



New South Wales

# Water Industry Competition Amendment (Review) Bill 2014

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to make amendments to the *Water Industry Competition Act 2006* (the *principal Act*) to implement the recommendations of the Urban Water Regulation Review and, in particular:

- (a) to separately provide for design and operational approvals for water industry infrastructure and for licences for the operation of water industry infrastructure and the sale of water or sewerage services, and
- (b) to narrow the legislative scheme of approvals and licensing to particular classes of water industry infrastructure focusing on the risks to public health and customers and removing duplication in relation to schemes already approved under section 68 of the *Local Government Act 1993*, and
- (c) to extend the application of the legislative scheme of approvals and licensing to metropolitan councils, and
- (d) to remove the requirement for entities regulated by the principal Act to obtain sufficient water other than from a public water utility while including measures to manage the degree of competition with incumbent utilities that is permitted for the provision of services to small retail customers, and
- (e) to provide for a scheme of implied contracts on standard terms and conditions to put entities regulated by the Act in the same position as public utilities, and
- (f) to extend the last resort arrangements for ensuring continuity of supply of services defined as, or determined to be, essential to cover the operation of infrastructure as well as the retail supply of water or sewerage services, and

- (g) to provide that land and infrastructure may be acquired by a public water utility if that is necessary to resolve a failure of a licensee and to ensure the continuity of an essential service, and
- (h) to review and increase penalties as appropriate, and
- (i) to include review and appeal provisions.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

## **Schedule 1      Amendment of Water Industry Competition Act 2006 No 104**

**Schedule 1 [1]** amends the long title to ensure that it properly captures the scope of the principal Act, including as proposed to be amended.

**Schedule 1 [2]** introduces an objects clause setting out matters that must be taken into account in administration of the principal Act. These are derived from relevant licensing principles currently set out in section 7 of the principal Act.

**Schedule 1 [3]** substitutes Part 2 of the principal Act which currently deals with licensing of network operators and retail suppliers. Proposed Part 2 establishes a scheme of approvals for certain infrastructure and licences for operators of the infrastructure and retailers of water or sewerage services provided by means of the infrastructure. The terminology is changed from “network operator” to “operator” for accuracy and “retail supplier” to “retailer” for simplicity.

Proposed Division 1 (section 5) deals with the scope of the Part.

Proposed section 5 establishes the scope of the approval and licensing scheme (a significantly narrower approach than that provided by the current scheme). It applies Part 2 to category A schemes (for providing water or sewerage services to 30 or more small retail customer premises), large drinking water facilities, large sewage treatment facilities and other prescribed water industry infrastructure. It is intended that the regulations will set out criteria for identifying high risk and other infrastructure that is to be subject to Part 2. The proposed section excludes infrastructure operated by public water utilities and infrastructure operated under approvals under section 68 of the *Local Government Act 1993* and contemplates further exclusions being set out in the regulations.

Proposed Division 2 (sections 6–9) sets out when an approval or licence is required in connection with water industry infrastructure to which Part 2 applies.

Proposed section 6 requires a design approval for the carrying out of works for construction, installation or alteration of water industry infrastructure (including testing and commissioning of infrastructure prior to operation on a commercial basis). It is intended that the regulations will exempt from the application of this section trivial alterations of low risk.

Proposed section 7 requires an operational approval to be obtained by the owner of water industry infrastructure before commercial operation of the infrastructure commences. Proposed changes to definitions in the Dictionary mean that if there is a long term lease over the infrastructure, the lessee will be regarded as the owner and subject to this obligation.

Proposed section 8 requires a licence for operation of water industry infrastructure. In addition, there must be an arrangement in place between the holder of the operational approval for the infrastructure and the licensee. However, a person engaged to construct the works need not have an operator’s licence in order to commission and test the infrastructure in accordance with a design approval prior to the infrastructure being operated on a commercial basis. If different parts of

water industry infrastructure are operated by different corporations, each corporation would require an operator's licence.

Proposed section 9 requires a licence for the sale of water or sewerage services provided by means of a category A scheme. In addition, there must be an arrangement in place between the holder of the operational approval for the scheme and the licensee. The proposed section also requires a licence for the sale of other water or sewerage services to small retail customers (including services physically provided by a public water utility or another entity under another Act) other than by the owner or operator of the relevant infrastructure. This requirement, together with the condition imposed by proposed section 20F (1), is designed to manage the degree of competition with incumbent utilities that is permitted for the provision of services to small retail customers. It is proposed to allow a licensed retailer to provide a consolidated retail service to its customers (and a single bill) if the retailer is already providing retail services in connection with an approved category A scheme. For example, a licensed retailer may sell to small retail customers recycled water and sewerage services provided by a category A scheme approved under the principal Act. The same retailer could also sell drinking water (delivered by public water utility infrastructure), so long as the customer agrees to switch from the public water utility to the licensed retailer.

