



WATER NSW ACT 2014

# Statutory Review

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Final report

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## Key terms

Term	Meaning
<b>Conferred functions</b>	Functions conferred on WaterNSW in Schedule A of the Operating Licence 2017-2022
<b>DPIE or the Department</b>	Department of Planning, Industry and Environment
<b>IPART</b>	Independent Pricing and Regulatory Tribunal
<b>IPART Review</b>	Water NSW operating licences review Final Report, May 2017
<b>NRAR</b>	Natural Resources Access Regulator
<b>Operating Licence</b>	Water NSW Operating Licence
<b>SCA</b>	Sydney Catchment Authority
<b>SOC</b>	State Owned Corporation
<b>Statutory review</b>	Statutory review of the <i>Water NSW Act 2014</i>
<b>Sydney Water</b>	Sydney Water Corporation
<b>The Act</b>	<i>Water NSW Act 2014</i>
<b>The Government</b>	NSW Government
<b>The Minister</b>	Minister for Water, Property and Housing
<b>The Regulation</b>	<i>Water Management (General) Regulation 2018</i>
<b>WaterNSW</b>	Water NSW Corporation
<b>WMA</b>	<i>Water Management Act 2000</i>

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# 1. Executive summary

The *Water NSW Act 2014* (the Act) establishes the statutory State Owned Corporation (SOC) WaterNSW to manage bulk water and infrastructure in New South Wales as well as to protect water quality in the Sydney catchment. The Act focusses on the role and functions of WaterNSW and requires WaterNSW to carry out its functions in accordance with an operating licence. The Act is available [here](#).<sup>1</sup>

Section 115 of the Act requires a review of both its policy objectives and the Act's appropriateness to secure those objectives. To comply with this requirement, the Department of Planning, Industry and Environment (the Department) conducted a statutory review seeking submissions and input on an [Issues Paper](#) which was released as part of the public submission process. The Department received fourteen written submissions in response to the Issues Paper, including one from WaterNSW, and additional input from six stakeholders, including a representative from WaterNSW.

This report has been prepared by the Department on behalf of the Minister for Water, Property and Housing for tabling in the Upper and Lower Houses of Parliament, following an analysis of the submissions and the input received.

The Review found that the policy objectives of the Act remain valid and the mechanisms in the Act that specify the terms and conditions that WaterNSW must adhere to remain largely appropriate for securing the objectives. The submissions to the Review generally supported that the existing objectives and functions of the Act are appropriate.

The Review found that the regulatory framework established by the Act, including the Operating Licence, various agreements and memoranda of understanding, provide a robust foundation for the operation of WaterNSW.

In delivering its services, WaterNSW is showing an overall high level of compliance with its Operating Licence<sup>2</sup> and is demonstrating an ability to operate successfully as a SOC<sup>3</sup>.

## Finding 1

The objectives of the Act remain valid and provisions of the Act are fit for purpose to achieve those objectives.

The Review has identified some issues that would be better considered in the course of the 2022 review of the WaterNSW Operating Licence rather than as Act amendments.

<sup>1</sup> <https://www.legislation.nsw.gov.au/#/view/act/2014/74/full>

<sup>2</sup> "WaterNSW has shown an overall high level of compliance with the Licence" WaterNSW Operational Audit 2019 Report to the Minister, IPART, December 2019, pg 6.

<sup>3</sup> WaterNSW reported a net profit after tax for 2018-19 (excluding revaluation of property, plant and equipment) of \$30.3 million, WaterNSW Annual Report 2018-19, pg 4.

**Finding 2**

That WaterNSW's Operating Licence be amended at the next available opportunity to improve clarity around purpose, roles and functions by including the following:

- a clear statement of purpose of the Operating Licence
- definitions to improve clarity of functions listed in the Act
- clarification of the role of WaterNSW regarding planning, mitigation and management of drought, floods and fire
- clarification of the role of WaterNSW regarding collection and provision of data and information.

The Review makes three recommendations which propose minor legislative changes to improve the clarity and operation of the Act (Section 3). The intent of these recommendations is to improve the transparency and accountability of WaterNSW in undertaking conferred functions, to further explore the benefits of introducing customer contract provisions into the Act and to clarify the definition of the term 'public authority'. Implementation of these recommendations could be considered when the Act is next updated, as part of a broader reform process or as part of the next review of the Act.

**Recommendation 1**

That the Act specify that functions conferred or imposed on WaterNSW by an operating licence may be subject to conditions or performance standards.

**Recommendation 2**

That the Government further consider the benefits and risks of introducing customer contracts for WaterNSW water supply customers into the Act.

**Recommendation 3**

That a definition of a 'public authority' be developed and included in the Act.

In addition to the three recommended amendments, the issues raised through consultation have been categorised into three groups:

1. Issues considered but no legislative amendments are supported at this time (Section 4)
2. Issues that should be addressed in the review of the WaterNSW Operating Licence in 2022 (Section 5)
3. Broader policy questions regarding water management arrangements in NSW that were beyond the terms of the review of the Act (Appendix B).

## 2. Introduction

### 2.1 The Water NSW Act 2014

The *Water NSW Act 2014* (the Act) was introduced by the NSW Government to merge the Sydney Catchment Authority (SCA) and the State Water Corporation (State Water) to establish Water NSW (WaterNSW). The new entity was tasked with the management of bulk water and infrastructure in New South Wales as well as the protection of water quality in the Sydney catchment.

WaterNSW is constituted as a statutory State Owned Corporation under the *State Owned Corporations Act 1989 (SOC Act)*, with the *Water NSW Act 2014* setting out the specific functions and enabling provisions.

WaterNSW's operations are also governed by a number of other Acts. The primary ones being:

- the *Water Management Act 2000 (WMA)* – which governs the management of water in NSW. WaterNSW holds a number of licences and approvals, and supplies water to its customers in accordance with those customers' WMA entitlements
- the *Independent Pricing and Regulatory Tribunal Act 1992* – which establishes the Independent Pricing and Regulatory Tribunal (IPART) and provides for its review and determination of maximum prices that can be charged for bulk and retail water by major water utilities including WaterNSW
- the *Dam Safety Act 2015* – which establishes Dams Safety NSW as an independent regulator responsible for auditing compliance of declared dams with safety regulations.

