Local Government Association of NSW

Shires Association of NSW

SUBMISSION TO THE NSW GOVERNMENT URBAN WATER REGULATION REVIEW	
DATE	*FEBRUARY 2013*

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1. Introduction

The Local Government and Shires Associations of NSW (the Associations) are the peak bodies for NSW Local Government.

Together, the Associations represent all 152 NSW general purpose councils, special purpose county councils and the regions of the NSW Aboriginal Land Council. The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils and promote Local Government to the community. In this role, the Associations represent the current 102 Local Government water utilities that provide water supply and sewerage services in regional NSW.

Local Government plays an important role in water management and in the provision of water services to the community. Councils use water for their business activities and community services and continuously aim to improve the efficient use of this scarce resource including by way of recycling and stormwater harvesting projects. In regional NSW, councils also provide water supply and sewerage services including ensuring supply security through infrastructure provision, demand management and integrated water cycle management. There are currently 102 local water utilities providing water supply and sewerage services to communities in regional NSW, including 97 council-owned and operated local water utilities, four water supply county councils, and one water supply and sewerage county council. Local water utilities service over 1.8 million.

The Associations thank the Metropolitan Water Directorate of the Department of Finance and Services for the opportunity to make a submission to its review of urban water regulation; particularly of the regulation of recycling and stormwater under the *Water Industry Competition Act (NSW) 2006* (WICA) and the *Local Government Act (NSW) 1993* (LG Act).

In general, the Associations support a consistent, effective and efficient regulatory framework that takes account of the level of risk associated with recycling and stormwater schemes. The regulatory framework should avoid duplication and close existing regulatory gaps for private stormwater schemes as well as for council recycling and stormwater schemes, particularly in metropolitan areas.

2. Comments on Local Government issues

The Associations would like to comment on a number of specific issues raised in the review's discussion paper including:

- Future scope of council approvals for private recycling and stormwater reuse schemes under section 68 LG Act and regulatory gaps for private stormwater reuse schemes;
- Regulatory uncertainty for council recycling and stormwater reuse schemes – The Ministerial approval requirement under section 60 LG Act does not apply to metropolitan councils and, in regional areas where it applies, does not cover stormwater reuse schemes;
- The lack of last resort arrangements in WICA where private schemes fail and the local water utility has to, or maybe, be required under WICA to step in; and
- Improvement of data availability on water use and future needs to enable the sector, including local water utilities, to undertake adequate medium and long term water management and drought management planning.

Approvals for private schemes - section 68 LG Act

The Associations call on the review to improve clarity on the scope of section 68 LG Act and its interaction with WICA as well as to close regulatory gaps and implement adequate

regulatory arrangements for private, particularly higher risk schemes that do not fall under WICA.

Under section 68 LG Act, a person must obtain approval from the council for water supply, sewerage and stormwater drainage works as well as for the construction and operation of sewage management systems. However, private schemes that require a licence under WICA do not require section 68 approval.

Local Government has identified a number of issues with respect to section 68 approvals that need to be addressed. These include:

- Improved regulatory clarity is required with respect to exemptions from section 68 LG Act as a result of schemes being covered by WICA - There are uncertainties as to whether schemes are covered under WICA and a better regulatory process is required for councils to know/be advised (in advance) whether a section 68 approval is required.

- Closure of the regulatory gap for private stormwater schemes that do not fall under WICA - Section 68 LG Act does not cover such schemes and they are therefore not regulated as to their health and environmental risks. In this context, Local Government warns of over-regulation of smaller, private stormwater schemes. However, the Associations note that the review is not to cover regulation of recycling in single households or dual-occupancy dwellings.

- Improve consistency in regulation of higher risk private schemes - Section 68 currently represents a light-handed regulatory approach that might be inadequate for increasingly complex recycling and stormwater reuse schemes (e.g. commercial reuse that does not fall under WICA). Unlike WICA, the approval regime under section 68 LG Act does not call up relevant guidelines such as the *Australian Guidelines for Water Recycling*, does not require referral/concurrence from relevant regulators (NSW Health, NSW Office of Water), and does not include a comprehensive audit regime after approval was granted.

  Regulatory responsibility for complex, higher risk scheme that currently do not fall under WICA (e.g. larger than single household, commercial reuse, or generally where schemes go beyond effluent disposal and include some form of reuse) could be transferred to a central state regulator (e.g. IPART) either by way of extending WICA or otherwise. Any transfer of regulatory responsibility from councils to a central regulator should be accompanied by the establishment of a notification requirement to the council/local water utility in whose area private schemes are planned. This is already the case for private schemes under WICA with IPART being required to notify the council/local water utility.