Proposed Division 3 (sections 10–12) sets out additional objects of the Part relevant to the grant of an approval or licence, a suitability test for the grant of an approval or licence and a process for determination by IPART that infrastructure is essential infrastructure for the purposes of the principal Act.

Proposed section 10 sets out additional objects of the Part. These objects reflect the licensing principles currently set out in section 7 of the Act that are not covered by the general objects of the Act set out in proposed section 2A.

Proposed section 11 is an interpretation provision for the test of whether a corporation is a suitable corporation to be granted an approval or licence under the principal Act. The test extends to issues of compliance and criminal conduct, reputation, character, solvency and capacity.

Proposed section 12 empowers IPART to designate water industry infrastructure that meets specified criteria as essential infrastructure. The designation brings the infrastructure within the requirements for last resort arrangements. Under proposed section 14 (4) (f), IPART cannot grant an operational approval in relation to infrastructure that has been designated as essential unless a last resort provider has been designated for each provider of the essential service. However, this requirement does not apply where the essential service is provided by a council. Usually the designation would be made at the design approval stage but circumstances may change and it may be necessary to make a designation at a later stage.

Proposed Division 4 (sections 13–20A) sets out various matters relating to approvals.

Proposed section 13 requires IPART to determine an application and sets out requirements for inviting submissions on an application. Decisions must be published on IPART's website. The proposed section also deals with a determination by IPART that particular water industry infrastructure for which an approval is sought is essential infrastructure.

Proposed section 14 sets out that a design approval authorises works to be carried out as specified in the approval and subject to its conditions and establishes criteria for the grant of an approval. The approval holder may not be an individual.

The requirements for a design approval include the following:

- that the applicant is a suitable corporation to be granted the approval,
- that the proposal will, if the infrastructure is constructed, installed or altered as proposed, comply with appropriate standards and water quality objectives and has been audited as approved by IPART to assess compliance with that requirement,
- that the applicant has established:
  - that it is reasonable to believe that the proposal is financially viable based on information that is reasonably available, and

- in the case of a category A scheme—that it is not reasonably foreseeable that the scheme will have significant adverse financial implications for small retail customers,

**Note.** This requirement reflects the licensing principle currently set out in section 7 of the principal Act. For example, there may be reasonable grounds to think that estimated charges set out in an application are unsustainably low and would need to increase significantly in order for the scheme to be viable, or no allowance may have been made in proposed charges to cover the replacement of assets and the need to impose those costs in the future could have significant adverse impacts on customers.

- that the applicant is a licensed operator of infrastructure of the relevant class and proposes to operate the infrastructure under the licence or has entered into a suitable agreement with a licensed operator for the operation of the infrastructure,
- that the applicant or other licensed operator (as the case requires) has certified (in the manner and form required by IPART) that it will have the capacity (including technical, financial and organisational capacity) to operate the infrastructure in a manner that does not present a risk to public health or a significant risk of harm to the environment.

The requirements for an operational approval include the following:

- that the applicant is a suitable corporation to be granted the approval,
- that the infrastructure has been constructed, installed or altered substantially in compliance with the design approval,
- that the infrastructure complies with appropriate standards and water quality objectives and has been audited for compliance as approved by IPART to assess compliance with that requirement,
- in the case of a category A scheme—that the applicant is a licensed retailer and proposes to sell the water or sewerage services provided by means of the scheme or has entered into a suitable agreement with a licensed retailer for the sale of water or sewerage services provided by means of the scheme,
- in the case of essential infrastructure—that a last resort provider has been designated for each essential service provider other than a council.

It is also provided that IPART may refuse to grant an approval if it is not satisfied as to questions of capacity in relation to the proposed licensed operator or licensed retailer. This process is additional to the assessment of capacity that occurs as part of the licensing process and enables IPART to consider whether the licensee has the capacity to undertake all the activities that it has been engaged to undertake.

Proposed section 15 sets out the scheme for conditions of approval. It contemplates that conditions may be imposed by the Act or the regulations or by IPART on the grant of the approval, subsequently under this provision or as disciplinary action. The section also makes it an offence for the holder of an approval to contravene the conditions and requires the holder to take all reasonable steps to facilitate compliance by others (for example, a construction company or licensed operator) bound by conditions of the approval.

Proposed section 16 sets out that a design approval is subject to a condition requiring the holder to maintain a suitable agreement with a licensed operator and to notify IPART of variations to the agreement. The proposed section provides examples of conditions that may be imposed by the regulations or IPART, including a condition requiring the giving of security for compliance with conditions and the completion of the project.

Proposed section 17 sets out several conditions imposed on the holder of an operational approval and provides examples of conditions that may be imposed by the regulations or IPART, including a condition requiring the giving of security for compliance with conditions and the continued operation of the infrastructure. The conditions imposed require the holder to ensure relevant licensees are involved and to ensure that there is not more than one licensed retailer for a particular service provided by means of a category A scheme. The latter limitation is supported by proposed

section 20Z. The conditions also require the holder to take all reasonable steps to prevent the need for the last resort arrangements to be brought into play.

