

WICA FACT SHEET

Overview of licensing regime under the *Water Industry Competition Act 2006*

August 2008

Introduction

The NSW Government introduced the *Water Industry Competition Act 2006* (the Act) <http://www.ipart.nsw.gov.au/water/private-sector-licensing/regulatory-framework.asp> as part of its strategy for a sustainable water future to harness the innovation and investment potential of the private sector in the water and wastewater industries. At the same time, the Act establishes a licensing regime for private sector entrants to ensure the continued protection of public health, consumers and the environment.

A person must not construct, maintain or operate any water industry infrastructure or to supply water (potable or non-potable) or provide sewerage services by means of any water industry infrastructure otherwise than under the authority of a licence under the Act. An application for a licence may only be made by or on behalf of a corporation.

However, a public water utility does not require a licence in relation to water industry infrastructure situated within its area of operations. (Note: There are other exemptions to the requirement for a licence. See Fact Sheet "Who needs a licence under the WIC Act?" for more information at <http://www.ipart.nsw.gov.au/water/private-sector-licensing/fact-sheets.asp>.)

Legislative framework

The Act sets out when a licence is required, the procedures for applying for a licence, how licences and licence fees are determined, and how licences are audited and enforced. The Act establishes mechanisms to resolve disputes between private sector bodies and their customers, and to protect customers in the event of the failure of a new market entrant (i.e. retailer of last resort provisions). The Act also establishes a register of licences to provide key licensing information to licensees and the public.

The Act sets out the functions and responsibilities given to the Minister for Water (the Minister) and the Independent Pricing and Regulatory Tribunal (IPART) in relation to the licensing regime. The Minister's functions include determining whether to grant a licence, determining licence conditions, setting licence fees and enforcing licences. IPART's functions include considering licence applications, recommending the terms or conditions of a licence to the Minister, and auditing and enforcing licences. The Minister also has a range of functions to ensure the integrity of the licensing regime, such as giving emergency directions to deal with a risk to public health or safety, declaring specified persons as retailers of last resort and declaring a supply failure.

The Act is supported by the *Water Industry Competition (General) Regulation 2008* (the Regulation)

<http://www.ipart.nsw.gov.au/water/private-sector-licensing/regulatory-framework.asp> which sets out the matters a licence application must address, standard licence conditions, information to be contained on the register of licences and the retailer of last resort provisions. The Regulation also provides for the establishment of a marketing code of conduct, a transfer code of conduct and a water industry code of conduct.

The following information provides an overview of the elements of the licensing regime set out under the Act and the Regulation.

Types of licences granted

Corporations that wish to supply water or provide sewerage services must obtain a licence.

There are two types of licences:

- ▼ a network operator's licence, and
- ▼ a retail supplier's licence.

Network operator's licence

A network operator's licence must be obtained to construct, maintain or operate water industry infrastructure. Once the Minister has granted a network operator's licence, the licensee is entitled to operate on terms similar to a public water utility. Specifically, licensed network operators are entitled to:

- ▼ carry out work in or under public roads and public reserves to construct water industry infrastructure
- ▼ require landowners to stop trees, other structures and things on their land from damaging their infrastructure
- ▼ retain ownership of all the water industry infrastructure they construct, whether or not they own the land in, on or over which it is situated

- ▼ appoint meter readers to enter private premises to read meters that measure the supply of water from or discharge of sewage into a water or sewer main controlled by the licensed network operator.

A licensed network operator does not need to pay the local council or roads authority for any water industry infrastructure located in a public reserve or public road or for the space in a public reserve or public road that is occupied by the infrastructure.

Retail supplier's licence

A retail supplier's licence must be obtained to supply water (potable or non-potable) or provide sewerage services by means of water industry infrastructure. A retail supplier may require access to existing infrastructure to supply water or provide a sewerage service via the use of that infrastructure. (For further information, see <http://www.ipart.nsw.gov.au/water/network-access/network-access.asp>.)

