently take account climate change and, in particular, the new circumstances of which the CSIRO and BoM jointly warn, namely, that there will be more extreme events, with rainfall events more intense. Water NSW must use major decision support systems and modelling tools that reflect that the risk of material damage from flooding arises within shorter time frames than ever before, and that the intensity of the flooding and consequent level of damage caused is greater than before.

*Note: This clause requires Water NSW to identify the improvements, but it does not require Water NSW to effect such improvements, as to do so may require Water NSW to reallocate existing funding or obtain additional appropriate funding and may require Water NSW to obtain any necessary third party approvals.”*

46. Current clauses 1.3 to 1.7, which will be retained in the new Operating Licence, would be renumbered as a consequence of the above new clauses 1.3 to 1.11. As noted above in respect of clause 1.3.2, I make no submission as to the current carve-out of the Sydney catchment area from the listed function of “to undertake flood mitigation and management”. Even so, I wonder whether, in the light of statutory structures created by the combination of sections 7(1)(i), 7(3), 11(1), 15(1), and 15(2)(a) of the Water NSW Act, that carve-out in the current Operating Licence has ever been legally permissible or valid. The NSW Parliament, through the Water NSW Act, seems to mandate that the “listed function” of “to undertake flood mitigation and management” is to apply to Water NSW in its area of operations – the whole of the State.
47. New clause 1.7.1 above should be unobjectionable. The word “safety” does not appear at all in the current Operating Licence (except on page 42 to repeat the heading of a provision in other legislation). While it might be thought that it goes without saying that safety should be foremost in the duties of Water NSW, it really does need to be reinforced and front of mind. The Operating Licence, the very authority for Water NSW to carry out its functions, should be part of that reinforcement. The *Dams Safety Act 2015* (NSW), its regulations, and published guidelines, focus on averting a failure of any of the 403 or so “declared” dams in NSW. That legislative scheme focuses on the safety of the dam itself – a failure of it – with the safety of the community downstream of the dam which is operating under normal load conditions and not in danger of failure being irrelevant. Work Health and Safety legislation relates primarily to health, safety and welfare of “workers” and others at a “workplace”. In the case of Water NSW, the safety of the community downstream of each dam operated by Water NSW, is apparently missing from the legislative framework or to the extent that it might fall under existing legislation, the issue needs to be specifically and better addressed. This should, at the very least, be done through the new Operating Licence.

48. New clause 1.8.1 and the related new definition of “Flood Mitigation and Management” is a reasonable approach to making Water NSW accountable in respect of this listed function.
49. New clause 1.9.1, together with paras a and b of the related new definition of “Flood Protection and Control Duties”, are likewise a reasonable approach to making Water NSW responsible and accountable with respect to such matters. This new duty requires Water NSW, in carrying out its functions, to take all steps reasonably necessary to avoid a threat to human life or property arising from floods, and when flooding is underway or imminent to minimise the risk to human life or property. The people of NSW would expect no less.
50. As to new clause 1.9.2 and the specific Flood Protection and Control Duties in new Schedule B, their terms speak for themselves. It is my strong submission that the history of matters known by me in relation to the “Murrumbidgee Area of Concern”, as set out and supported at length in my NRC Submission, justifies the imposition of the specific Flood Protection and Control Duties as set out in Schedule B in relation to that particular area.
51. New clauses 1.10.1 to 1.10.5, which deal with Water NSW’s duty to provide reliable notifications re water storages, are a revision of Water NSW’s existing duty in current clause 6.4, which is in need of improvement. New clauses 1.10.1 to 1.10.5 largely reflect what Water NSW already does under its “Early Warning Network”. As a consequence of new clauses 1.10.1 to 1.10.5, current clause 6.4 is to be deleted. To the extent that the notifications to be made by Water NSW might be duplicative of those made by the BoM or the SES, this duplication is appropriate, for the reasons set out in paras 166 to 168 of my NRC Submission.
52. New clauses 1.11.1 and 1.11.2 are a reasonable approach to requiring Water NSW to, at the very least, review the decision support systems and modelling tools it uses. This is to see whether they are up-to-date and, in the light of climate change and extreme events becoming more likely, still fit for purpose. My concern is that the approach to flood mitigation and management by Water NSW and the DPE, and possibly IPART, is to operate on a flawed assumption that future flooding can be reliably predicted based on over 100 years of historical flood data. This creates a false sense of security. The BoM and the CSIRO have for some years now been warning in their annual reviews that climate change brings unpredictable rainfall patterns and higher intensities. This means that the weighting of over 100 years of historical flood data leads to design assumptions with respect to flood mitigation and management falling well short of the realities that now confront us in NSW.
53. In paras 5, 12(b), 23, 28, 30(c), 31, 75(b), 76, 102, and 133 of my NRC Submission, I indicate my concerns with respect to the decision support systems and modelling tools used by Water NSW, and the need for changes to them. New clauses 1.11.1 and 1.11.2 do not require Water NSW to actually change those decision support systems and modelling tools. Such changes may be complex, costly, and need careful consideration by Water NSW and others. Requiring Water NSW to at least undertake the review is reasonable as it will inform Water NSW of what deficiencies there may be and may