Proposed section 18 states that an approval remains in force until it is cancelled.

Proposed section 19 contemplates an application for variation of the works authorised by a design approval. IPART may grant a variation if it is satisfied that:

- the approval as varied will be substantially the same as the original approval, and
- no prejudice will be caused to any person who made a submission concerning the application for the original approval.

If the variation amounts to a different proposal that should be the subject of further submissions, a new application for a design approval would need to be made.

Proposed section 20 establishes a scheme for periodic returns and fees for approvals.

Proposed section 20A enables the transfer of an approval with the consent of IPART.

Proposed Division 5 (sections 20B–20K) sets out various matters relating to licences for operators of water industry infrastructure to which the Part applies and retailers of water or sewerage services provided by such infrastructure.

Proposed section 20B sets out the process for determination by the Minister of an application for a licence.

Proposed section 20C sets out the criteria for the grant of a licence. The licensee may not be an individual and must meet the requirements to be considered a suitable corporation to be granted a licence. An operator's licence must specify a class of infrastructure that may be operated under the licence. A class may be described by type, capacity or any other factor or combination of factors.

Proposed section 20D sets out the scheme for licence conditions. It contemplates that conditions may be imposed by the Act or the regulations or by the Minister on the grant of the licence, subsequently under this provision or as disciplinary action. The proposed section makes it an offence for a licensee to contravene the conditions.

Proposed section 20E imposes specific conditions on an operator's licence and gives examples of other conditions that may be imposed by the regulations or the Minister, including conditions requiring security to be given for compliance with conditions. Proposed subsection (3) states that a licensed operator must comply with the conditions of the design approval or operational approval as the case requires. This reflects that the design approval governs the construction phase while the operational approval governs the subsequent operation phase (and the design approval gives way to the subsequent operational approval).

Proposed section 20F imposes specific conditions on a retailer's licence and sets out examples of conditions that may be imposed by the regulations or the Minister, including a condition requiring security to be given for compliance with licence conditions and conditions of the kind currently set out in section 13 (2) (c) of the principal Act.

Proposed section 20G provides that a licence remains in force until it is cancelled or the licence is surrendered with the consent of the Minister.

Proposed section 20H contemplates variation of the class of infrastructure that may be operated under an operator's licence on application of the licensee.

Proposed section 20I establishes a scheme for annual returns and fees for licences.

Proposed section 20J provides for surrender of licence subject to the consent of the Minister. It is contemplated that conditions may be imposed prior to surrender and, if the licensee provides an essential service, that alternative arrangements must be in place for the continuity of the service.

Proposed section 20K prevents a licence being transferred.

Proposed Division 6 (sections 20L and 20M) contains special provisions addressing risk to public health or safety.

Proposed section 20L empowers the Minister to give public health and safety directions to the holder of an approval or a licensee. The provision is similar to current section 18 of the principal Act.

Proposed section 20M imposes substantially increased penalties for an offence involving the operation of water industry infrastructure without a required approval or licence or in contravention of conditions of approval or licence if the act is intentional and the operation of the infrastructure caused actual or potential harm to the health or safety of human beings that is of a high impact or on a wide scale.

Proposed Division 7 (sections 20N–20U) contains enforcement provisions and provisions for the cancellation of approvals in certain circumstances.

Proposed section 20N is an interpretation provision defining “regulatory authority” and “statutory default”. The regulatory authority is IPART in relation to approvals and the Minister in relation to licences. It should be noted that a reference to the contravention of the Act by the holder of an approval or a licensee includes contravention of a condition of the approval or licence.

Proposed section 20O explains that the powers to deal with statutory default are in addition to the powers to take criminal proceedings.

Proposed section 20P empowers the regulatory authority to issue a compliance notice to remedy or mitigate the consequences of a statutory default or to prevent the continuance or recurrence of the default. It is an offence to fail to take the action required by a compliance notice. A continuing offence is provided for by proposed section 96A.

Proposed section 20Q empowers the regulatory authority to apply to the Supreme Court for an injunction to prevent a statutory default or to prevent recurrence of the statutory default.

Proposed section 20R empowers the regulatory authority to take disciplinary action for statutory default. The types of disciplinary action that may be taken are set out in proposed subsection (3) and include monetary penalties, imposition of conditions, suspension, cancellation and disqualification. They extend to disqualification of a related corporation or a person who is a director or concerned in the management of a related corporation.

Proposed section 20S gives the court additional powers when imposing a penalty for a contravention of Part 2, including power to order the recovery of costs and expenses of a public authority or a victim or of the amount of the economic benefit acquired by the person or accruing as a result of the contravention. These powers are similar to those provided in the *Protection of the Environment Operations Act 1997*.