The Act requires WaterNSW to carry out its functions in accordance with an operating licence and specifies some of the terms and conditions that must be included in the operating licence.

### 2.2 The Review

Section 115 of the Act requires a review of both its policy objectives and appropriateness of provisions to secure those objectives (the Review). This report has been prepared by the Department of Planning, Industry and Environment (the Department) on behalf of the Minister for Water, Property and Housing for tabling in the Upper and Lower Houses of Parliament.

The aims of the Review are to:

1. Review the Act's policy objectives to see whether they remain valid and if the Act remains appropriate to secure those objectives.
2. Consider making recommendations to the Minister relating to:
  - i. Objectives and functions of WaterNSW, including its roles in water supply to Sydney Water, local water utilities and to regional customers, catchment management and infrastructure planning, construction and management
  - ii. Management of declared catchment areas and special and controlled areas
  - iii. Regulatory functions, including of WaterNSW and its regulatory relationship with IPART
  - iv. The need for any legislative and regulatory amendments
  - v. Timeline for the implementation of the proposed recommendations.

## 2.3 Consultation and submissions

The [Issues Paper](#) was prepared to provide background information on key issues for the Review and to provide guidance for individuals, stakeholders and agencies to make a submission. The Issues Paper is [available here](#) along with the twelve submissions that can be made public.<sup>4</sup> An overview of the consultation process and the list of individuals and agencies who provided input is included at Appendix A.

Submissions from non-WaterNSW stakeholders raised a variety of issues which can be grouped into three broad themes: (1) the role of WaterNSW (2) its performance and (3) commentary on general water management arrangements.

The main issues raised regarding the role of WaterNSW were the inclusion of more specific environmental protection objectives and an expansion of its role in delivering water quality outside areas where WaterNSW currently has a clear role to deliver water quality outcomes for the Greater Sydney catchment.

Suggested improvements that focused on the performance of WaterNSW included:

- A call for new performance standards on customer satisfaction and consultation as well as the need to improve day-to-day catchment management to improve performance;
- Improving transparency and ultimately performance by enabling oversight of WaterNSW's operating licence, its carriage of conferred functions, obligations around customer contracts and interactions with other entities, such as MOUs;
- One submission raised the potential to transfer of Sydney drinking water catchment responsibilities to another agency such as Sydney Water.

Stakeholder submissions also raised broader water management issues. These ranged from the need for a State Water Strategy, a call for additional dam construction, suggestions for water sharing processes and the regulatory oversight of irrigation infrastructure operators. These issues have been noted by the Government but are outside the scope of the review of the Act.

The submission from WaterNSW raised a number of issues where it believes the Act could be amended to improve operational effectiveness and efficiency. WaterNSW suggested consideration of changes to the Act in areas such as liability for flood mitigation and management, seeking exemptions for fees and charges, the scope of hydro-electricity works, procedures for the Greater Sydney catchment auditing and land access during infrastructure construction.

## 2.4 Assessment

When considering the Act, the Review tested whether

1. The policy objectives of the Act are still valid:
  - a. Do the policy objectives in the Act reflect the expectations for WaterNSW?
  - b. Are the objectives clear and do they effectively guide the decisions of WaterNSW?
  - c. Are the policy objectives comprehensive and fit-for-purpose?
2. The Act remains appropriate to secure those objectives:
  - a. Does the Act enable WaterNSW to meet its objectives efficiently?
  - b. Does the Act allow appropriate flexibility to encourage WaterNSW to pursue commercial outcomes?

<sup>4</sup> Submitters agreed to their submission being publicly available.



## 3. Findings and recommendations

### 3.1 The Act remains fit for purpose

The principal objectives of WaterNSW under the Act are:

- (a) to capture, store and release water in an efficient, effective, safe and financially responsible manner, and
- (b) to supply water in compliance with appropriate standards of quality, and
- (c) to ensure that declared catchment areas and water management works in such areas are managed and protected so as to promote water quality, the protection of public health and public safety, and the protection of the environment, and
- (d) to provide for the planning, design, modelling and construction of water storages and other water management works, and
- (e) to maintain and operate the works of WaterNSW efficiently and economically and in accordance with sound commercial principles<sup>5</sup>.

The policy objectives of the Act as described in the second reading speech to Parliament are:

- the efficient and first-class management of storage and supply of bulk water across NSW
- greater clarity in the operation of dam and bulk water infrastructure
- responsive and appropriate management of catchments for improved water quality and public health outcomes
- establishing a single entity to deliver efficiency of service delivery, improved dam safety and sharing of skills and knowledge.

A full description of the functions and objectives of the Act are outlined in the Section 3 of the [Issues Paper](#). The Review concludes that the objectives the Act remain valid and the provisions of the Act are fit for purpose to achieve those objectives.

Submissions raised questions regarding whether the current objectives and functions promote sufficient transparency and accountability or if the objectives provide appropriate clarity around relationships with other agencies. The Review finds that many of the issues raised are the result of a lack of clarity around inter-agency arrangements and associated processes and any alterations to the Act would not improve transparency. For example, many conferred functions are shared between WaterNSW, Natural Resources Access Regulator (NRAR) and the Department and inclusion of these roles in the Act would require a level of detail and specification that is more appropriately covered as an agreement, as is currently the case.

The Review found that the Act enables WaterNSW to operate effectively in accordance with the objectives set out in the Act, and that there are no major deficiencies with the Act.

#### **Finding 1**

The objectives of the Act remain valid and provisions of the Act are fit for purpose to achieve those objectives.

<sup>5</sup> Section 6 (2) contains the 'other objectives' of WaterNSW.

While the Act operates effectively, the Review has identified that the Act could be improved with three minor amendments relating to the:

- standards and conditions for conferred functions to improve transparency and accountability for key water management functions
- further consideration of benefits and risks of the Act providing for customer contracts for WaterNSW's water supply customers
- a definition of a public authority to clarify their obligations.

## 3.2 Recommendations

### Conferred functions

The Act enables Government to confer functions on WaterNSW that are not specified in the list of functions in the Act<sup>6</sup>. Currently, WaterNSW has over 200 functions conferred on it in Schedule A of the [WaterNSW Operating Licence](#), including functions under the WMA. Conferred functions include important customer focused functions such as licensing and metering.