justify in some cases the actual changes being made and support the funding of making such changes.

## **EXCLUSION OF LIABILITY, CURRENT AND ONGOING**

54. Lest it be thought that the imposition of new duties on Water NSW, or the requirement to carry out new specific activities under the umbrella of existing duties imposed by the current Operating Licence, would expose Water NSW and its staff to new liabilities, it should not be forgotten that the following current, very wide and very effective, statutory protection is provided. Under s 113 of the Water NSW Act:

### **“113 Exclusion of personal liability**

(1) An act or omission of any of the following:

(a) the Minister ...

(c) Water NSW or a director of Water NSW,

(d) an authorised officer,

(e) a member of staff of the Department (including the Secretary) or of Water NSW or the Regulatory Authority,

(f) a person acting under the direction of a person referred to in paragraphs (a), (b), (c), (d) or (e),

does not subject the Minister, a director, authorised officer, member of staff or person so acting personally to any action, liability, claim or demand if the act or omission was done, or omitted to be done, in good faith for the purpose of executing this or any other Act.”

So, in NSW, if Water NSW is negligent then, so long as it acted in good faith, Water NSW is not exposed to any liability. Obviously, it would be a matter for the NSW Parliament at some point in the future if it wanted to decrease, qualify, or increase, that protection for Water NSW and its staff.

55. The current and ongoing protection of Water NSW and its staff from liability, as set out in the preceding para, is wider than the provision in Queensland. In Queensland, the operator of water infrastructure is declared to be not liable for an “event or circumstance”, such as “the escape of water from water infrastructure” or “flooding upstream or downstream of water infrastructure”, if that event or circumstance was both “beyond the control of” the operator and, in relation to the event or circumstance, the operator “acted reasonably and without negligence.” (s 49 *Water Supply (Safety and Reliability) Act 2008* (Qld)). So, in Queensland, negligence exposes the operator to liability.

## CURRENT CLAUSE 1.6: END-OF-TERM REVIEW

56. **IPART should recommend** that in the new Operating Licence the equivalent of current clause 1.6.1 b be amended by replacing “during the term of this Licence” with “either during the term of this Licence or the term of the operating licence which immediately preceded this Licence”. The need for this is self-evident in the present circumstances where IPART “deferred the end-of-term licence review in 2021” with the result that a substantive review was never done in respect of the Operating Licence which ended on 30/0/6/2022 (Issues Paper 6). Because the Commencement Date of the current Operating Licence, due to the 2-year extension, became 01/07/2022, technically IPART’s review is restricted to issues which have arisen since 01/07/2022, instead of since the original Commencement Date of 01/07/2017 (see **para 9** above).
57. Quite apart from the unusual circumstances of that 2-year extension, it is appropriate that whenever an end-of-year review is undertaken it should also include issues which arose during the term of the immediately preceding operating licence. The reasons for this include:
- (a) First, due to the necessary deadline for lodging submissions to IPART, each review will very likely miss issues that might arise in the last 8 months of the term of the operating licence being reviewed. This is 13% of a 5-year term of an operating licence that will not be reviewed.
- (b) Second, there may well be issues that have arisen up to 9 years or so earlier than the end-of-term review that are relevant to consider in relation to the effectiveness of the licence during its most recent 4 years or so. One example is the effectiveness of clauses which have not changed over that 9-year period and particular flooding events that occurred say 8 and 6 years ago that were considered in the prior review but at the time of the current review are viewed much more seriously in the light of the more up-to-date scientific knowledge and consensus in relation to the worsening of such flood events due to climate change. Another example might be in relation to the impact of bush fires on the quality of water supplied by Water NSW, such bush fire events also being viewed more seriously because of more up-to-date scientific consensus on climate change.
58. **IPART should recommend** that in the new Operating Licence the equivalent of current clause 1.6, and relevant definition in current clause 8.1, be amended so that each use of “End of Term Review” is changed to “End-of-Term Review”.

