

REVIEW OF THE NSW RECONSTRUCTION AUTHORITY ACT 2022

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Mr Clayton Barr MP
Joint Select Committee on the NSW Reconstruction Authority
Parliament House
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Submission to the Joint Select Committee on the NSW Reconstruction Authority

Dear Chair

WaterNSW welcomes the opportunity to make a submission to the Joint Select Committee's section 93 review of the *NSW Reconstruction Authority Act 2022* (**Act**).

WaterNSW has previously provided commentary and feedback as part of a formal review process in relation to the Regulatory Impact Statement on the *NSW Reconstruction Authority Regulation* in 2023. Some of the points we raised in our previous submission will be the same points we make in relation to the Act. Namely, that some parts could benefit from greater clarity or definition and stricter or clearer parameters, while other parts have resulted in regulatory duplication with the remit of WaterNSW and other agencies. Reducing inconsistency and ambiguity within the Act, will ensure the NSW Reconstruction Authority has both clear and comprehensive legislative functions for better disaster coordination.

At WaterNSW, we are the largest supplier of bulk water in NSW, delivering two-thirds of the water used in NSW. As the largest dam owner in the State, we have responsibility for 41 of the State's declared dams. We own significant critical infrastructure that plays an important role during times of emergency and disaster planning. For these reasons, WaterNSW has a strong interest in the review of the Act. As the owner of critical infrastructure, we also have a keen interest in the evolution, update, and amendment of the State Disaster Mitigation Plan (**SDMP**), as well as any relevant local Disaster Action Plans (**DAPs**).

We look forward to further consultation with the Committee as part of your review.

Yours sincerely,



Andrew George
Chief Executive Officer

WaterNSW Submission

The Committee is reviewing the *NSW Reconstruction Authority Act 2022* (**Act**) as required under section 93.

The Committee is reviewing the Act to determine whether:

- (a) The policy objectives of the Act remain valid, and
- (b) The terms of the Act remain appropriate for securing the objectives.

WaterNSW recommends the Committee consider the following issues as part of this review:

1. Unclear role in disaster prevention, preparedness and adaptation

<p>Section 3: Primary object “disaster prevention, preparedness and adaptation”</p> <p>Section 4: How the primary object is to be achieved “functions and powers of the NSW RA to mitigate against the impact of potential disasters on communities”</p> <p>Section 10: Functions The NSW RA’s functions include (1):</p> <ul style="list-style-type: none"> (a) “disaster prevention and preparedness including identifying, assessing and managing the risks from disasters...and leading mitigation activities” ... (o) “to carry out flood modelling and the determination of flood planning levels, particularly in relation to high risk catchments”. 	<p>REASON: Lack of clarity & duplication</p> <p>We understand that the NSW Reconstruction Authority’s (NSW RA) remit is intended to apply at two-key phases of emergency management. Firstly, before a disaster occurs (i.e. in the planning, preventative and preparatory phase) and secondly, after disaster occurs (i.e. in the recovery and reconstruction phase).</p> <p>WaterNSW understands that the preventative role of the NSW RA provides for their function and responsibility as custodian of the development of the State Disaster Mitigation Plan (SDMP) and local Disaster Action Plans (DAPs), among other things. As the Act is currently written, it is unclear whether some of their preventative functions encroach upon and duplicate the preventative role and functions of other agencies.</p> <p>For instance, section 4(b)(ii) of the Act provides that one of the NSW RA’s ‘objects’ is to mitigate against the impact of potential disasters on communities. Then in section 10(1)(a)(ii), it is said that one of the ‘functions’ of the NSW RA is responsibility for “<u>leading</u> disaster resilience, adaptation and mitigation activities”. This proactive requirement – as the lead agency for disaster mitigation – may result in both duplication and conflict with the activities of WaterNSW and Dams Safety NSW.</p> <p>Under the <i>WaterNSW Act 2014</i>, it is WaterNSW’s responsibility to:</p> <ul style="list-style-type: none"> • “Store and release water in a...safe manner.” (section 5(1)(a)); • “Ensure that the declared catchment areas and water management works... are managed and protected so as to promote... the protection of public health and safety, and the protection of the environment” (section 5(1)(c)); and • “Undertake flood mitigation and management” (section 7(1)(i)) <p>As part of these objects and functions, WaterNSW provides an integral role in the prevention of dam failure through dam design, construction,</p>
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	<p>operation and maintenance, flood modelling and various activities to ensure compliance with dam safety requirements.</p> <p>Under the <i>Dams Safety Act 2015</i>, it is Dams Safety's responsibility to:</p> <ul style="list-style-type: none"> • "Ensure that any risks that may arise in relation to dams (including risks to public safety and to environmental and economic assets) are of a level that is acceptable to the community" (section 3) • "Formulate measures (including the development of guidelines) to ensure the safety of dams" (section 9(f)); and • Require declared dam owners to prepare and implement an emergency plan for their dams (section 17) <p>Dams Safety NSW has the legislative function to oversee dam owners to prevent and mitigate against disasters arising from a dam failure.</p> <p>The Act should better clarify the intended parameters of the NSW RA in the preventative space to avoid possible duplication or interference with the functions of WaterNSW or Dams Safety NSW.</p> <p>The Act should also better clarify the NSW RA's function with regards to flood modelling. In NSW, the responsibility for the development of flood modelling, including flood forecasting models for both general forecast and flood warning purposes, lies with the Commonwealth Bureau of Meteorology (BoM). WaterNSW assists the BoM by providing data, while the NSW SES operate as the lead combat agency. NSW DCCEEW also performs floodplain modelling as part of their Floodplain Management Programs. WaterNSW also undertakes modelling of dam inflows and the impact they may have, which is complementary to the BoM's work on flood forecasting.</p> <p>The wording in section 10(1)(o) should be amended to limit the NSW RA's flood modelling function "for the purposes of determining flood planning levels". This would clarify that the NSW RA do not also engage in flood forecast modelling or other duplicative modelling.</p> <p>In addition, clarity is needed as to the meaning of 'disaster adaptation'"</p>
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2. Duplication in terms of notification and step-in powers