The Act does not specify conditions or impose performance standards with respect to these conferred functions and how they should be undertaken. However, the power to impose conditions or standards in an operating licence is implied. The Operating Licence currently does not specify how conferred functions should be performed or to what standard. IPART noted that this gap may limit the scope and effectiveness of audits in its input to the Review.

Although the power to impose conditions and standards on WaterNSW when exercising conferred functions may already be implied in the Act, it would be beneficial to improve clarity by specifying that the Operating Licence may impose conditions and performance standards or requirements on functions that may be conferred upon WaterNSW. This would improve transparency and accountability with respect to key water management functions that fall within the remit of WaterNSW under the Operating Licence, but which are not prescribed in the Act itself.<sup>7</sup>

#### Recommendation 1

That the Act specify that functions conferred or imposed on WaterNSW by an operating licence may be subject to conditions or performance standards.

### Customer contracts

WaterNSW has different types of customers. It provides capture store release (CSR) water, which means that WaterNSW will capture, store and release (but not supply) water to those entitled to take it, including the release of environmental water. WaterNSW also provides a water supply service to Fish River Water Supply Scheme customers and also to a group of customers it provides raw water from pipelines linked to its storages. WaterNSW has Customer Supply Agreements established with these customers for water supply.

<sup>6</sup> Further functions can be conferred or imposed on WaterNSW in addition to the listed functions specified in section 7(1) of the Act:

- (a) by or under another provision of this Act, or
- (b) by or under any other Act or law, or
- (c) by an operating licence.

In addition, the terms and conditions of an operating licence may confer on WaterNSW any specified functions of:

- (a) the Minister administering the *Water Management Act 2000* under that Act or the *Water Act 1912*, or
- (b) the Water Administrative Ministerial Corporation under any Act or law.

<sup>7</sup> Note: Should performance standards be developed and imposed for conferred functions there is merit in assessing if those standards should be applied to all authorities performing those same statutory functions.

IPART's submission highlighted that, unlike the Acts governing Sydney Water and Hunter Water, the *Water NSW Act 2014* does not contain the same provisions for establishing customer contracts within the operating licence. For example, it does not include the deeming provisions in relation to contracts and other legislative provisions allowing for customer protections for unfair contracts.<sup>8</sup>

WaterNSW indicated that they consider persons that they supply water to (as distinct from CSR customers) have entered into a contract. It noted that these contracts can be individually negotiated and variations to the customer contracts can be made. Inclusion of standard provisions such as that the terms and conditions of customer contracts are to be set out in the operating licence in the Act will improve transparency and protections for both the customer and WaterNSW.

### Recommendation 2

That the Government further consider the benefits and risks of introducing customer contracts for WaterNSW water supply customers into the Act.

### Definition of a Public Authority

While the term 'public authority' is defined in the Act<sup>9</sup> to focus on corporations, it is not clear whether this definition also includes councils, Government departments and local authorities. This is different to other natural resource legislation where the term is defined broadly to include councils and local authorities. Additionally, there is not a standard definition of a public authority under the *Interpretation Act 1987* (NSW). At times local councils and authorities, who must abide by numerous Acts, are defined as a public authority for some activities and not for others. This can create legal and administrative uncertainty and operational issues.

An amendment to the Act is recommended to clarify what public authorities are captured by its requirements. The amendment should prescribe a definition that includes local councils and other public authorities prescribed under the Regulation, similar to that contained in the *Roads Act 1993*<sup>10</sup>. It is considered that this change would improve clarity and the operation of the Act.

### Recommendation 3

That a definition of a 'public authority' be developed and included in the Act.

### 3.3 Timeline for the implementation of recommendations

These amendments could be considered when the Act is next updated, as part of a broader reform process or as part of the next review of the Act.

<sup>8</sup> See Sydney Water Act (1994) Division 7 Customer contracts for example.

<sup>9</sup> a corporation that is incorporated by or under an Act, but does not include:

- (a) a company within the meaning of the *Corporations Act 2001* of the Commonwealth, or
- (b) a co-operative within the meaning of the *Co-operatives National Law (NSW)*, or
- (c) an association incorporated under the *Associations Incorporation Act 2009*, or
- (d) a body prescribed by the regulations as not being a **public authority** for the purposes of this definition.

<sup>10</sup> **public authority** means a public or local authority constituted by or under an Act or a statutory body representing the Crown and includes a Minister and anybody or class of bodies prescribed by the regulations for the purposes of this Act and the regulations or of any specified provision of this Act or the regulations.

### 3.4 Issues for consideration for the Operating Licence review

The consultation process has identified some issues that would be better considered in the course of the 2022 review of the WaterNSW Operating Licence rather than as Act amendments. The next Operating Licence review should consider issues identified in Section 5 of the Report.

#### **Finding 2**

That WaterNSW's Operating Licence be amended at the next available opportunity to improve clarity around purpose, roles and functions by including the following:

- a. a clear statement of purpose of the Operating Licence
- b. definitions to improve clarity of functions listed in the Act
- c. clarification of the role of WaterNSW regarding planning, mitigation and management of drought, floods and fire
- d. clarification of the role of WaterNSW regarding collection and provision of data and information.

## 4. Issues considered

A number of issues identified by stakeholders were not considered as warranting legislative amendment at this time because either:

- the proposed changes concerned fundamental changes to the Act's objectives which were not considered valid for the specific nature of WaterNSW and its Act;
- it was not considered efficient to make a significant change to the way the Act operates because it would reduce the flexibility of its current regulatory framework including its Operating Licence, or
- the issue and proposed changes were not of sufficient benefit to require an amendment to the Act.

### 4.1 Clarity around Act's policy objectives, functions and roles and responsibilities

A number of submissions stated that the policy objectives of the Act are either no longer fit for purpose or need to be expanded. Issues raised included:

- Improving the clarity around the role of WaterNSW regarding implementing broader policy and planning objectives of government such as: water sharing arrangements<sup>11</sup>; metropolitan planning; environmental protection; environmental water; cultural water; river operations; and drought mitigation.
- Strengthening the role of WaterNSW in regard to environmental protection, for example the Inland Rivers Network (IRN) suggested '*broadening the focus from only operational efficiency and maximising business outcomes to include environmental outcomes*' it was also suggested that the *Protection of the Environment Operations Act 1997* should be linked as an objective.<sup>12</sup>
- Protecting water quality outside declared catchment areas and that consideration should be given to the protection of water quality across NSW in the Act, or at a minimum, that WaterNSW should maintain the water quality of bulk water storages and distribution systems they operate.<sup>13</sup>
- WaterNSW's role in the operations in the Greater Sydney area with the Public Interest Advocacy Centre (PIAC) considered that there would be value in 're-examining WaterNSW's role managing water storages, catchments and declared areas within Greater Sydney' and transferring these functions to Sydney Water.