  Where councils retain regulatory responsibility or are delegated regulatory functions by the central regulator, the arrangements need to ensure that councils can fully recover the cost associated with their regulatory activities. The discussion paper notes that councils currently could not fully recover their regulatory cost associated with section 68 approvals. This is confirmed by the Associations' cost shifting survey which includes activities under section 68 LG Act.[1]

Approvals for council run schemes – Section 60 LG Act
The Associations call on the review to address regulatory uncertainties around council owned and operated recycling and stormwater reuse schemes.

[1] Further information on and final reports of the Associations' annual cost shifting survey are available at the Associations' website at www.lgsa.org.au/policy/finance/cost-shifting-survey.

When drafted, the main objective of section 60 LG Act was to require Ministerial approval for water supply, treatment and sewage reuse facilities where councils are the water and sewerage utility.

Local Government has identified a number of issues with respect to section 60 LG Act that need to be addressed. These include:

- Council recycling and stormwater reuse schemes in the metropolitan area, i.e. inside the area of operation of Sydney Water and Hunter Water, are currently planned and operated without adequate regulatory arrangements. Such schemes are exempt from approval requirements under section 60 LG Act pursuant to section 56 LG Act as it was not anticipated that other entities than Sydney Water and Hunter Water would undertake such activities. WICA does not apply to council schemes. This includes council schemes such as schemes irrigating sporting fields or parks with recycled water or harvested stormwater, or recycling in council buildings.

  The existing regulatory uncertainty needs to be addressed to ensure schemes are properly regulated in terms of their health and environmental risks. It is likely that this would be a good outcome for metropolitan councils as their schemes would benefit from the advice and guidance of a responsible and accountable regulator.

- In non-metropolitan areas, section 60 LG Act generally applies but does not cover council stormwater reuse scheme. Regulatory uncertainty was a significant issue in the development and implementation of council stormwater reuse schemes (e.g. Orange City Council's Blackmans Swamp Creek Stormwater Harvesting Scheme). Effective and efficient regulation is required to enable councils to develop and operate such schemes.

- Section 60 does not call up relevant standards such as the *Australian Drinking Water Guidelines* and the *Australian Guidelines for Water Recycling*.

- Ambiguities around the concept of "stormwater" – A clear definition should be developed clarifying when water take represents take of normal runoff (e.g. water pumped out of a creek or river) or take of "special" stormwater (e.g. runoff from urbanised area without subsequent environmental buffer).

  Making a clear distinction appears particularly difficult in regional areas where town water sourced from a river/creek downstream of another town might contain significant proportion of urban runoff from that upstream town. Perhaps, instead of creating a separate water source category of stormwater, it might be more appropriate to address special risks from urban runoff by way of water quality risk management on a scheme by scheme basis.

Generally, the Associations support the closure of existing regulatory gaps in an effective and efficient manner including, as raised in the Associations' submission to the Local Government Act Review Panel, by way of:

- Reviewing the current complex regulatory environment for local water utilities with the NSW Office of Water as a general "utility" regulator whose functions often duplicate health regulation by NSW Health and environmental regulation by the NSW Environment Protection Authority and whose relationship with the general council regulator, the Division of Local Government is unclear;

- Establishing a modern regulatory framework with economic, health and environmental regulation/regulators based on the NSW Office of Water's *Best Practice Management*

Framework and calling up relevant guidelines such as the *Australian Drinking Water Guidelines* and *Australian Guidelines for Water Recycling*;

- Inclusion of contemporary provisions on the general conditions of supply of services where customers are bound by the conditions as amended from time to time (see Part 6, Division 7 of the *Sydney Water Act (NSW) 1994*);

- Removing unnecessary regulatory duplication arising from Ministerial approval requirements for works or other activities under section 60 LG Act. Scheme regulation might be redundant/fall under general public health regulation for mature local water utilities (e.g. water treatment plant) or could be dealt with through the normal regulatory framework where necessary.

  Currently, section 60 of the LG Act triggers Ministerial approval requirements, facilitated by the NSW Office of Water, for works or activities that are also regulated by other authorities. For example, water treatment plants require section 60 LG Act approvals as well as a licence from the NSW Environment Protection Authority; recycling schemes covered by section 60 LG Act would also require application of the *Australian Guidelines for Water Recycling*.