<p>Sections 39–41: 'declared project' & other declarations</p> <p>NSW RA can recommend a project be deemed a 'declared project, 'reconstruction area' or 'disaster prevention area'.</p> <p>Section 45: Particular powers in relation to declarations</p> <p>If the Authority makes a ss. 39–41 declaration, they can:</p>	<p>REASON: Duplication & regulatory inconsistency</p> <p>There is duplication regarding the step-in powers and functions of the NSW RA with Dams Safety NSW.</p> <p>This results in duplication, potential conflict, and lack of clarity when determining which agency is the appropriate agency to step-in and/or take over responsibility for a dam in the event of an anticipated dam failure which could result in disaster. This is essentially a preventative power.</p> <p>Under the <i>Dams Safety Act 2015</i>, Dams Safety NSW has the power to:</p>
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<p>(a) acquire land for the declared project, (b) to give notice to a decision-maker, (c) to a give a progression notice to a decision-maker (d) to give a step-in notice to a decision-maker.</p> <p>Section 65: Step-in powers The RA has additional step-in powers for declared projects.</p> <p>There is a transfer of asset and projects power under sections 66 and 67.</p>	<ul style="list-style-type: none"> • Give directions to dam owners (of declared dams) to direct the owner to do things to ensure the safety and proper maintenance and operation of the dam if Dams Safety (section 19); • Issue "stop work" orders (section 20); • Issue emergency orders (section 21); • Declare that an emergency exists in respect of a declared dam and issue an 'emergency order' (section 21); and • If an emergency order is issued under section 21, to: <ul style="list-style-type: none"> ○ "take full charge and control of the dam, the area under, over and surrounding the dam and the water or material impounded by the dam" (Section 21(5)(a)), and ○ "carry out all such works and all such things" that Dams Safety believe are necessary (section 21(5)(c)). <p>The power to issue notices and to take over control of projects such as a declared dam results in duplication between the two agencies if that power is exercised to address anticipated safety concerns resulting in possible dam failure.</p> <p>If it is intended that the NSW RA step in during the recovery and reconstruction phase, this should be clarified within the Act.</p> <p>The Act should be amended remove any inconsistency with the functions and role of Dams Safety NSW.</p>
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3. Unclear meaning of disaster – dam failure and drought