Licensed retail suppliers will be required to belong to an approved external ombudsman scheme to deal with disputes and complaints involving small retail customers.

Licensed retail suppliers are also required to implement any relevant government policy with respect to social programs that apply to it. Social programs for the supply of water and the provision of sewerage services are programs to ensure that those services are available to people in need, including those suffering financial hardship and those living in remote areas, and includes a program for the granting of payment assistance, discounts or rebates.

Licensed retail suppliers must comply with the water industry code of conduct, marketing code of conduct and transfer code of conduct established pursuant to the Regulation.

Applying for a licence

Licence applications must be lodged with IPART. (Licence application forms can be obtained from <http://www.ipart.nsw.gov.au/water/private-sector-licensing/application-forms.asp>). IPART will furnish copies of the application to the Minister. IPART will also furnish copies and invite submissions from:

- ▼ the Minister administering the *Public Health Act 1991*,
- ▼ the Minister administering Chapter 2 of the *Water Management Act 2000*,
- ▼ the Minister administering the *Environmental Planning and Assessment Act 1979*, and
- ▼ the Minister administering the *Protection of the Environment Operations Act 1997*.

IPART must also invite submissions on the application from the public.

IPART will consider the licence application, along with any submissions, and provide a report to the Minister recommending whether or not the licence should be granted and on what terms or conditions.

Obtaining a licence

Licences are granted by the Minister. In deciding whether or not to grant a licence, and what conditions the licence should be subject to, the Minister will consider (but is not bound to accept) any advice or recommendation in IPART's report.

To obtain a licence, applicants must:

- ▼ be a corporation
- ▼ not be a disqualified corporation
- ▼ have, and continue to have, the capacity (including technical, financial and organisation capacity) to carry out the activities to be authorised by the licence
- ▼ have the capacity to carry out the activities to be authorised by the licence in a manner that does not present a risk to public health or a significant risk of harm to the environment

- ▼ have made, and continue to maintain, appropriate arrangements with respect to insurance
- ▼ comply with such other matters as the Minister considers relevant, having regard to the public interest.

In addition, applicants for a retail supplier's licence to supply water must, if the licence is granted, be in a position to obtain sufficient quantities of water from a source other than from a public water utility.

In determining whether or not to grant a licence, and what conditions the licence should be subject to, the Minister will have regard to a number of licensing principles under the Act:

- ▼ protection of public health, the environment, public safety and consumers
- ▼ encouragement of competition
- ▼ sustainability of water resources
- ▼ promotion of production and use of recycled water.

Licence conditions

If an application is successful, a licence will be granted indefinitely, dependent upon the payment of annual licence fees and compliance with the licence. The licence will be subject to conditions imposed by the Act, the Regulation and the Minister.

Standard licence conditions that apply to all licences are set out in the Schedules to the Regulation. These standard licence conditions include requiring a licensed network operator to prepare and implement an infrastructure operating plan and water quality or sewage management plan (as is relevant), and a licensed retail operator to prepare and implement a retail supply management plan.

The Minister may impose such additional licence conditions as he or she sees fit, consistent with the Act and the Regulation. In particular, the Minister may impose conditions to:

- ▼ ensure the licensee has, and continues to have, the capacity (including technical, financial and organisational capacity) to carry out the activities authorised by the licence,
- ▼ give and maintain security (in such amount and form as the Minister may determine) for the fulfilment of the licensee's obligations under the licence, and
- ▼ maintain appropriate arrangements with respect to insurance.

IPART will make recommendations to the Minister as to what licence conditions it believes the licence should be subject to.

The conditions of a licence may be varied at any time either by the Minister or upon application by the licensee. The existing conditions may be amended or new conditions may be imposed.

Commercial operation of new infrastructure

The granting of a licence does not allow the licensee to bring new water or sewerage infrastructure into immediate commercial operation. It is a standard licence condition on all network operators' licences that written Ministerial approval must be obtained prior to commencing commercial operation.