Proposed section 20T provides for cancellation of an approval essentially when the infrastructure is no longer to be constructed or used to provide water or sewerage services under the principal Act. There are limitations relating to continuity of any essential service. Cancellation may be accompanied by forfeiture of security if IPART considers that appropriate and may be made subject to preconditions.

Proposed section 20U empowers the Minister to cancel an approval in the public interest. The holder of the approval may apply to the Supreme Court for compensation. This provision equates to current section 19 of the principal Act, but has necessarily been made to apply to approvals rather than licences.

Proposed Division 8 (sections 20V and 20W) contains provisions for administrative review and appeal.

Proposed section 20V sets out the circumstances in which an applicant for or holder of an approval or licence may apply to the Civil and Administrative Tribunal for an administrative review. These decisions relate to applications and conditions.

Proposed section 20W sets out the circumstances in which a person may appeal to the Civil and Administrative Tribunal. These decisions relate to enforcement decisions or decisions relating to approval cancellation or forfeiture of security.

Proposed Division 9 (sections 20X–20Z) deals with miscellaneous matters.

Proposed sections 20X and 20Y deal with the mechanics of applications and notices.

Proposed section 20Z resolves what is to happen if the holder of an operational approval purports to appoint more than one licensed retailer for the same service in contravention of the conditions of approval (see proposed section 17 (1) (b) (ii)).

**Schedule 1 [4] and [5]** amend the penalty provisions for access regime offences. Because the amendments propose high levels of penalty consistent with other similar legislation, the penalties in the principal Act are being presented in monetary amounts. A consistent ratio of 5:1 is being introduced for offences by corporations as compared to offences by individuals.

**Schedule 1 [6]** is a technical amendment to ensure that the heading to Part 5 of the principal Act refers to the water industry market to acknowledge that the Part relates to both water and sewerage services and deals with operational and retail matters.

**Schedule 1 [7]** inserts a new Division at the beginning of Part 5 of the principal Act. The provisions in this Division replicate certain provisions that apply to public water utilities.

Proposed section 46AA sets out definitions for the purpose of the Division.

Proposed section 46AB treats category A schemes in the same way as public water utility infrastructure in that it automatically implies a contract for connection and supply of water and sewerage services between the licensed operator and the land owner and the licensed retailer and the land owner. More than one licensed operator may be involved in the operation of a category A scheme (for example, one licensee may operate the sewage treatment plant while another operates the reticulation network). The proposed section creates an implied contract between the licensee responsible for operating the infrastructure that connects to the property, as well as an implied contract with the retailer responsible for selling services to the property owner (if these are different parties). The regulations will prescribe standard terms and conditions that will apply unless varied. The proposed section contemplates modification or exclusion of the contract by express agreement between the licensee and the customer. To ensure that prospective purchasers of land are aware of any water or sewerage services provided to the land under the principal Act, consequential amendments are included requiring that information to be disclosed in a planning certificate under section 149 of the *Environmental Planning and Assessment Act 1979* (see Schedule 2.3).

Proposed section 46AC sets out conditions relating to contract charges for category A schemes. It requires the charges to be published on the licensee's website and requires customers to be given at least 6 months' notice of any increase, although the Minister may reduce the period of notice on application of the licensee.

Proposed section 46AD provides that on a change of ownership of land the new owner becomes liable for outstanding contract charges payable to a licensee.

Proposed section 46AE empowers a lessee to pay outstanding charges owed to a licensee by a lessor and to recover the amount from the lessor. If, for example, water pressure has been reduced under a contract for non-payment of contract charges, this provision allows the lessee to remedy the situation.

Proposed section 46AF supports arrangements for the transfer of land by requiring a licensee to provide a certificate relevant to apportionment of charges for water or sewerage services between the vendor and purchaser of land.

**Schedule 1 [8] and [9]** amend section 47 of the principal Act to ensure that the requirement for internal dispute resolution matches the requirement for an ombudsman scheme. Any matter that may be taken to an ombudsman must first be subject to internal review by a licensee.

**Schedule 1 [10] and [11]** amend section 49 of the principal Act. The amendment in Schedule 1 [10] is with a view to an ombudsman scheme enabling an occupier who is a small retail customer to take a dispute to the ombudsman even if the contract for water or sewerage services is with the owner of the land. For example, an occupier who is liable to pay usage charges may wish to dispute the accuracy of metered water usage, an issue that does not impact an owner who is only paying fixed charges. The amendment in Schedule 1 [11] removes the limitation of the scheme to authorised licensed network operators since the ombudsman scheme must apply not only to operators with a right of entry under Part 6 but operators who operate infrastructure that connects a customer's land to a category A scheme.