Last resort arrangement under WICA
The discussion paper notes that retailer of last resort provisions need to be strengthened and an operator of last resort regime need to be introduced in WICA. Local water utilities in regional NSW are likely to be declared last resort providers for private water service schemes licensed under WICA in their areas of operations and require planning certainty and need to be protected against the risks and costs associated with failures of such schemes (e.g. failing infrastructure).

The Associations note that NSW Government is undertaking a separate review of last resort provision in WICA. The Associations previously made a submission to this review which is provided as attachment.

In addition, the Associations reiterate that comprehensive information for customers of private schemes should be required to be provided on the risks, including health risks, as well as costs of failure of the scheme.

Improvement of data availability on water use and future needs
The Associations support the proposal to require central data collection regarding the volume of water (potable and other) being supplied by government and non-government entities, the capacity of recycled water schemes and degree of potable substitution.

Central data collection and availability is important to enable governments as well as utilities to undertake effective medium and long term service and infrastructure planning as well as drought planning using accurate supply and demand data. Council local water utilities will require such data to enable them to undertake long term, sustainable water demand and supply planning for their communities. As the number of participants in the urban water sector grows, it will become increasingly important to ensure that there is a central means to collect such data.

3. Closing Remarks

The Associations welcome the review and support its aim to establish a consistent, effective and efficient regulatory framework for urban water regulation that takes account of the level of risk associated with recycling and stormwater reuse schemes. The regulatory framework should avoid duplication and close existing regulatory gaps for recycling and stormwater reuse schemes.

The Associations call on the review to improve clarity on the scope of section 68 LG Act and its interaction with WICA as well as to close regulatory gaps and implement adequate regulatory arrangements for private recycling and stormwater reuse scheme, particularly higher risk schemes that do not fall under WICA. Where councils retain regulatory responsibility or are delegated regulatory functions by the central regulator, the arrangements need to ensure that councils can fully recover the cost associated with their regulatory activities.

Furthermore, the Associations call on the review to address regulatory uncertainties with respect to council owned and operated recycling and stormwater reuse schemes, particularly in metropolitan areas.

The Associations hope that their comments are of assistance and look forward to participating in the next steps of the review.

ATTACHMENT

Local Government Association of NSW

Shires Association of NSW

SUBMISSION TO REVIEW OF LAST RESORT ARRANGEMENTS UNDER THE *WATER INDUSTRY COMPETITION ACT (NSW) 2006*	
DATE	*OCTOBER 2011*

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4. Introduction

The Local Government and Shires Associations of NSW (the Associations) are the peak bodies for NSW Local Government.

Together, the Associations represent all 152 NSW general-purpose councils, special-purpose county councils and the regions of the NSW Aboriginal Land Council. The mission of the Associations is to be credible, professional organisations representing Local Government and facilitating the development of an effective community-based system of Local Government in NSW. In pursuit of this mission, the Associations represent the views of councils to NSW and Australian Governments; provide industrial relations and specialist services to councils and promote Local Government to the community.

In this role, the Associations represent the current 106 Local Government water utilities that provide water supply and sewerage services in regional NSW, including 97 council-owned and operated local water utilities, four water supply county councils, and one water supply and sewerage county council. Local Government water utilities service over 1.8 million people – approximately 30% of the state population.

The Associations thank the Metropolitan Water Directorate of the Department of Finance and Services for the opportunity to make a submission to its review of last resort arrangements under the *Water Industry Competition Act (NSW) 2006* and the review's discussion paper entitled *Retailer of Last Resort and Operator of Last Resort arrangements under the Water Industry Competition Act 2006*.

The Associations welcome the review and agree with the review that the retailer of last resort provisions need to be strengthened and that an operator of last resort regime need to be introduced. Local Government water utilities in regional NSW are likely to be declared last resort providers for private water service schemes licensed under the *Water Industry Competition Act (NSW) 2006* in their areas of operations. They require planning certainty and need to be protected against the risks and costs associated with failures of such schemes.

Hereunder, the Associations provide a number of general comments on what is suggested in the discussion paper as well as answers to selected questions in the paper.