## NEW DEFINITIONS: “BoM”, “Flood Mitigation and Management”, “Flood Protection and Control Duties”, “water storage”

59. **IPART should recommend** that the following be added to the definitions in clause 8.1 of the Operating Licence:



“**BoM** means Bureau of Meteorology which was established under the *Meteorology Act 1955* (Cth) and which operates under that Act and the *Water Act 2007* (Cth).

“**Flood Mitigation and Management** means reducing river levels downstream of each water storage operated by Water NSW (except for water storages in the Sydney catchment area), which are or may become at flood level, by using planned and modelled airspace in the water storage to temporarily store floodwater and only release that floodwater later when the downstream river levels have subsided to a safe level.

*Note: One of the listed functions of Water NSW is “to undertake flood mitigation and management in all areas of New South Wales” (and under clause 1.3.1 i this is except for the Sydney catchment area).”*

“**Flood Protection and Control Duties** means each of the following duties:

- a. in carrying out its listed functions and other functions, to take all steps reasonably necessary to avoid a threat to human life or property arising from floods; and
- b. in carrying out its listed functions and other functions, to minimise the existing and future risk to human life or property, from the effects of flooding; and
- c. to comply with Parts 2, 3, 4, and 5 of Schedule B, and with Parts 2, 3, 4, and 5 of each Schedule that follows Schedule B.”

“**water storage**” means the water body impounded by a dam wall or other like structure constructed across a river, which is used to regulate and manage river flows in a water source. The word “**dam**” may be used to not only refer to such wall but also to refer to the “water storage”.

## **NEW SCHEDULE B: “MURRUMBIDGEE AREA OF CONCERN”, SPECIFIC PARTS OF NEW “FLOOD PROTECTION AND CONTROL DUTIES”**

60. **IPART should recommend** that the name “Schedules” on page 32 of the current Operating licence be renamed “Schedule A” (to, in any event, match clause 1.2.3) and that after “Schedule A” the following be added as new “Schedule B” to the Operating Licence:

### **“Schedule B**

#### **Part 1: Murrumbidgee Area of Concern**

The “**Murrumbidgee Area of Concern**” means:

- (a) the area which is 4 kilometres either side of what Water NSW has most recently recorded is the median point of the Murrumbidgee River when the river level at Wagga Wagga (gauging station 573000/410001) is between 4.5 and 5.5 metres, such median

point and area being recorded as a continuous line for the length of that part of the Murrumbidgee River which is:

- (i) from the confluence of the Tumut River and the Murrumbidgee River,
- (ii) to the point on the Murrumbidgee River which is 8 kilometres, as the crow flies, north-west of the Mundowry Lane Bridge (which bridge is about 15 km west of the CBD of Wagga Wagga); and

(b) the area which is 2 kilometres either side of what Water NSW has most recently recorded is the median point of the Tumut River, such median point and area being recorded as a continuous line for the length of that part of the Tumut River which is from immediately below the wall of the Blowering Dam to the confluence of the Tumut River and the Murrumbidgee River.

## **Part 2: Determinations and predictions to be made, and announced**

Included in the “Flood Protection and Control Duties” with respect to the Murrumbidgee Area of Concern, is the following:

B1. As part of carrying out its Flood Protection and Control Duties, Water NSW is solely responsible for making, in the light of all available information, and regardless of whether that information is issued or not and whether that information is from the BoM or otherwise, the following determinations and predictions in relation to, or likely to impact on, the Murrumbidgee Area of Concern:

(a) Water NSW must determine what the storage release from each of the Burrinjuck Dam and the Blowering Dam will be over what period; and

(b) Water NSW must predict the quantum of spillage for each such dam in that same period; and

(c) Water NSW must predict what the river levels and other flooding consequences downstream of the confluence of the Murrumbidgee River and Tumut River will be at Wagga Wagga and not less than 2 other specified points in the Murrumbidgee Area of Concern in that period.