**Schedule 1 [12] and [13]** amend section 50 of the principal Act as a consequence of the change in terminology and the provision for an implied contract with a licensed operator in relation to the connection point on a customer's land. The amendment ensures that relevant operators are required to be members of an ombudsman scheme and that the operator is bound by determinations of the ombudsman in relation to a dispute arising under the contract.

**Schedule 1 [14]** inserts a new section 50A to require an insolvency official of a licensee to facilitate the dispute resolution process in relation to complaints against the licensee and to apply the Division to the official as if the official were the licensee.

**Schedule 1 [15]–[17]** make consequential amendments to the provisions relating to monopoly supply. The amendments are consequential on the inclusion of approvals of water industry infrastructure. This matter is also dealt with in transitional provisions. The reference to the supply of recycled water in section 51 (2) (b) of the principal Act is altered to a reference to a water service of a kind prescribed by the regulations so that the regulations can cater for changes to the legislative scheme to which the paragraph refers.

**Schedule 1 [18]** substitutes Division 3 of Part 5 of the principal Act which currently deals with retailers of last resort and introduces new last resort arrangements covering retailers and operators. Retailers and operators of last resort are referred to collectively as last resort providers.

Proposed section 54 provides for designation by Ministerial order published in the Gazette of a last resort provider to take the place of an essential service provider in the event that the essential service provider is declared to have failed. The last resort provider is to be a public water utility or a licensee.

Proposed section 55 requires a designated last resort provider to prepare and review a contingency plan for the continuity of the essential service for approval by IPART and to conduct exercises to test the operation of the approved contingency plan as contemplated in the plan or required by IPART. Proposed subsection (3) enables a public water utility that has been designated as a last resort provider to identify the contract terms and charges that will apply to transferred customers in the event a failure is declared. For example, a public water utility may identify the contract terms and charges applicable to its own small retail customers (in connection with a nominated recycled water scheme) as the terms and charges applicable to transferred customers to whom a failed licensee previously provided a similar service. This approach enables public water utilities designated as last resort providers to extend their normal customer service systems to transferred customers. Alternatively, if no such terms or charges are identified, proposed section 57C states that the terms and charges applicable to transferred customers will be those terms and charges applied by the failed licensee.

Proposed section 56 requires an essential service provider and the holder of an operational approval for essential infrastructure and any other provider or last resort provider of the essential service to facilitate contingency planning by the last resort provider. A single scheme may involve multiple providers and potentially more than one last resort provider. For example, one party may provide drinking water services, a second party may provide recycled water and a third party may provide sewerage services. While it is intended that in most cases a single last resort provider will be designated in respect of all services provided by a scheme, it is possible that one last resort provider could be designated to provide one service (for example, drinking water) while another may be designated as the last resort provider in relation to other services (for example, recycled



water and sewerage services). The essential service provider is required to pay to the last resort provider the reasonable cost of compliance with section 55. If the parties cannot agree an amount, IPART is to determine the amount payable on application of the last resort provider.

Proposed section 57 empowers the Minister to declare that an essential service provider has failed in certain circumstances including insolvency. The declaration must specify a date that marks the beginning of the period of the declared failure. This date is known as the transfer date. If an essential service provider operating a number of category A schemes fails, the Minister's declaration may trigger the provision of services by a number of last resort providers in different parts of the State.

Proposed section 57A sets out the effect of a declaration of a failure, including the last resort provider taking over responsibility for the provision of the essential service formerly provided by the essential service provider declared to have failed. Proposed subsection (3) ensures that, during a declared failure, the last resort arrangements will not be undermined by a purported agreement entered into by the holder of an operational approval for the essential infrastructure.

Proposed section 57B provides for the last resort provider to take over the contracts of the essential service provider that are necessary for the provision of the essential service.

Proposed section 57C provides for the transfer of customers from the essential service provider to the last resort provider if, following the declaration of a failure, the last resort provider is a retailer or an operator of the infrastructure that connects a category A scheme to a customer's land. Relevant contracts are implied and the proposed section identifies the relevant contract charges and conditions (including the last resort supply fee currently provided for in clause 23 of the *Water Industry Competition (General) Regulation 2008*). The charges cannot be increased under proposed Division 1AA during the failure. If the last resort provider is a licensee, the contract charges payable by transferred customers are the same as those that were payable to the failed licensee (with the exception of the transfer fee, which is a one-off fee to cover the cost of transferring customers to the last resort provider). If the last resort provider is a public water utility, the contract charges are those of the failed licensee or the standard contract charges identified in the contingency plan, whichever is greater at the time the failure is declared.

Proposed section 57D contains matters relevant to the provision of the essential service by the last resort provider. The proposed section entitles the last resort provider to necessary access to infrastructure, customer data systems and other property. The contingency plan may contemplate staff of the failed licensee assisting the last resort provider to provide the service. The failed licensee, the holder of the operational approval for the essential infrastructure and any other provider or last resort provider of the essential service must facilitate the provision of the essential service, comply with the contingency plan and comply with reasonable directions given by the last resort provider. An offence of obstruction of a last resort provider is proposed.