While these issues are worthy of consideration, in many cases the issues are not directly related to the Act but existing water management arrangements. The Review therefore found that the policy objectives in the Act remain appropriate at this time. Many of the issues concerning objectives, functions and roles and responsibilities raised by stakeholders, while considered important, are clearly the responsibility of other agencies or would require significant policy development and concurrent changes to other Acts.

#### Environmental protection

In the case of establishing environmental protections, the expectations for WaterNSW as a business should reside with Government. Additionally, as a SOC, WaterNSW should comply with these obligations, including obligations around environmental protection. A SOC should be a successful business and it should meet any obligations imposed on its activities and conduct its

<sup>11</sup> For example, Submission 5 - Inland Rivers Network.

<sup>12</sup> For example, Submission 3 – Dugald Bucknell.

<sup>13</sup> Noted in Submission 2 - Tamworth Regional Council.

operations in compliance with required environmental approvals and standards and the principles of ecologically sustainable development.

### **Roles and responsibilities**

Roles and responsibilities in water management are outlined in legislation, regulations and operating licences.<sup>14</sup> This approach provides a degree of flexibility to deal with emerging issues and carry out water management activities efficiently.<sup>15</sup> Input to the review highlighted that the complexity of water management arrangements and roles and responsibilities may reduce transparency.<sup>16</sup> The Review found that there would be merit in the Department and WaterNSW jointly communicating these arrangement and accountabilities more clearly with the public and stakeholders.

There are also some functions conferred on WaterNSW which may benefit from more explicit communication. The Review concluded that there was no cause to update the Act to improve clarity around these functions. Recommendation 1 of this Review “That the Act specify that functions conferred or imposed on WaterNSW by an operating licence may be subject to conditions or standards” would provide opportunity for greater clarity.

PIAC noted that a sector wide review would better inform consideration of the responsibility for functions for the planning and management of water storages in the Greater Sydney area.<sup>17</sup> The Review notes that WaterNSW’s specific functions can be assigned and withdrawn using instruments outside of the Act. This transfer of functions would require examination of the benefits of the integrated management of bulk supply and catchment management with treatment, network and wastewater functions.

## **4.2 Performance standards**

The need to enhance the standards and measures used to assess WaterNSW’s performance was raised in most submissions.<sup>18</sup> It was noted that the current performance standards, which are given effect in the Operating Licence, are generally input focused and should provide more information on outcomes.

The range of issues where stakeholders suggest performance standards may be required included security, robustness and reliability of supply, environmental matters, cultural water, environmental water, policy implementation, consultation and engagement with First Nations, catchment management, river operations, raw water supply, distribution networks, water conservation and efficiency, wastewater, licensing and approvals, and trade. Customer satisfaction was also raised by several stakeholders.<sup>19</sup>

In relation to customer performance, the Review found that while WaterNSW has developed targets and measures for customer satisfaction, and currently reports on them internally, it does not have clearly defined performance standards.

WaterNSW’s submission proposed that performance standards should be set through a sector wide benchmarking study, rather than through alignment of performance standards in the existing legislation provisions. It noted that some its functions involve outcomes that depend on contributions from other entities. For example, customer satisfaction measures may be affected by

<sup>14</sup> [https://www.watnsw.com.au/\\_\\_data/assets/pdf\\_file/0020/133940/Water-Roles-and-Responsibilities.pdf](https://www.watnsw.com.au/__data/assets/pdf_file/0020/133940/Water-Roles-and-Responsibilities.pdf)

<sup>15</sup> [https://www.watnsw.com.au/\\_\\_data/assets/pdf\\_file/0020/133940/Water-Roles-and-Responsibilities.pdf](https://www.watnsw.com.au/__data/assets/pdf_file/0020/133940/Water-Roles-and-Responsibilities.pdf)

<sup>16</sup> For example, Submission 8 – Peter Gill and Submission 10 – Lex Stewart.

<sup>17</sup> See Submission 12 - Public Interest Advocacy Centre.

<sup>18</sup> See Recommendation 2 regarding performance standards for conferred functions.

<sup>19</sup> For example, input provided by the NSW Irrigators Council.

functions performed under the Deed of Business Transfer between WaterNSW and the Department.

The Review supports improved transparency and accountability measures and finds that greater clarity around functions and performance standards should be further considered outside of the Act. Having performance standards outside the Act in the operating licence provides the flexibility required to allow for quick updates as monitoring and reporting tools and processes are updated.

### 4.3 Determining consents and authorising activities

South32's submission proposed adding determining consents and authorising activities within the Special and Controlled Areas as a new objective of WaterNSW under the Act.<sup>20</sup>

Illawarra Metallurgical Coal (IMC) is 100 per cent owned by South32 and it owns and operates the Dendrobium Mine which is located within a declared Special and Controlled Area.

Special and Controlled Areas Consents are determined by WaterNSW and are issued under Clause 10 of the *Water NSW Regulation 2020* (the Regulation). WaterNSW also issues other activity approvals to IMC, specific to various activities.

WaterNSW's consent is guided by WaterNSW's objectives, particularly relating to promoting water quality and protecting public health and safety.

The Review found that the inclusion of consents in the Regulation adequately addresses this issue and there was no cause to update the Act and elevate determining consent and authorising activities to a function or objective of the Act.

### 4.4 Functions authorised by the Operating Licence

For WaterNSW to be able to undertake a function, the Operating Licence must contain the authorisation for that function, unless it has already been authorised by another regulatory instrument. The Operating Licence should also specify the areas and circumstances in which WaterNSW is able to exercise its authorised functions. If a listed function is not authorised by the operating licence, or any other instrument, WaterNSW must not undertake that function or it would be in breach of the Act.<sup>21</sup>

Even if already authorised by another instrument, IPART considers it appropriate to authorise WaterNSW's functions in the Operating Licence to include additional terms and conditions related to that function that are not included within the other instrument. IPART's view is that the Act can only impose conditions on the exercise of those functions which it also authorises.