5. Comments on the discussion paper

Adequacy of regime dealing with physical failure of supply source or infrastructure

The Associations have concerns about the efficacy of regulatory measures that are to precede any application of the last resort provisions in addressing physical failure of the supply source and/or infrastructure. The discussion paper suggests that adequate measures were in place for the event of physical failure such as contingency measures required by licensees in their management and operations plans as well as emergency powers of the Minister under the *Water Industry Competition Act (NSW) 2006* or the *Essential Services Act (NSW) 1988*.

The Associations believe that regulatory measures aimed at avoiding physical failure or requiring the licensee to maintain capacity to address physical failure need to be strengthened. This includes detailed requirements for the licensee to demonstrate ongoing adequacy of contingency measures and capacity of the licensee to fund them.

There is a strong possibility, notably in regional NSW where supply systems are often isolated, that physical failure of infrastructure, and particularly, the supply source might also result in a failure of the licensee triggering the last resort provisions. This is especially relevant where the licensee relies on a separate single supply source and/or infrastructure network. It is important to note that, different to the electricity sector where there is almost always sufficient alternative generation capacity, in the water supply sector, alternative supply sources might not be available or their capacity limited.

Comprehensive regulation of licensed schemes

Furthermore, regulation of licensees needs to address and counter any incentive for licensees not to invest into good practice or adequate infrastructure in order to increase short term profits and shift long term risks (e.g. ongoing infrastructure renewal) onto last resort providers. This includes comprehensive and strict regulation ensuring that licensed schemes are fit for purpose, financially viable and sustainable and comply with water quality standards. Importantly, licensees need to be required to undertake long term asset management and financial planning for capital cost (infrastructure renewal/replacement or upgrade) to avoid financial shocks when renewal/upgrade is due that might result in insolvency of the licensee and a last resort event.

Licensees as well as their customers, when entering into private water service scheme, need to be made aware of the costs and risks involved in the scheme, including those related to physical failure of the supply source or infrastructure.

The regulatory regime also needs to include the requirement for regular audits of the ongoing adequacy of the licensee's management and operations plans and financial sustainability. Furthermore, the regulatory regime needs to include a requirement of the licensee to notify the regulator early of any non-compliance with their plans and, importantly, the likelihood of both physical and licensee failure. Penalties should be available for non-compliance with the notification requirement.

Recovery of costs of the last resort provider (questions 16 to 18 and 37 to 53 in the discussion paper)

As a principle, the last resort provider should be able to recover all costs associated with the declaration as well as with any actual stepping in as a result of a licensee failure. As a general principle, costs incurred under the last resort arrangements should be borne by the licensee and his or her customers. This would ensure that licensees are fully accountable to their customers and customers are fully aware of risks and costs of private schemes. For equity reasons, these costs must not be spread across existing customers of the last resort provider.

Cost recovery arrangements should separate between costs triggered by the declaration and cost incurred as a result of an actual last resort event.

Costs associated with the declaration

Costs associated with the declaration (e.g. general contingency planning, familiarisation with the private scheme, capital expenditure required for changes in the last resort provider's system design in order build and maintain capacity to step in) are incurred regardless of the actual occurrence of a licensee failure. Depending on the nature of the required activity, these costs should be covered either by a one-off or by an ongoing cost recovery mechanism and be borne by the licensee and passed through to his or her customers. This would ensure appropriate price signals are sent to the licensee as well as his or her customers on the risk management cost associated with the private scheme (and so let the market manage the risk).

The Associations do not agree with the suggestions in the discussion paper on page 39 that licensees should not be allowed to pass through such cost to their customers. Such a restriction would distort the pricing signal to (potential) customers with regard to the risk management cost involved in the private scheme.

Finally, the Associations object to the suggestion in the discussion paper on page 39 that last resort public utilities that have "avoided" capital investment as a result of the licensed scheme covering customers that would have otherwise needed to be serviced by the public utility, would need to offset avoided costs from the contingency planning charge on the licensee. Principally, the existing customers of the public utility would not have avoided any cost as capital investment for the new group of customers would not have be borne by existing customers of the utility but by the new group of customers by way of development contributions.

Cost associated with stepping in
Cost associated with stepping in when a last resort event occurs (e.g. operational expenditure of running the private scheme, capital expenditure required for emergency works and infrastructure renewal in the private scheme, for bringing the private scheme up to the last resort provider's standards, or for upgrades required to the last resort provider's own system to address increased demand) should be treated separately. Preferably, customers of the failed licensee would bear costs by way of their regular charges and, for additional expenditure, by way of additional charges. Additional expenditure could also be funded from any bond the licensee had to provide for this purpose and to which his or her customers have contributed to.