B2. Water NSW must publicly announce its determinations and predictions under clause B1 in a timely manner with a view to its Flood Protection and Control Duties being carried out as soon as practicable.

B3. Water NSW must make such determinations, predictions, and announcements, as and when Water NSW considers it appropriate, in the light of its Flood Protection and Control Duties, its other listed functions, and all other circumstances.

## **Part 3: Maintain “flood mitigation airspace” volumes**

Included in the “Flood Protection and Control Duties” with respect to the Murrumbidgee Area of Concern, is the following:

B4. Water NSW must maintain a “flood mitigation airspace” volume for the Blowering Dam, such airspace to be devoted solely to flood mitigation and to be in addition to any airspace volume devoted to other purposes.

B5. Water NSW must maintain a “flood mitigation airspace” volume for the Burrinjuck Dam, such mandatory airspace solely devoted to flood mitigation and to be in addition to any airspace volume devoted to other purposes.

B6. Water NSW must coordinate releases from both such dams, so that flood mitigation is best achieved.

B7. Water NSW must make the calculation of the mandatory “flood mitigation airspace” volume in each of clauses B4 and B5 every 3 months, and it must announce those volumes as soon as practicable.

B8. Water NSW must make such 3-monthly calculation on the basis of advice from the BoM and the specific flood mitigation duty imposed on Water NSW by clause B9.

#### **Part 4: Duty to avoid height of Murrumbidgee River exceeding certain levels**

Included in the “Flood Protection and Control Duties” with respect to the Murrumbidgee Area of Concern, is the following:

B9. Both in its forward planning for, and the day-to-day operations of, the Blowering Dam and the Burrinjuck Dam, Water NSW must avoid both:

(a) the height of the Murrumbidgee River at Wagga Wagga (gauging station 573000/41004) exceeding 7.10 metres on any day.

*Note: The BoM records that river heights for the Murrumbidgee River at Wagga Wagga gauging station are at differing flood levels as follows: minor 7.30m; moderate 9.00m; and major 9.60m.*

(b) the height of the Murrumbidgee River at Gundagai (gauging station 073132/410004) exceeding 5.90 metres on any day.

*Note: The BoM records that river heights for the Murrumbidgee River at Gundagai gauging station are at differing flood levels as follows: minor 6.10m; moderate 7.60m; and major 8.50m.*

#### **Part 5: Duties to be exercised to the maximum extent permissible under each Management Plan**

Water NSW must exercise each of the duties in Parts 2, 3, and 4 of this Schedule B:

(a) to the maximum extent permissible by law; and

(b) to the maximum extent permissible under any discretion available to Water NSW under each Management Plan for a water source of which the Murrumbidgee Area of Concern forms part; and

(c) otherwise to the maximum extent permissible under each such Management Plan which does not cause Water NSW to be in breach of a mandatory provision imposed on Water NSW under such Management Plan.”

61. **Similar approach for some other dams in regional NSW.** As is obvious from the whole the recommended new Schedule B for the Operating Licence, as set out above, that Schedule B is crafted for the circumstances applicable to the Blowering Dam, Burrinjuck Dam, and the defined area starting from below the walls of those 2 dams. It would be appropriate for IPART, perhaps through Water NSW, to invite a similar approach to be taken with respect to some other dams in regional NSW operated by Water NSW. For each such additional region, a new Schedule C, D, and so on, would be added to the Operating Licence, with the new Schedules C, D, and so on, using the template provided by Schedule B. While I feel I understand the circumstances of the Blowering Dam and the Burrinjuck Dam and their contribution to flood events, I do not have sufficient knowledge of the circumstances of Water NSW’s operation of other dams in regional NSW and the degree of contribution to flood events by uncontrolled tributaries downstream of each of such other dams. With that large caveat, I venture that there are definable “Areas of Concern” downstream of the following dams operated by Water NSW which may be relevant to consider for addition as Schedules C, D, and so on, in the Operating Licence, with Parts 2, 3, 4, and 5 appropriate to each such additional Schedule:
62. **No change to Schedule B until legislation mandates equivalent or higher. IPART should** only give consideration to recommending the amendment or deletion of aspects of new Schedule B (and Schedules, C, D, and so on) of the Operating Licence when a relevant Water Sharing Plan, or relevant legislation binding upon Water NSW, has mandated that Water NSW carry out the functions in the new Schedule B, and so on, to the same level or better. Even then, IPART should consider the benefits of retaining the provisions in Schedule B, and so on, so that they remain auditable by IPART.
63. **IPART should recommend** that current Schedule “B Indicative map of operations” be renamed “Appendix 1 Overview map of Area of Operations”, and that in current clause 8.1 in the definition of “Licence” and in current clause 8.2 a iii “Schedule B” be replaced with “Appendix 1”.