Proposed section 57E sets out a special obligation on the holder of an operational approval for essential infrastructure to attempt to resolve a failure as quickly as possible. It contemplates that this may be by entering into an agreement with a different licensee for the provision of the service, obtaining a licence for that purpose or selling the infrastructure and transferring the operational approval to a suitable corporation.

Proposed section 57F requires IPART to review a failure at least once in each 6 months and make recommendations to the Minister about how the failure may be resolved. The proposed section contemplates that the failure may be resolved through the actions of the holder of the operational approval and the replacement of the failed licensee, by the connection of affected premises to alternative infrastructure or by a public water utility providing a service under its own Act to replace the essential service.

Proposed section 57G empowers the Minister to make a declaration that will enable a public water utility to voluntarily or compulsorily acquire essential infrastructure and land if the Minister is satisfied that the failure should be resolved by the provision of a water or sewerage service under the utility's Act rather than the principal Act. The assimilation of the scheme for acquisition of

infrastructure into the existing scheme for acquisition of land is designed to ensure that similar processes and the principles of just terms compensation apply.

Proposed section 57H enables the Minister to declare the end of a failure. The end date must not be earlier than 6 months after the transfer date unless the last resort provider consents to an earlier end date. In fixing the end date the Minister must consider matters of cost recovery for the last resort provider.

Proposed section 57I sets out the effect of a declaration of the end of the failure, including transferring customers from the last resort provider to a new licensee or public water utility, as the case may require, and providing for a new licensee to take over relevant contracts if the service is to continue to be provided under the principal Act. There is an obligation on the last resort provider, the holder of the operational approval for the essential infrastructure and any other provider or last resort provider of the essential service to facilitate this process.

Proposed section 57J provides immunity from liability for the last resort provider in the absence of negligence.

Proposed section 57K requires a last resort provider or new licensee to maintain the confidentiality of confidential or commercially sensitive information obtained under the Division.

Proposed section 57L contemplates a last resort provider applying to the Minister for a cost recovery scheme. It is contemplated that the scheme may provide for recovery from the failed licensee, recovery from the holder of the operational approval for the essential infrastructure or, in circumstances in which it is unlikely that all the costs can be recovered from the licensee or holder, recovery from customers or the establishment of an industry contribution scheme. The proposed section deals with the mechanics of each of those possibilities and also contemplates regulations on the topic.

Proposed section 57M provides the mechanism for the enforcement of obligations under the Division on a public water utility, licensee or holder of an approval.

Proposed section 57N provides a system for the revocation of a determination of water industry infrastructure as essential infrastructure on application to IPART by an essential service provider or last resort provider or on IPART's own initiative.

Proposed section 57O sets out how applications are to be made for the purposes of the Division and enables the Minister or IPART to require further information or verification of information.

Proposed section 57P imposes obligations on an insolvency official of an essential service provider or holder of an operational approval for essential infrastructure to facilitate compliance with the Division and continuity of the provision of the essential service. The official is to be regarded as if the official were the licensee or holder.

Proposed section 57Q ensures that nothing in the *Privacy and Personal Information Protection Act 1998* prevents the disclosure of customer information under the Division.

**Schedule 1 [20]** inserts a preliminary Division at the beginning of Part 6 of the principal Act which deals with work relating to water industry infrastructure. It is proposed that Part 6 continues to apply to water industry infrastructure operated under the principal Act. The amendments ensure that the Part also allows the holder of an operational approval for the infrastructure to carry out necessary work on the infrastructure. In addition, it is contemplated that the regulations may extend the application of the Part to other water industry infrastructure for which it is not necessary to have an operational approval or operator's licence. In that way, necessary work may be undertaken on the infrastructure with the benefit of the application of the Part subject to the requirements of the regulations. These provisions are designed to ensure that, while the scope of the licensing regime has been narrowed, the facilitative measures provided by the Act remain available to infrastructure that meets the applicable criteria. For example, and pending development of the regulation, it is envisaged that a low risk industrial recycling scheme will no longer require an approval or licence under the principal Act as such schemes do not pose risks to public health and are subject to regulation under other frameworks such as the *Work Health and*

*Safety Act 2011*. Under the proposed provisions, such schemes will be able to seek a declaration to enable maintenance work etc to be undertaken under the provisions of Part 6. The criteria will be established in the regulations and it is intended that the regulations will have regard for the nature of the infrastructure and whether it confers public benefits such as reducing pressure on potable water supplies.

**Schedule 1 [19], [21], [22] and [24]** are technical amendments consequential on the insertion of the preliminary Division and introduction into the scheme of the principal Act of the requirement for the owner of water industry infrastructure to which Part 2 applies to hold an operational approval.