Submissions suggested that the Review examine the need for specific listed functions to be authorised in the Operating Licence, namely:

- 7(1) (i) 'to undertake flood mitigation and management' - IPART raised that WaterNSW will only be able to undertake flood mitigation and management activities under its water management work approvals, under the WMA,
- 7(1)(j) education, and 7(1) (k) research. Some submissions were in favour of WaterNSW being able to undertake research and education without specific requirements in the Operating Licence. Other submissions countered this perspective, highlighting that having

<sup>20</sup> Raised in Submission 4. - South32

<sup>21</sup> Section 7(5) of the Act provides that the Act does not require the authorisation of an operating licence for WaterNSW to exercise a function conferred on it under a provision of the WaterNSW Act, other than section 7, or by another Act or law.

specific requirements in the Operating Licence would increase the opportunity for education and research to collaborate and align with broader Government objectives and work in these areas.

The Review considers that legislative amendment is not warranted in relation to these issues for the following reasons:

- The Review considers that the current framework for authorising flood mitigation and management activities is appropriate and no change to the Act is warranted. The framework allows for WaterNSW's ability to undertake flood mitigation and management activities to be considered and managed on an individual asset basis, as enabled by the water management work approvals or planning consents. It also provides the ability for these activities to be authorised in the Operating Licence if Government determines this is needed.
- In the case of education and research, the Review found that the authorisation of functions in the Operating Licence should be undertaken if there is a policy need, for example to clarify roles and responsibilities, or if further specification is required for the conduct of the function. WaterNSW decisions on its prudent and efficient research and education activities to support the delivery of its objectives should be a matter for WaterNSW Board and its economic regulator. It is not clear that the current Act and Operating Licence does not reduce appropriate investments in this area.

#### 4.5 Operational Audit

IPART identified a number of inconsistencies between the operational audit requirements in the Act governing the three major public water utilities, (WaterNSW, Sydney Water and Hunter Water) related to the frequency of audits, timing of providing reports to the Minister and the timing of tabling reports.

IPART recommended that greater consistency between the requirements of the three major water utilities regarding operational audits could improve transparency and accountability.

The Review considers that while consistency may be a worthwhile objective, the current terms of the Act do not prevent improvements being made to the timing of reports and that the benefit of amendments to the process of tabling audits would be negligible.

#### 4.6 Catchment audit

Section 42 of the Act requires that every 3 years the Minister must appoint an auditor to assess the health of declared catchment areas, with the final report to be tabled in Parliament. The audit aims to present a holistic picture of catchment health, which in practice requires engaging with and making recommendations for a wide range of entities and agencies including WaterNSW, National Parks and Wildlife Service, NSW Environment Protection Agency, multiple groups within DPIE, InfrastructureNSW, NSW Fire and Rescue, Rural Fire Service, the Forestry Corporation and Councils.

The 2016 catchment audit found "*There is overlap and gaps in public authorities' responsibilities for management of the Sydney Catchment area. To address this, it is suggested the Minister consider appointing the NSW Audit Office to monitor implementation of recommendations from this*



Audit and to lead subsequent catchment audits to ensure effective and coordinated responses to catchment pressures by the NSW Government.”<sup>22</sup>

WaterNSW supported the view that the NSW Audit Office lead catchment audits and suggested that this change could be implemented through Act amendment, noting that:

- the current scope of the catchment audit report is an audit of the entire catchment, not only WaterNSW’s role in the catchment;
- while actions arising from the catchment audit are allocated to other government agencies, WaterNSW has limited ability to compel other agencies to undertake or complete their actions including providing data and information. Involvement of the Audit Office would help in this regard;
- while the audit is of the state of the catchment (as opposed to an audit of the conduct of WaterNSW), the current arrangement means that WaterNSW is both the facilitator of the audit and one of the agencies with close involvement. This has the potential to lead to either actual or perceived conflict of interest.

WaterNSW noted the facilitation and coordination of the audit by a party, other than WaterNSW, would help change this misconception and provide a clearer focus for accountabilities.

The alternate view is that the NSW Audit Office may not have the necessary drinking water catchment and water quality expertise to effectively conduct a catchment audit which may increase the cost when compared to a competitive process using external and expert providers managed by an informed contract manager. For example, the Natural Resources Commission may be another independent body that could play a role in the audit process.

The Review considers that the case for a legislative amendment has not been satisfactorily made. The Review found that the Act currently gives the Minister authority to appoint any public authority to conduct catchment audits, including the NSW Audit Office or the Natural Resources Commission, if they consent. Even if it would be beneficial to commit to using the Audit Office for all future catchment audits, this could be achieved just as effectively by making a policy commitment instead of a legislative one.

#### **4.7 Hydro-electricity**

Section 35 of the Act provides for the use of water management works to generate hydro-electricity, this is from devices that are on or in the water management works (i.e. the dams). In developing the Renewable Energy and Storage Opportunities (RESO) with the Department, WaterNSW identified limitations in the Act with regard to Section 35.

Through the RESO, opportunities were identified for devices not located on or in the water management works but on land owned by WaterNSW. It has been suggested that greater flexibility in relation to Section 35 would ensure the full portfolio of hydro-electric power projects from WaterNSW’s RESO could be considered and / or developed.

The Review recommends that greater flexibility be further explored to identify the extent of policy and operational implications and any unintended consequences. It is noted that greater flexibility could allow WaterNSW to explore opportunities on land owned by WaterNSW but should not exempt them from existing approval processes.

<sup>22</sup> Alluvium Consulting Australia, 2016 Audit of the Sydney Drinking Water Catchment, 2017, page ii.

#### 4.8 Exemption for approval for Crown roads and fees for pipelines

WaterNSW owns, operates and constructs certain water supply pipelines from its dams to customer-owned water treatment plants. Some of these pipelines pass under, over or through public roads.

Under section 33 of the Act WaterNSW has the power to “*open and break up*” public roads and public reserves for the purposes of its works. These provisions are mirrored in the:

- *Sydney Water Act 1994 (NSW)*
- *Electricity Supply Act (NSW)*
- *Gas Supply Act 1996 (NSW)*.

While this section provides certainty in relation to local, unclassified public roads, it is less certain in relation to Crown roads and public reserves.

