



New South Wales

# Water Industry Competition Amendment Act 2011 No 66

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New South Wales

# **Water Industry Competition Amendment Act 2011 No 66**

Act No 66, 2011

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An Act to make miscellaneous amendments to the *Water Industry Competition Act 2006*, *Water Industry Competition (General) Regulation 2008* and *Local Government (General) Regulation 2005*. [Assented to 28 November 2011]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Water Industry Competition Amendment Act 2011*.

**2 Commencement**

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsection (2).
- (2) Schedule 1 [24]–[26] commence on the date of assent to this Act.

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

**[1]    Section 5 Prohibition of unlicensed network operation and water supply**

Insert “or public water utility” after “licensed retail supplier” in section 5 (2).

**[2]    Section 6 Licences**

Insert “(or, if so specified, both)” after “sewerage services” in section 6 (1) (b).

**[3]    Section 7 Licensing principles**

Insert “generally” after “consumers” in section 7 (1) (a).

**[4]    Section 7 (1) (e)–(g)**

Insert after section 7 (1) (d):

- (e) the promotion of policies set out in any prescribed water policy document,
- (f) the potential for adverse financial implications for small retail customers generally arising from the activities proposed to be covered by the licence,
- (g) the promotion of the equitable sharing among participants in the drinking water market of the costs of water industry infrastructure that significantly contributes to water security.

**[5]    Section 7 (3)**

Insert after section 7 (2):

- (3) In this section:  
*prescribed water policy document* means a plan or other policy document concerning the use of water resources issued by or on behalf of the Government that is prescribed by the regulations (whether as in force at a particular time or from time to time).

**[6]    Section 10 Determination of applications**

Omit section 10 (3). Insert instead:

- (3) A licence may not be granted to:
  - (a) a disqualified corporation, or
  - (b) a corporation that is a related entity (within the meaning of the *Corporations Act 2001* of the Commonwealth) of a disqualified corporation, but only if the disqualified corporation would have a direct or indirect interest in, or

influence on, the carrying out of the activities that the licence would authorise if granted.

**[7] Section 13 Conditions of licences**

Insert at the end of section 13 (2) (b):

, and

- (c) in the case of a retail supplier's licence that authorises the licensee to supply drinking water—the Minister may impose conditions on the licence that the Minister is satisfied promote the equitable sharing among public water utilities and licensed retail suppliers of drinking water of the costs of water industry infrastructure that significantly contributes to water security, including (but not limited to) the following:
  - (i) a condition requiring the licensee to obtain a specified proportion of the water that it supplies under the authority of its licence by means of specified water industry infrastructure,
  - (ii) a condition requiring the licensee to contribute to the costs of specified water industry infrastructure (whether or not it is used to provide the licensee with the water that it is authorised to supply under the licence) calculated in a specified manner and payable to a specified person or persons.

**[8] Section 13 (3) (d)**

Insert at the end of section 13 (3) (c):

, and

- (d) may make provision for the calculation of contributions for the purpose of the imposition of conditions under subsection (2) (c).

**[9] Section 13 (3A)**

Insert after section 13 (3):

- (3A) Nothing in Part 3 (Access to infrastructure services) limits the power of the Minister to impose conditions under this section.

**[10] Part 5 Operation of water retail market**

Omit “**between small retail customers and licensed retail suppliers**” from the heading to Division 1.

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**[11] Section 46A**

Insert before section 47:

**46A Definition**

In this Division:

*entitled person* means any of the following:

- (a) an owner or occupier of land affected by the exercise (or proposed exercise) of a function under Division 2 of Part 6,
- (b) any other person of a class prescribed by the regulations.

**[12] Section 48 Review of decisions under approved ombudsman scheme**

Omit “, and any other person of a class prescribed by the regulations,” from section 48 (1).

Insert instead “and any entitled person”.

**[13] Section 48 (3)**

Omit “other persons of such classes as are prescribed by the regulations”.

Insert instead “entitled persons”.

**[14] Section 49 Approved ombudsman scheme**

Insert after section 49 (1) (a):

- (a1) disputes and complaints concerning the exercise, or proposed exercise, of functions under Division 2 of Part 6, and

**[15] Section 49 (2) (a) and (c)**

Insert “and authorised licensed network operators” after “licensed retail suppliers” wherever occurring.

**[16] Section 49 (2) (d)**

Omit “other persons prescribed by the regulations”.

Insert instead “entitled persons”.

**[17] Section 49 (2) (g)**

Omit “other persons of such classes as are prescribed by the regulations”.

Insert instead “entitled persons”.

**[18] Section 49 (5)**

Insert “or authorised licensed network operator” after “licensed retail supplier”.

**[19] Section 50 Licence conditions relating to approved ombudsman scheme**

Insert “or provides sewerage services (or both)” after “supplies water”.

**[20] Section 50 (2)**

Insert at the end of section 50:

- (2) It is a condition of the network operator’s licence of an authorised licensed network operator that:
  - (a) the operator must be a member of an approved ombudsman scheme, and
  - (b) the operator is bound by, and must comply with, any decision of the ombudsman under the scheme relating to a dispute or complaint involving the operator and an entitled person.