See Fact Sheet "Commercial operation of new infrastructure under the WIC Act" for further information at <http://www.ipart.nsw.gov.au/water/private-sector-licensing/fact-sheets.asp>.

Performance monitoring and reporting

The licensee must keep records and furnish information to IPART, where IPART requests the licensee to do so. IPART is required to report to the Minister annually on the compliance of licensees with their licence conditions. This report is to be laid before both Houses of Parliament.

Licence audits

A number of components of the licensing regime are subject to audit.

Compliance and licence review audits:

IPART is required to monitor and report to the Minister on a licensee's compliance with the conditions of the licence. In particular, IPART is required to review each licence at intervals of not more than every 5 years (starting from the date the licence commences). IPART may require an audit of the licence as part of its compliance reporting or licence review process.

Commercial operation of new infrastructure audits:

An audit must be conducted by an approved auditor and provided to the Minister in order to obtain his or her approval to bring any new water or sewerage infrastructure into commercial operation.

Plans and infrastructure audits:

Periodic audits by an approved auditor will also be required by the Minister or IPART as to the condition of the licensee's infrastructure and the adequacy of the licensee's infrastructure operating, water quality, sewage management or retail supply management plans (as is relevant to the particular licence).

See Fact Sheet "Summary of audit framework under the WIC Act" for further information at <http://www.ipart.nsw.gov.au/water/private-sector-licensing/fact-sheets.asp>.

Approved auditors

An approved auditor will conduct audits on behalf of the Minister, IPART or a licensee. An approved auditor is a person nominated by IPART, chosen by the licensee from a panel of persons nominated by IPART or nominated by the licensee and approved by IPART.

See Fact Sheet “Joining the audit panel for the purposes of the WIC Act” for further information at <http://www.ipart.nsw.gov.au/water/private-sector-licensing/fact-sheets.asp>.

Licence enforcement

When a licensee contravenes the Act or the Regulation or a condition of the licence, the Minister or IPART may take a range of enforcement action. Such action could include (amongst other things) imposing a monetary penalty not exceeding \$500,000 for the first day of the contravention, and \$20,000 for each subsequent day (not exceeding 25 days); requiring a licensee to notify customers or take action to rectify the contravention; cancelling or suspending a licence; or disqualifying a corporation or individual for the purposes of the Act. (However, some of these enforcement actions can only be taken by IPART if the Minister concurs.)

Register of licences

IPART must maintain a register of licences on its website which will contain all the key information pertaining to each licence granted under the Act. The register can be found at <http://www.ipart.nsw.gov.au/water/private-sector-licensing/registers.asp>.

Monopoly suppliers

A licensed network operator or a licensed retail supplier may be declared by the Minister to be a monopoly supplier if they provide a service for which there are no other suppliers to provide competition in that market, and for which there is no contestable market by potential suppliers in the short term and, in the case of a water supply service for recycled water, that connection of land to that service is required by or under some other Act.

If declared a monopoly supplier, the licensee may be subject to a pricing determination or periodic review of their pricing policies by IPART.

Retailer of last resort scheme

Where a licensed retail supplier can no longer supply water or provide sewerage services to its customers, the Act protects the continued supply of these customers by providing that a licensed retail supplier or a public water utility may be declared by the Minister as a retailer of last resort. In the event that the Minister declares a supply failure in relation to a licensed retail supplier, the retailer of last resort must commence supplying water or providing sewerage services to the customers in the area in respect of which it is the retailer of last resort.

Further information

For any further information on the licensing scheme, please contact IPART’s Utility Licensing team either by:

- ▼ **phone**
(02) 9290 8400 (general number)
- ▼ **email**
compliance@ipart.nsw.gov.au

Legal context for this Fact Sheet

IPART has prepared this Fact Sheet as a general summary of relevant parts of:

- ▼ **the Act**
Water Industry Competition Act 2006.
- ▼ **the Regulation**
Water Industry Competition (General) Regulation 2008.

This Fact Sheet should not be relied on as a substitute for legal advice, and is designed to be read in conjunction with the above source documents.