The *Gas Supply Act 1996 (NSW)* contains a clause (section 51) that exempts a gas network operator from having to pay charges for the placement of gas works. To minimise the cost of WaterNSW infrastructure to customers, a similar provision could be included in the Act to exempt WaterNSW from having to pay charges for the placement of water pipelines.

The Review considered these issues and found that exemptions for a single authority introduces discrepancies and inequities across all other agencies and third parties who are still required to seek approval for works on Crown roads and public reserves, which are managed under the *Crown Land Management Act 2016* by a range of Crown land managers including Local Government. WaterNSW could work with the Department on ways to streamline approvals processes within the existing legislative and regulatory framework.

#### 4.9 Water supply works - general exemption

The *Local Government Act 1993* provides that any person who “carries out” a water supply work is required to obtain an approval. Exemptions are provided for carrying out water supply work on land within Sydney Water Board and Hunter Water Board operations, or another water supply authority. WaterNSW noted that there may be circumstances, particularly for some proposed new infrastructure, where part or all of WaterNSW’s water supply work is not within a water supply authority’s area of operations but still within a local government area. WaterNSW therefore submitted that it would be beneficial to include a general exemption in the Act for water supply works undertaken by WaterNSW or on behalf of WaterNSW.

The Review considered these issues and found that exemptions for a single authority (WaterNSW) introduces discrepancies and inequities across all other agencies. Additionally, the Review found that planning for infrastructure and works should comply with all approvals processes.

#### 4.10 Access to land for WaterNSW works

WaterNSW noted that the number of instances where it requires access to land outside of its control or management is likely to increase in the future, due to its role in projects such as constructing regional critical state significant infrastructure and the Dungowan pipeline works. The need to access land not controlled or managed by WaterNSW is particularly likely for linear infrastructure where multiple landowners may be impacted for short periods to undertake investigations or the construction of the works.

WaterNSW submitted that there may be an opportunity to clarify rights to land access for WaterNSW works in the Act, including:

- that WaterNSW contractors are able to exercise the power on behalf of WaterNSW, given that currently only WaterNSW “employees” or “agents” are authorised
- a definition for works to clarify the scope of works captured by these provisions
- a definition of “landholder” under Section 32(5) to clarify who should be provided notice, particularly where there are multiple persons or parties with an interest in the land.

The Review found that the current rights to enter land provided for in the Act allow WaterNSW to operate effectively. Any future expansion of those rights, which may be warranted, would require detailed investigation, consultation and analysis. This is particularly important in relation to projects that are likely to be contentious and attract widespread public comment.

#### **4.11 Liability provisions**

WaterNSW raised potential implications for it as the operator of Warragamba Dam if the proposal of operating Warragamba Dam for the purpose of flood mitigation commences. Major issues raised include liability provisions and defences for flood mitigation and management.

The Review notes these issues and that any changes to the Act relating to flood management and mitigation for Warragamba Dam will be part of the Government’s consideration of the Warragamba Dam Raising proposal expected in 2021.

The Review has found no urgency for the changes at this time. Rather, the Review finds that those changes should be considered when an opportunity arises to amend the Act. It is appropriate that any issues for the Act arising out of the Warragamba Dam Raising proposal should be addressed once the proposal is released.

## 5. Water NSW Operating Licence issues

The Operating Licence for WaterNSW was last reviewed in 2017 and is due for review in 2022. This Water NSW Act Review acknowledges that several issues raised through the submission process and agency consultation should be further considered in the next review of the Operating Licence.

### 5.1 Purpose of Operating Licence

The need for the Act to specify that the Operating Licence include a statement of purpose was raised. It was suggested that the Operating Licence would benefit from including:

- an updated clause in the Licence that clarifies the objective of the Operating Licence; and
- a purpose statement for the Licence as a note to this clause.

This suggestion does not require amendments to the Act.

The Act does not currently either require or prevent the Operating Licence from including objectives and a statement of purpose. Stakeholders considered that articulating objectives in the Operating Licence would provide a greater understanding of the Act's function, and that this would achieve improved auditing. The Review found it would be beneficial for the Operating Licence to contain clear objectives and purpose given it authorises functions, including those functions imposed or conferred on WaterNSW, to improve transparency and auditing.

### 5.2 Definitions

The Act and the Operating Licence do not define terms used in the listed functions of WaterNSW. Submissions have indicated that there would be benefit in the Operating Licence distinguishing between listed functions and clarifying the extent to which WaterNSW is authorised to undertake these functions, for example across the State or for infrastructure. This suggestion does not require amendments to the Act. The 2022 review of the Operating Licence should examine whether the following terms can be better defined:

- capture, store and release water
- supply water
- flood mitigation
- flood management
- water quality.

### 5.3 Clarification of the role of WaterNSW

Several submissions suggested that, given the importance of current issues such as preparation for and mitigation of risks around drought, floods and fire, the Operating Licence could specify and clarify the role of WaterNSW regarding these matters.

This suggestion does not require amendments to the Act. The Review found that the requirements in relation to the management and planning for drought and fire are clearly provided for in other Acts. Accordingly, it was not considered that further requirements should be imposed on WaterNSW through the Act without strong evidence to support such a change.

## 5.4 Data and information

Transparency and accountability were raised as key issues, particularly for the WaterNSW's rural business. Inputs into the Review included proposals around the provision of timely data and information to other agencies, customers and the public<sup>23</sup>. It was noted that this would also assist strategic planning across the water sector and integrate the work of WaterNSW into broader reform agendas. Improved transparency would enable customers and the public to better understand and use data on water availability and extraction levels.

The Review supports clarifying the role of WaterNSW relating to the collection of data and information and provision of data and information on water take. The Review notes the issue of data and information collection and sharing, these issues are currently being considered by the Government. Any clarification of WaterNSW's role in this area would need to be consistent with the Government's position and should consider issues around competitive neutrality.

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<sup>23</sup> The NSW Irrigators Council noted that customers can not publicly demonstrate their level of take (or when they are not using water)

## Appendix A: Consultation process

The consultation period was open to the public from 2 - 30 September 2020, with the *Statutory Review – Water NSW Act 2014 Issues Paper* published on the NSW Government Have Your Say website and the Department's website.

The Review was promoted in newspaper advertisements and over twenty stakeholders were invited to provide input or make a submission.