## **NEW “COMMUNITY ADVISORY GROUPS”**

64. **Current Customer Advisory Groups.** Clause 6.5.1 of the current Operating Licence requires Water NSW to establish and maintain advisory groups for “Customers” in different regions. For each such Group the membership must be representative of the 10 categories of water users, plus 2 categories of water utilities (clause 6.5.4). In the Operating Licence, “Customer” is narrowly defined and captures only those to whom

Water NSW makes direct supply of water. Water NSW is required to “regularly consult” with such Groups (clause 6.5.2). It is notable that this again emphasises the rights of “water users”, with no inclusion of any representatives of the general community who may be very interested in “flood mitigation and management”.

65. In relation to the ninth “listed function” of Water NSW in s 7 of the Water NSW Act, namely, “to undertake flood mitigation and management”, which is a condition imposed by clause 1.2.1 k of the current Operating Licence, that flood mitigation and management function clearly promotes the following parts of the purpose and objects of Water NSW specified in s 6 of the Water NSW Act:

A. “**to capture, store and release water in a ... safe ... manner**” (s 6(1)(a)).

B. “to exhibit a sense of social responsibility by **having regard to the interests of the community in which it operates**” (s 6(2)(b)) (emphasis added).

66. However, the current Operating Licence is deficient in relation to requiring Water NSW to consult with the very community which is at risk from flooding events downstream of the water storages which Water NSW operates in regional NSW.
67. **New Community Advisory Groups.** In the light of, first, the deficiencies highlighted in **paras 64 and 66** above, second, the objectives set out in **paras 34 and 65** above and, third, the duties and obligations in **para 45** (“listed functions” and functions imposed under new clauses 1.7 to 1.10), **IPART should recommend** that conditions be imposed in the Operating Licence to require Water NSW establish and maintain “Community Advisory Groups”, in parallel with the current “Customer Advisory Groups”, in different regions in regional NSW.
68. To that end, **IPART should recommend** that a set of additional clauses be added to the Operating Licence, perhaps located between current clauses 6.7 and 6.8, which would mirror with appropriate adaptations, and where necessary differ from, current clauses 6.5.1 to 6.6.4 of the Operating Licence as follows:

(a) The equivalent of clause 6.5.2 would be to the effect that Water NSW must regularly consult with the relevant Community Advisory Groups in regions in regional NSW in those circumstances where, based on Bureau of Meteorology (“**BoM**”) forecasts, and all the other relevant circumstances, it was likely that issues concerned with flood mitigation and management may arise in that region. Meetings with such Groups would be convened often in periods of predicted heavy inflows with consequential possibility of risk of flooding in the region in question. In practice, this would be during the following announced stages of the BoM ENSO Outlook: a “La Niña WATCH”, or a “La Niña ALERT”, or a “La Niña event is declared and underway” (each leading to above-average rainfall). This would also mean that a meeting of a Community Advisory Group would not be convened for a particular region during BoM ENSO Outlook phases of “Neutral” or any of the 3 phases of El Niño (leading to below average rainfall).

(b) The equivalent of clause 6.5.4 would be to the effect that, for each Community Advisory Group, the membership must meet the following requirements:

(i) Each individual should be representative of those in the community who have experienced one or more flooding events (whether in the region or elsewhere) or who work or reside in a place in the region which has been the subject of one or more flooding events within the preceding 30 years; and

(ii) Each individual must not have a conflict of interest between the membership and purpose of the Community Advisory Group, and any of the categories of “water user” listed in paras a. to l. of clause 6.5.4. Examples of such of a conflict of interest would be that the following categories of individuals would be ineligible to be a member of the Community Advisory Group: any individual who is, or has been in the preceding 15 years, a water user listed in any of paras a. to l. of clause 6.5.4 in any part of regional NSW; any individual who is, or has been in the preceding 15 years, a director of, employee of, consultant to, or contractor to, a water user listed in any of paras a. to l. of clause 6.5.4 in any part of regional NSW.