**[21] Section 64 Ownership of water industry infrastructure**

Omit section 64 (1) and (2). Insert instead:

- (1) Except where another Act expressly provides otherwise, water industry infrastructure is owned by the person that constructs or installs it or any person that subsequently acquires title to it, whether or not the land in, on, under or over which it is situated is owned by that person.

**Note.** Examples of provisions of other Acts that expressly provide for the ownership of water industry infrastructure by certain public water utilities include the following:

- (a) section 19 of the *Hunter Water Act 1991*,
  - (b) section 21 of the *State Water Corporation Act 2004*,
  - (c) section 37 of the *Sydney Water Act 1994*,
  - (d) section 54 of the *Sydney Water Catchment Management Act 1998*.
- (2) Water industry infrastructure that a network operator’s licence authorises the licensee to construct, maintain or operate is not to be taken in execution of any judgment against a person (other than the owner of the infrastructure or the licensee) under any process of a court.

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[22] **Part 6, Division 1, heading**

Insert before section 58:

**Division 1 Powers and duties relating to water industry infrastructure generally**

[23] **Part 6, Division 2**

Insert after section 65:

**Division 2 Powers of entry of authorised licensed network operators**

**65A Interpretation**

- (1) In this Division:  
*authorised agent* of an authorised licensed network operator means a person appointed by the operator under section 65F.
- (2) A reference in this Division to the water industry infrastructure of an authorised licensed network operator (however expressed) is a reference to the water industry infrastructure that the operator is authorised to construct, maintain or operate under its network operator's licence regardless of whether the infrastructure is owned by the operator or any other person.

**65B Entry of land**

- (1) An authorised licensed network operator may, by any of its authorised agents, enter any land in accordance with this Division for any one or more of the following purposes:
  - (a) to carry out an inspection or maintenance work on any of its water industry infrastructure,
  - (b) to carry out necessary repair work on any of its water industry infrastructure,
  - (c) to carry out emergency work on any of its water industry infrastructure.
- (2) Except in emergencies, a power of entry may be exercised only during daylight hours.

**65C Notice of entry**

- (1) Before an authorised agent of an authorised licensed network operator exercises a power of entry under this Division, the authorised licensed network operator concerned must give the



occupier (or, if there is no occupier, the owner) of the land written notice of the intention to enter the land.

- (2) The notice must specify the day on which the authorised agent intends to enter the land and must be given at least 2 days before that day.
- (3) This section does not require notice to be given:
  - (a) if entry to the land is made with the consent of the occupier (or, if there is no occupier, the owner) of the land, or
  - (b) if entry is required urgently and the case is one in which the authorised licensed network operator has authorised in writing (either generally or in the particular case) entry without notice, or
  - (c) if the giving of notice would defeat the purpose for which the power is to be exercised.

**65D Use of force**

- (1) Reasonable force may be used for the purpose of gaining entry to any land (other than such part of a building as is being used for residential purposes) under a power conferred by this Division, but only if authorised by the authorised licensed network operator concerned in accordance with this section.
- (2) The authority:
  - (a) must be in writing, and
  - (b) must be given in respect of the particular entry concerned, and
  - (c) must specify the circumstances that must exist before force may be used.

**65E Compensation**

- (1) An authorised licensed network operator, in exercising its functions under this Division, is to do as little damage as practicable and is, subject to this Division, to compensate all persons who suffer damage by the exercise of the functions.
- (2) Compensation may be made by reinstatement, repair, construction of works or payment.

**65F Certificates of authority to enter land**

- (1) An authorised licensed network operator may appoint a person to be an authorised agent of the authorised licensed network

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operator for the purposes of exercising powers under this Division by issuing the person with a certificate of authority.

- (2) A power of entry under this Division may not be exercised by an authorised agent unless the authorised agent:
- (a) is in possession of a certificate of authority issued by the authorised licensed network operator concerned, and
  - (b) produces the certificate when required to do so by the owner or occupier of the land.
- (3) The certificate of authority:
- (a) must state that it is issued under this Act, and
  - (b) must give the name of the person to whom it is issued, and
  - (c) must describe the nature of the powers conferred and the source of those powers, and
  - (d) must state the date (if any) on which it expires, and
  - (e) must describe the kind of land to which the power extends, and
  - (f) must:
    - (i) be under the seal of the authorised licensed network operator concerned, or
    - (ii) bear the signature of the principal officer of the authorised licensed network operator concerned or of any other officer of that operator (or an officer belonging to a class of officers of that operator) prescribed by the regulations.
- (4) The Minister may, by written notice given to an authorised licensed network operator, do any or both of the following:
- (a) impose conditions or restrictions on certificates of authority issued under this section by the operator, either generally or in particular cases, including restrictions on the purposes for which and the circumstances in which a power of entry may be exercised,
  - (b) issue guidelines to be observed by the operator concerning the issue of certificates of authority under this section.

**65G Entry to residential premises**

A power of entry conferred by this Division is not exercisable in relation to such part of a building as is used for residential purposes except:

- (a) with the consent of the occupier (or, if there is no occupier, the owner) of that part of the building, or
- (b) under the authority conferred by a warrant of entry.