**Schedule 1 [23]** amends the penalty provision in section 65 of the principal Act for the reasons described in relation to the amendments to sections 42 and 43 of the principal Act.

**Schedule 1 [25]** substitutes the heading to Part 7 of the principal Act to reflect that its contents extend beyond the matter of offences to matters of enforcement generally.

**Schedule 1 [26]** is an amendment that is consequential on the insertion of Division 1AA into Part 7 by the next item.

**Schedule 1 [27]** inserts a new interpretation Division at the beginning of Part 7 of the principal Act which deals with enforcement. Proposed section 65J ensures that the Part continues to apply to a licensed operator and infrastructure operated by the licensed operator and extends the application of the Part to an operator of water industry infrastructure declared to be a WICA provider for the purposes of Part 6 of the principal Act and infrastructure to which the declaration relates.

**Schedule 1 [28], [29], [31], [33], [34], [36] and [37]** amend penalty provisions. The levels of penalty have been chosen with a view to internal consistency and relativities and external consistency with penalties for similar offences in other relevant Acts.

**Schedule 1 [30] and [32]** amend references to a licensed retail supplier and are consequential on the insertion of Division 1AA into Part 7.

**Schedule 1 [35]** amends the powers of inspectors in a material respect. The powers are extended to investigating whether there is a risk to public health or safety that may give rise to the issuing of public health and safety directions by the Minister. The amendment also ensures that the powers may be exercised to ascertain whether a person is committing or is about to commit an offence, rather than just whether a person has committed an offence.

**Schedule 1 [38]** inserts a new Division at the beginning of Part 8 of the principal Act which deals with the functions of IPART. The proposed Division deals with the register currently maintained by IPART for the purposes of the principal Act. The requirements are extended to cover approvals as well as licences and generally to reflect the proposed provisions.

**Schedule 1 [39]** is a technical amendment to the heading to Division 1 of Part 8 of the principal Act to reflect the expansion of IPART's responsibilities under the Part.

**Schedule 1 [40]** substitutes section 85 of the principal Act and expands the functions of IPART to include review of compliance with approval conditions and the continued relevance and appropriateness of the arrangements for last resort providers.

**Schedule 1 [41]** inserts a new requirement into section 86 of the principal Act to provide for recovery of the costs of the performance of IPART's functions from the holder of an approval equivalent to the requirement that applies to licensees.

**Schedule 1 [42]** is a consequential amendment.

**Schedule 1 [43]** enables IPART to direct approval holders to keep records and furnish information.

**Schedule 1 [44], [45] and [47]** are technical drafting amendments. Material that was in section 88 of the principal Act is more appropriately distributed among relevant provisions and the offences

relating to the provision of false or misleading information set out in Part 5A of the *Crimes Act 1900* are relied on.

**Schedule 1 [46]** amends the requirement for IPART to provide an annual report to take account of the proposed expansion of its functions.

**Schedule 1 [48]** inserts a new section into Part 9 (Miscellaneous) of the principal Act requiring timely determination of applications. The regulations may set out required time frames for the determination of applications by IPART and, if not met, the applicant may apply to the Minister for a direction to IPART requiring the decision to be made within a time fixed by the Minister.

**Schedule 1 [49]–[51]** remove unnecessary references to the Director-General who does not have particular powers under the principal Act.

**Schedule 1 [52]** provides for continuing offences. The daily penalty imposed is one-tenth of the maximum penalty for the offence.

**Schedule 1 [53]** amends the offences identified as offences attracting executive liability to cover offences of not having a required approval or licence or contravening conditions of an approval or licence. The reference to section 71 is removed since that section is just one of many that relate to interference with water industry infrastructure.

**Schedule 1 [54]** inserts a Corporations Act displacement provision into the principal Act. This allows the proposed provisions relating to obligations and rights of insolvency officials to have full effect and take precedence over requirements of the Corporations legislation.

**Schedule 1 [55]** is a technical drafting amendment designed to achieve consistency and does not make a substantive change to the law.

**Schedule 1 [56] and [57]** are consequential amendments ensuring that section 99 of the principal Act dealing with the recovery of monetary penalties applies to approval holders as well as licensees.

**Schedule 1 [58]** is a technical amendment updating section 100 of the principal Act which deals with evidentiary certificates.

**Schedule 1 [59]** draws various regulation-making powers together and allows the regulations to make exemptions as necessary and to provide for the payment of fees by instalments. The level of penalty that may be imposed by the regulations has been increased to reflect the proposed increases to penalties in the principal Act.

**Schedule 1 [60]** substitutes section 104 of the principal Act so as to require the effect of the proposed amendments to be reviewed and a report tabled in Parliament.

**Schedule 1 [61]** is a consequential amendment to the regulation-making powers set out in Schedule 2 to the principal Act designed to reflect that certain matters may be made the responsibility of an approval holder rather than a licensed operator.