(c) The equivalent of clause 6.5.5 would contain the additional requirement that Water NSW must provide the Community Advisory Group with the same information that was most recently provided to the Customer Advisory Group for that region, together with the minutes of the last 3 meetings of that Customer Advisory Group.

69. Water NSW has claimed that it works closely with communities in flood prone valleys. The “Water NSW Annual Report 2020–21” (176 pages) includes:

(a) The “Message from the Board” includes the statement:

“We have managed major inflow events and sought to maximise water resources. Through prudent management we aim to achieve a balance between water security **whilst working closely with communities in flood prone valleys to manage airspace and mitigate the impact of dam releases.**” [p5].

(b) The “Message from the Chief Executive Officer” opened with:

“The significant and ongoing recovery in water storages from increased rainfall and inflows following one of the worst droughts on record in many valleys has been the theme for 2021. With a significant shift in weather patterns and replenished storages across the State, this has led to increased community confidence addressing the very real concerns about water security for towns and communities following years of intense drought.

The challenges of managing these major inflow events are significant for our teams across NSW. **We want to ensure we capture as much water as possible** for our customers, but we also **want to work closely with local communities** and environmental water holders **in understanding how best to manage large inflow**

**events, storage airspace and local flooding impacts.** We do this in collaboration with a range of stakeholders, and notably the Bureau of Meteorology, State Emergency Service, NSW Health and local councils.

**The ability of our teams and people right across NSW to adjust to changing priorities, major weather events, floods, and working closely with local communities has been and continues to be extraordinary. Managing such events in real time requires the highest levels of operational and technical expertise,** catchment knowledge and working closely with other agencies. Our customers and stakeholders across our operations have seen first-hand the dedication of our people to do the best and right thing by local communities.” [p8] (emphasis added).

70. The phrases which I have emphasised in the preceding para, of which I am critical, which appeared in the “Water NSW Annual Report 2020–21” (176 pages), should be seriously questioned when viewed in the light of, first, the clear warnings by the BoM in its ENSO Outlook of La Niña and the foreshadowing of flooding events, and then the actual flooding events that all occurred through to 31/12/2022.
71. The need to make Community Advisory Groups mandatory in regions in regional NSW and to require Water NSW to regularly consult with such of those groups
72. **Cost-benefit analysis of Community Advisory Groups.** The cost of the new mandatory Community Advisory Groups in regional NSW should be minimal, for a number of reasons. First, such groups are really only operative during periods where the BoM ENSO Outlook is at the stage of “La Niña WATCH”, or “La Niña ALERT”, or there is a “La Niña event declared and underway”. Second, Water NSW already claims to be engaging with the community and does so in some cases through an informal Airspace Reference Panel for particular regions, and hence, third, as suggested in **para 68(c)** above, the Community Advisory Groups would be receiving the same information as is already being provided to the parallel Customer Advisory Groups. Fourth, it is very likely that meetings of the parallel groups would be held on the same day with the same personnel from Water NSW in attendance. It is reasonable to expect that the benefits would be the same as. Or better, than the current informal Airspace Reference Panel for particular regions.

#### **WATER NSW REPORTING MANUAL 2022-2024**

73. The functions of IPART in relation to an operating licence include monitoring and reporting to the portfolio Minister on compliance by Water NSW with its operating licence [s 56(3) Water NSW Act]. Under clause 7.2 of the Operating Licence, Water NSW must comply with its reporting obligations set out in the Operating Licence and in IPART’s 42-page “Water NSW Reporting Manual 2022-2024” (published October 2022). The word “flood” does not appear in this “Water NSW Reporting Manual”, or the 2017-2022 manual which preceded it.

74. **IPART should revise** the “Water NSW Reporting Manual 2022-2024”, and IPART’s proposed draft replacement of it, to include requirements with respect to Water NSW reporting on:
- (a) its listed function to undertake flood mitigation and management; and
  - (b) its “Flood Protection and Control Duties” in Schedules B and following.
75. **IPART should recommend** that clause 7.2.1 of the current Operating Licence be amended by adding at the end:
- “g. flood mitigation and management; and
  - h. Flood Protection and Control Duties in Schedules B and following.”