The Issues Paper provided background to the Act and outlined a range of themes together with specific questions for stakeholders to consider. Stakeholders were also invited to provide comments which could assist with the statutory review and to comment on any other issues relevant to the administration of the Act.

The Department received fourteen written submissions and input<sup>24</sup> from six stakeholders, including government agencies.

**Table 1 List of submissions received and interviews**

Number	Name / Organisation
1.	Katerina Heffer
2.	Tamworth Regional Council
3.	Dugald Bucknell
4.	South 32
5.	Inland Rivers Network
6.	Cathy Merchant
7.	J L Howard
8.	Peter Gill
9.	Scott Jago
10.	Lex Stewart
11.	Susie Hearder
12.	Public Interest Advocacy Council
13.	Sydney Water
14.	WaterNSW
Input received	
15.	NSW Irrigators Council
16.	IPART
17.	InfrastructureNSW
18.	WaterNSW
19.	DPIE
20.	EPA

<sup>24</sup> Input was received via email, phone and online meetings.

## Appendix B: Summary of issues raised

The table below outlines issues raised in submissions which are out of scope of the review of the Water NSW Act 2014.

**Table 2 Issues out of scope raised by stakeholders**

Issue	Summary of comments	Response
Commonwealth Government	Comments include: <ul style="list-style-type: none"> <li>- amend the Act to include the relationship with the Commonwealth Environmental Water Holder (Submission 5)</li> <li>- amend the Act to recognise the role of the Commonwealth economic regulation within Murray-Darling Basin valleys as these are a significant area of WaterNSW operations (Submission 5)</li> <li>- need for consistency with Commonwealth economic regulations as WaterNSW operations cover a significant amount of water managed under Commonwealth agreements (Submission 6)</li> <li>- Murray-Darling Basin Plan is flawed as it gives the environmental priority over the economy and community; needs to be scrapped and start again (Submission 10).</li> </ul>	Referred to DPIE - policy
Coordination	Comments include: <ul style="list-style-type: none"> <li>- current Act does not require WaterNSW to comply with WSPs - this obligation would assist improved co-ordination with Government departments and other agencies especially in regard to how WaterNSW undertakes its strategic planning and better manages its existing storages to meet critical water needs in the future (Submission 6)</li> <li>- there are complications and lack of transparency when multiple agencies are involved (Submission 11).</li> </ul>	Referred to DPIE - policy
Consultation	Comments include: <ul style="list-style-type: none"> <li>- inadequate consultation with customers (various)</li> <li>- WaterNSW does not seem required to consult with any others except its customers. Consultation needs to include WaterNSW's role in regard to social and environmental responsibility more broadly than an immediate customer focus (Submission 6)</li> <li>- lack of coordination between agencies when consulting with existing groups such as Community Advisory Groups (DPIE) and River Operations Stakeholder Consultation Committees (WaterNSW) (Submission 14)</li> <li>- citizens juries are not supported (Submission 14).</li> </ul>	Referred to DPIE and WaterNSW

Issue	Summary of comments	Response
Dams	Comments include: <ul style="list-style-type: none"> <li>- concerns raised about new large instream storages without independent economic or environmental analysis about the benefits of dam proposals; community concerns about the processes (Submission 5)</li> <li>- risk that “policy vacuum will be filled by a return to traditional water storage infrastructure approaches as proposed with the ‘fast tracked’ new dams” (Submission 6)</li> <li>- more small dams should be constructed in declared areas for fire fighting (Submission 9)</li> <li>- detailed comments on the Chaffey Dam (Submission 8)</li> <li>- more dams be built as none have been built since 1983; considerable and detailed comments on need for more dams and related issues (Submission 10).</li> </ul>	Referred to DPIE - policy  Planning for water storages and dams are considered in the WaterNSW Strategy
Declared areas	Comments include: <ul style="list-style-type: none"> <li>- need to improve the day to day management of declared areas, for example weed and pest management (Submission 9).</li> </ul>	Operational issues can be raised with WaterNSW directly.
Environmental concerns	Comments include: <ul style="list-style-type: none"> <li>- the environment has become unsustainable</li> <li>- concerns about risks of fish kills, droughts, bushfires, water shortages, temperature, climate change (Submission 3)</li> <li>- the health of NSW river systems has been significantly impacted by the detrimental effects of large instream bulk water storage (Submission 4)</li> <li>- regulation of inland waters has had significant environmental impacts e.g. biodiversity loss, barriers to fish movement, thermal pollution, water stagnation, downstream drying; commodification of “water” cannot be separated from the fundamental and critical importance of an adequate amount of water kept in landscapes and water systems (Submission 6)</li> <li>- environmental impact includes the floodplain and riparian wetlands and social impacts are beyond the immediate footprint of construction and extend to downstream users (Submission 7)</li> <li>- dig out ash from channels when they are dry (Submission 9)</li> <li>- There needs to be sound and proactive environmental whole of catchment management and priority given to environmental flows in all catchments (Submission 11).</li> </ul>	Referred to DPIE - policy
Irrigation Infrastructure Operators (IIOs)	Comments include: <ul style="list-style-type: none"> <li>- the water metering rules in NSW need to include IIO’s internal meters, not just the offtake point which it is currently</li> <li>- IIO’s should be made to join Energy and Water Ombudsmen NSW</li> <li>- NRAR must be given jurisdiction over IIO’s</li> <li>- when IIO’s are in breach of their operating licence, there must be a transparent process put in place to protect the shareholder / customers (Submission 1).</li> </ul>	Referred to DPIE - policy