<p>Section 6: Meaning of 'disaster'</p> <p>Disasters include:</p> <p>(a) "natural disasters, including, for example... floods"</p> <p>(b) "hazards caused by natural disasters including air pollution, water and soil contamination and water insecurity"</p>	<p>REASON: Lack of clarity and ambiguity</p> <p><u>DAM FAILURE</u></p> <p>It is unclear whether dam failure is included under the "meaning of 'disaster'" in section 6 of the Act.</p> <p>Dam failure is not necessarily a "natural disaster" as per the meaning of section 6(a) and is more likely to sit under section 6(b) which refers to hazards caused by natural disasters. Unlike the non-exhaustive list in section 6(a), section 6(b) appears to be an exhaustive list. Only three types of hazards are included under section 6(b) and dam failure is not included as one of them. It could be read into the meaning of "water insecurity" but there is no clear reference to dam safety.</p> <p>If the Act deliberately intended to exclude dam safety from the NSW RA's remit, it could alleviate concerns regarding duplicative power between Dams Safety NSW and the NSW RA, as described in Issue #1. However, if this was not intended, it should be clarified within the Act to remove ambiguity.</p> <p><u>DROUGHT</u></p> <p>The Act should clarify and specify that drought is generally excluded from the list of natural disasters for which the NSW RA has a role.</p>
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	<p>As previously noted, the list of natural disasters in section 6(a) is a non-exhaustive list of examples. Nonetheless, it is seemingly intentional that drought was not included as an example on that list. While it may be possible to read drought into section 6(b) as a “hazard caused by natural disaster... including water insecurity”, the SDMP suggests otherwise.</p> <p>Part 4, Division 1 of the Act, requires the NSW RA to prepare and maintain a SDMP. Under the current SDMP, drought is excluded as “it is being progressed by other Government agencies” and will be developed as part of the NSW Climate Change Action Plan. Droughts also fall under the NSW Extreme Events Policy.</p> <p>If it is intended that drought be excluded from the NSW RA’s remit, this should be made clear within the Act to remove ambiguity.</p> <p>FISH DEATHS</p> <p>During the 2022–2023 fish death event in the Menindee Lakes system, it was unclear who was the lead agency to deal with water contamination resulting from the mass fish deaths. Given that the Act defines a hazard as including “water contamination”, there is merit in considering whether the NSW RA have a role in these events and if so, clarifying this point within the Act or Regulation.</p>
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4. Lack of consultation required with SOC Boards

<p>Section 91: Directions to SOC</p> <p>(1) This section applies if, under this Act, the Minister of authority gives a direction to a SOC.</p> <p>(2) The SOC Act 1989, section 20P(4)-(6) applies to the direction if....</p> <p>Notably, there is no reference to section 20P(3) of the SOC Act.</p>	<p>REASON: Infringes upon the functions of SOC</p> <p>The NSW RA can give directions to SOC without Board consultation (section 91). This is because section 91 has been written in a way that specifically excludes the section 20P(3) requirement in the <i>State Owned Corporation Act 1989</i> (SOC Act) for the Minister to consult with the Board before giving a direction under section 20P.</p> <p>WaterNSW understands the policy intent of this power was to fast-track planning processes where possible. However, consideration should still be given to whether the direction is both in the interests of the SOC and is consistent with legislative objectives of the SOC to avoid inconsistency.</p> <p>WaterNSW proposes that this be amended in both the Act and Regulation to require some form of consultation, including Board consultation, before requesting or actioning a Ministerial or Premier’s direction. For instance, section 91 could be amended to include section 20P(3) of the <i>SOC Act</i> as one of the requirements. This would ensure the NSW RA are required to consult with the SOC Board before carrying out a section 12 development on ‘specified land’ that “has been or is likely to be directly or indirectly affected by a disaster”.</p>
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5. NSW Reconstruction Authority’s remit is broad

<p>Development approval powers</p> <p>Section 68: Ministerial authorisations</p> <p>(1) The Minister may by order authorise the undertaking of development without the need for (a) approval or assessment under the EPA Act 1979 or (b) consent from any person.</p> <p>...</p> <p>"in exceptional circumstances"</p> <p>"Exceptional circumstances" is defined in section 8 of the Regulation as:</p> <ul style="list-style-type: none"> - "A disaster that has resulted in... [or] a disaster may occur that is likely to result in, significant and widespread harm to life or damage to property or the environment." 	<p>REASON: Lack of clear parameters, broad powers</p> <p>The NSW RA has broad powers under the Act.</p> <p>It is understood that the policy intention was to permit the NSW RA to be an adaptable agency which can prepare for and respond to a wide range of emergency and disaster scenarios. Indeed, section 6(c) permits the Minister to ask the NSW RA to assist with almost any form of "emergency". The broadness of this remit is concerning given the extensive and far-reaching powers they have under the Act, such as the power to acquire land and step-in for decision makers.</p> <p>For instance, in section 68 the NSW RA have 'departmental approval powers' in "exceptional circumstances". As the definition of "exceptional circumstances" includes a disaster that has or that may occur, that is likely to result in significant and widespread harm to life or damage to property or the environment, this means the NSW RA could feasibly exercise this power for a <i>disaster that may occur</i>.</p> <p>The power in section 68 should be limited to those circumstances where "a disaster has resulted in, or it is <i>imminent</i> that it will result in <i>X, Y and Z...</i>". If section 68 is not amended to include a requirement that relates to the likelihood of a disaster occurring (i.e. such as imminency), it could result in overlap with the powers of WaterNSW in the declared catchments under the <i>Water NSW Act 2014</i>.</p>
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