However, recovering all costs of stepping in might not be feasible in all instances because they are too large and/or customers of the private scheme lack the capacity to pay (e.g. renew run-down infrastructure, undertake environmental clean-ups). Costs that are not recoverable from customers of the failed schemes should be borne by an industry fund contributed to by all licensees under the *Water Industry Competition Act (NSW) 2006.* Unused funds could pay for the regulatory activity mentioned above.

Comments on specific questions in the discussion paper
The following table contains the Associations' comments on selected question in the discussion paper.

Table: Comments on selected questions

Question in discussion paper	Comment
4. What provisions should the scheme include with regard to the retailer of last resort (RoLR) appointment process: a. Should the RoLR scheme require the appointment of a RoLR? If so, on what basis should the appointment be made? For example, should it be a requirement that all retail supplier licences granted under the WIC Act have an appointed RoLR from the date the licence is granted? What should be the timing requirements of this appointment? b. Alternatively, at the point a licence is issued, should the scheme require that the Minister first determine if it is necessary to nominate a RoLR in relation to that scheme? Should there be a minimum timeframe in which the Minister must make the determination? 24. What provisions should the scheme include with regard to the operator of last resort (OoLR) appointment process: a. Should the OoLR scheme require the appointment of a OoLR? If so, on what basis should the appointment be made? E.g. should it be a requirement that all network operator licences granted under the WIC Act have an appointed OoLR from the date the licence is granted? What should be the timing requirements of this appointment? b. Alternatively, at the point a licence is issued, should the scheme require that the Minister first determine if it is necessary to nominate an OoLR in relation to that scheme? Should there be a minimum timeframe in which the Minister must make the determination?	The Associations do not support Local Government water utilities automatically becoming the retailer or operator of last resort. This does not provide sufficient flexibility to consider specific circumstances and individual capacity of Local Government water utilities.

Question in discussion paper	Comment
6a. Should the RoLR arrangements include provisions that prescribe criteria that must be considered before making a RoLR appointment? If so, what should these criteria include? 26a. Should the OoLR arrangements include provisions that: a. prescribe criteria that must be considered before making an OoLR appointment? If so, what should these criteria include?	Yes, this should include consideration of individual capacity of Local Government water utilities.
6b. Should the RoLR arrangements include provisions that require the retailer to be consulted before being appointed as a RoLR? 26b. Should the OoLR arrangements include provisions that require the operator to be consulted before being appointed as an OoLR?	Yes, to ensure adequacy of assessment of capacity (see 6a).
8. Should licensed retail suppliers be required to notify the Minister or IPART if it is likely that a RoLR event will be triggered?	Yes, see se comments above.
9. Once appointed, should the RoLR arrangements be permanent or should the failed licensee have an opportunity to be reinstated? 27. Should the OoLR arrangements have the flexibility of being either a temporary or permanent arrangement?	This should be flexible as the retailer or operator of last resort might only want to or only have the capacity to step in temporarily.
12. Who should have the responsibility for preparing the contingency plan?	The retailer or operator of last resort should be responsible for preparing the "last resort" plan to make sure it is known what they can do and what the efficient cost are. This should be done in cooperation with licensee. As mentioned above, the licensee has preceding contingency planning responsibilities in relation to physical failure of the supply source or infrastructure.
13. Should the RoLR arrangements set a maximum period within which a customer of a RoLR must decide whether or not they want to remain a customer of the RoLR or switch to another retailer? If so, what should this maximum period be?	Any requirement must ensure ability to recover cost associated with last resort event.
14. Should the RoLR arrangements include provisions that govern the termination of a a. RoLR's supply obligation/appointment? If so: should a RoLR have the ability to seek a termination of its appointment; and/or b. should the Minister have the ability to terminate a RoLR appointment?	Yes, in the case of (unforeseen) circumstances beyond capacity of the last resort provider.
21. Should the RoLR be required to have a network assets access agreement in place with the network operator as part of its contingency planning obligations? 22. Or, should the existing agreement between the licensed network operator and the failed retail supplier automatically apply to the RoLR?	Access arrangements should automatically transfer to the last resort provider.

Question in discussion paper	Comment
34. Should nominated OoLRs be required to have a contingency plan?	Yes, contingency planning is essential to ensure continuity of supply and customer protection in the event of licensee failure.

6. Closing Remarks

The Associations hope that their comments are of assistance and look forward to participating in the next steps of the review.