Issue	Summary of comments	Response
Job creation and economic stimulus	Comments include: <ul style="list-style-type: none"> <li>- a recommendation that the economic and job creation benefits of WaterNSW has in capturing, storing and supplying water be captured in the objectives and functions of WaterNSW (Submission 10).</li> </ul>	Implicit in WMA and SOC Act
Principle objectives	Comments include: <ul style="list-style-type: none"> <li>- add the principle objectives from the WMA to the Act in respect of floodplain management, controlled activities and protection of the environment (Submission 3)</li> <li>- principal objectives to include environmental responsibility (Submission 4).</li> </ul>	Discussed in Section 4.1
State Owned Corporations (SOC)	Comments include: <ul style="list-style-type: none"> <li>- there are potential conflicts in the role of WaterNSW as a SOC and adhering to principles of ESD (existing and emerging) (Submissions 5, 6, 7)</li> <li>- both WaterNSW and Sydney Water are state owned corporations (SOCs), which are regulated monopoly businesses requiring return on investment and the payment of dividends. Rationalisation may result in material efficiencies and savings for the community (Submission 12).</li> </ul>	Referred to DPIE - policy Referred to IPART to address transparency around what is 'business', what is a CSO and / or delivering government policy.
State Water Strategy	Comments include: <ul style="list-style-type: none"> <li>- concerns about current announcements to fast-track large new instream storage construction outside the development, or in the absence, of a State Water Strategy</li> <li>- since the abolition of Catchment Management Authorities in NSW there is a major gap in the state's natural resource management and strategic planning to ensure sustainable use and management of important resources into the future (Submission 5, 6, 7).</li> </ul>	NSW Regional Water Strategies address these issues. Local Land Services is responsible for natural resource management planning at a regional scale.
Warragamba Dam	Comments include: <ul style="list-style-type: none"> <li>- expressed opposition to raising of the dam wall</li> <li>- fence Warragamba dam to keep feral animals out and protect other wildlife (Submission 9).</li> </ul>	Referred to DPIE - policy
Water extraction licenses	Comments include: <ul style="list-style-type: none"> <li>- water licences should be publicly available</li> <li>- Approval of licences and the link between licences and Local Environment Plans (Submission 11)</li> <li>- floodplain harvesting licences should be attached to land title (Submission 10).</li> </ul>	Referred to DPIE - policy

Issue	Summary of comments	Response
Water quality	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- supports mechanisms to ensure assets are maintained and operated to ensure water quality and reduced transmission losses</li> <li>- The Act should include obligations to maintain water quality in WaterNSW's bulk water storages and distribution systems (Submission 2)</li> <li>- there are significant "grey zones" in WaterNSW's responsibilities in relation to the protection of water-dependent ecosystems, eg. thermal pollution poses high risk to many inland waters (Submission 6).</li> </ul>	Referred to DPIE - policy
Water Resource Plans and Water Sharing Plans	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- longer term planning for town water needs to more adequately reflect the climatic cycles</li> <li>- improve predictions of inflows (or lack of inflows) using drought data</li> <li>- the need for WaterNSW to be legally bound by water sharing plans to mitigate risk such as cold water pollution.</li> <li>- amend Water Sharing Plans to provide a longer term algorithm reflecting High Security needs of Townships; determine Water Availability (AWD) on what is held in storage at commencement of the water year; base drought records on all available information (Submission 8).</li> </ul>	<p>Referred to DPIE - policy</p> <p>Water Sharing Plans, Water Resource Plans and the modelling and an analysis that underpins them are the responsibility of DPIE</p>
List of regulatory agencies	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- the Act currently includes regulatory agencies that WaterNSW is required to enter into an MOU with (details in Section 21) including EPA</li> <li>- other arrangements are specified in the Operating Licence</li> <li>- submitters proposed to include a requirement to enter into an MOU with DPIE in regard to environmental water and the Commonwealth Environmental Water Holder to improve communication and accountability with environmental water managers.</li> </ul>	DPIE (EES) provided a similar customer service as other large water entitlement holders and therefore should not be treated as a regulatory agency.
Water sharing	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- it was suggested the Act does not provide sufficient protections and rights for WaterNSW's CSR particularly as WaterNSW has discretion in sharing water deliveries between customers. This can result in WaterNSW meeting some customers' water orders and declining others, without a clear process or transparency in decision making</li> <li>- sharing decisions relies on Water Sharing Plans, water supply works approvals and, in the case of the drought sharing arrangements, on specific advice from the Department. At times WaterNSW may seek if customers are willing to voluntarily rescheduled orders and applies arrangements (such as dam wall debiting) equally to all entitlement holders (by class).</li> </ul>	This is a matter that could be addressed and clarified in the water sharing arrangements and referenced in the Operating Licence if required

**Table 3 Issues out of scope raised by WaterNSW**

Issue	Summary of comments	Response
Groundwater testing - water access licence exemption for essential water supply	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- during the recent drought, WaterNSW worked with government to identify and develop groundwater solutions to reduce water security risks. In developing these solutions there was a need to test groundwater resources for quality and quantity to assess feasibility</li> <li>- the amount of groundwater required to be extracted for this purpose was generally greater than the 3 ML exemption to access licensing available under clause 7, Schedule 4, Water Management (General) Regulation 2018 (the Regulation)</li> <li>- WaterNSW submitted that if WaterNSW is to have a similar role during future droughts it would be beneficial for it to be provided with a similar exemption as the Ministerial Corporation under the Regulation where there is not an access licence requirement for the take of water for the purposes of basic human water needs.</li> </ul>	<p>This is a broader water policy consideration. If Government considers that a broader exemption than the one currently available to WaterNSW is appropriate with respect to WaterNSW's role, this can be achieved through the Regulation and/or the Operating Licence and should be subject to detailed review, analysis and consultation. Appropriate Integrated Water Cycle Management (IWCM) planning should also assist in planning ahead to access necessary water from groundwater sources.</p>
Expanding ability to impose fees and charges under s114 of the WMA	<p>Comments include:</p> <ul style="list-style-type: none"> <li>- WaterNSW generally charges fees for its conferred functions, including for matters such as processing water trades, processing applications for approvals and licences as well as in respect of the supply of Bulk Water to its customers and Fish River water supply.</li> <li>- section 114 of the Water Management Act 2000 gives a general power to the Minister to "impose fees and charges for the purposes of this Act."</li> <li>- WaterNSW is currently conferred the function under s114(1) to impose fees and charges in relation "to the price of Bulk Water" (see Table A.14 of the Licence).</li> <li>- WaterNSW submitted that to avoid the potential for an inconsistent approach for fees and charges for functions conferred under the operating licence a "catch all" function could be conferred under s114 to allow WaterNSW to impose and waive fees and charges for all conferred functions under the Water Management Act 2000. This would clarify that WaterNSW is able to impose fees and charges as determined by IPART in accordance with its conferred functions (see s114(1) and the note to that provision).</li> </ul>	<p>Conferral of the power to impose fees and charges is a matter for the Operating Licence. The submission did not identify what other fees and charges WaterNSW may need to impose and on whom. No gap was identified in the material provided, suggesting that the current conferral is adequate.</p>