**Schedule 1 [62]** inserts a regulation-making power in relation to social programs, currently provided under section 13 (3) of the principal Act.

**Schedule 1 [63]** inserts a regulation-making power to deal with matters relating to connecting developments to water industry infrastructure operated under the principal Act. This amendment and the amendment to the *Environmental Planning and Assessment Act 1979* are designed to apply an equivalent compliance certificate scheme to that which applies to the infrastructure of the Sydney and Hunter water authorities to infrastructure operated under the principal Act.

**Schedule 1 [64] and [65]** deal with transitional issues.

Proposed Part 4 of Schedule 4 provides that all existing licences are to be brought over into the new scheme. Consequently, it is necessary for operational approvals to be granted to the owner of the infrastructure and for appropriate licensees and persons listed on licences under the current scheme to be granted new licences. This process is to happen without application or fees but

relevant persons may be required to provide necessary information to IPART verified as IPART requires. Licensees and persons listed in licences who are not granted licences under this scheme are given 28 days following commencement to apply for a licence without payment of an application fee.

Proposed clause 10 (2) is included to allow IPART an appropriate time frame within which to bring schemes currently run by metropolitan councils and other schemes within the ambit of the principal Act.

Proposed clause 11 converts current contracts between licensees and customers into implied contracts as provided for in proposed Division 1AA of Part 5.

Proposed clause 12 converts the current monopoly supplier declaration into a form that suits the requirements of the proposed scheme.

**Schedule 1 [66]–[70]** make necessary modifications to the Dictionary of the principal Act. The definition of *owner of water industry infrastructure* means that a long term lessee of water industry infrastructure is regarded as the owner for the purposes of the scheme. This is designed to accommodate arrangements such as that pertaining to the Sydney desalination plant. The definition of *providing an essential service* is designed to simplify the language in proposed Division 3 of Part 5 by allowing the expression to be used both in relation to the operation of essential infrastructure and the sale of an essential service. The definition of *public water utility* ensures that there is an explanation of what is meant by the utility's Act and the utility's area of operations for each public water utility. Metropolitan councils (to the extent that their council areas are in the areas covered by the Sydney and Hunter water authorities) are removed from the definition so that the principal Act will apply to infrastructure operated by or on behalf of metropolitan councils. The definition of *small retail customer premises* is used in determining what constitutes a category A scheme. A level of flexibility is introduced by allowing the regulations to refine this definition.

**Schedule 1 [71]** makes global amendments to the principal Act to accommodate the proposed changes in terminology.

## **Schedule 2 Consequential amendments of other legislation**

**Schedule 2.1** amends the *Energy and Utilities Administration Act 1987* to update terminology.

**Schedule 2.2** amends the *Environmental Planning and Assessment Act 1979* to extend the scheme requiring a developer to obtain a compliance certificate from a public water utility if it is proposed that a subdivision be connected to infrastructure of the utility to infrastructure operated under the principal Act.

**Schedule 2.3** amends the *Environmental Planning and Assessment Regulation 2000* to ensure that a planning certificate for land indicates that water or sewerage services are provided to the land under the principal Act if that is the case.

**Schedule 2.4** amends the *Fluoridation of Public Water Supplies Act 1957* to update terminology.

**Schedule 2.5** amends the *Hunter Water Act 1991* to update terminology and because the matter currently dealt with in section 36 (4) of that Act relating to contracts with Hunter Water Corporation as a last resort provider is proposed to be dealt with in the provisions dealing with last resort providers in the principal Act.

**Schedule 2.6** amends the *Local Government Act 1993* to update terminology and because the matter currently dealt with in section 553A (2) of that Act relating to contracts with a last resort provider is proposed to be dealt with in the provisions dealing with last resort providers in the principal Act. The amendment to section 124 empowers councils to require premises to be connected to a water or sewerage system without reference to council ownership of the system.

**Schedule 2.7** amends the *Local Government (General) Regulation 2005* to avoid duplication and ensure that activities carried out under an approval or licence under the principal Act do not require an approval under section 68 of the *Local Government Act 1993*.

**Schedule 2.8** amends the *Plumbing and Drainage Act 2011* to update terminology.

**Schedule 2.9** amends the *Public Health Act 2010* to update terminology.

**Schedule 2.10** amends the *State Environmental Planning Policy (Infrastructure) 2007* to link the authorisation for certain water industry infrastructure to be developed without consent on land within a prescribed zone to the holders of design approvals rather than licensees.

**Schedule 2.11** amends the *Sydney Water Act 1994* to update terminology and because the matter currently dealt with in section 55 (3B) of that Act relating to contracts with Sydney Water Corporation as a last resort provider is proposed to be dealt with in the provisions dealing with last resort providers in the principal Act.

**Schedule 2.12** amends the *Sydney Water Catchment Management Act 1998* to update terminology.

**Schedule 2.13** amends the *Water Management Act 2000* to update terminology.