**65H Warrants of entry**

- (1) An authorised licensed network operator may apply to an authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* if it is of the opinion that it is necessary for an authorised agent of the authorised licensed network operator to enter any land (including any building used for residential purposes) for the purposes of this Division.
- (2) An authorised officer within the meaning of the *Law Enforcement (Powers and Responsibilities) Act 2002* to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a warrant of entry authorising an authorised agent of the authorised licensed network operator named in the warrant to enter the land for the purposes of this Division.
- (3) Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to a warrant of entry under this section in the same way as it applies to a search warrant under that Act.

**65I Other powers of entry unaffected**

This Division does not apply to any power of entry that a licensed network operator has apart from this Division (including under any contract, lease or easement).

**[24] Schedule 4 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Water Industry Competition Amendment Act 2011*

**[25] Schedule 4, clause 1 (3)**

Omit “in the Gazette”. Insert instead “on the NSW legislation website”.

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[26] **Schedule 4, Part 3**

Insert after Part 2:

**Part 3 Provisions consequent on enactment of  
Water Industry Competition Amendment  
Act 2011**

**4 Definition**

In this Part:

*amending Act* means the *Water Industry Competition Amendment Act 2011*.

**5 Approval of new approved ombudsman scheme before  
commencement of amendments to Division 1 of Part 5**

- (1) For the purpose of facilitating the application of an approved ombudsman scheme to entitled persons in relation to the exercise of functions under Division 2 of Part 6 (as inserted by the amending Act) and to small retail customers of sewerage services, the Minister may before the relevant day approve an existing or new ombudsman scheme under section 49 as if all of the amendments made to Division 1 of Part 5 by the amending Act had commenced on the date of assent to that Act.
- (2) An ombudsman scheme approved as provided by subclause (1) has effect on and from the relevant day.
- (3) The provisions of this clause are in addition to, and do not derogate from, the provisions of section 26 of the *Interpretation Act 1987*.
- (4) In this clause:  
*relevant day* means the day on which the amendment to section 49 (1) made by the amending Act commences.

**6 Transitional period in relation to enforcement of new statutory  
licensing conditions**

- (1) The Minister may not take enforcement action under section 16 during the applicable transitional period in relation to any of the following licence conditions imposed by section 50 (as amended by the amending Act):
  - (a) the condition imposed by section 50 (1), but only in its application to any retail supplier who provides sewerage services under its retail supplier's licence,
  - (b) the condition imposed by section 50 (2).

- (2) The *applicable transitional period* in relation to a licence condition referred to in subclause (1) is the period of 3 months commencing on the day on which the amendment made by the amending Act that imposes the condition concerned commences.

#### **7 Ownership of water industry infrastructure**

- (1) Subject to the regulations, section 64 (1) (as substituted by the amending Act) is taken on and from the relevant day to extend to:
- (a) any water industry infrastructure constructed or installed before the relevant day, and
  - (b) any water industry infrastructure constructed or installed before the relevant day the title to which has subsequently been acquired by another person (whether before, on or after the relevant day).
- (2) The regulations may make provision for or with respect to the application of section 64 (1) (as substituted by the amending Act) to water industry infrastructure constructed or installed before the relevant day.
- (3) In this clause:  
*relevant day* means the day on which section 64 (1) is substituted by the amending Act.

#### **[27] Dictionary**

Insert in alphabetical order:

*authorised licensed network operator* means a licensed network operator that is a prescribed authority within the meaning of section 88A of the *Conveyancing Act 1919*.

#### **[28] Dictionary, definition of “disqualified corporation”**

Omit the definition. Insert instead:

*disqualified corporation* means:

- (a) a corporation that, pursuant to a declaration under section 16 (1) (e), has been declared to be a disqualified corporation for the purposes of this Act, or
- (b) a corporation that has, as one of its directors or as one of the persons concerned in its management, an individual who is a disqualified individual.

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**[29] Dictionary**

Insert in alphabetical order:

*land* includes (in Division 2 of Part 6 and Division 2 of Part 7) any building or part of a building, or any structure or part of a structure, located on, under or above land.

## **Schedule 2 Amendment of other legislation**

### **2.1 Local Government (General) Regulation 2005**

#### **Clause 48 Activities for which approval is not required**

Insert after clause 48 (f):

(g) **Activities authorised by licence under Water Industry Competition Act 2006**

An activity referred to in Part B or C of the Table to section 68 of the Act if it is carried out under the authority of a licence in force under the *Water Industry Competition Act 2006*.

### **2.2 Water Industry Competition (General) Regulation 2008**

#### **[1] Clause 3 Definitions**

Omit “8 or 15” from the definition of *retail supply management plan* in clause 3 (1).

Insert instead “7A”.

#### **[2] Clause 13 Prescribed licence conditions: section 13 (1) (a)**

Omit “5, 13 and 18” from clause 13 (2). Insert instead “5 and 7B”.

#### **[3] Clause 17 Person to be notified as to licence applications**

Insert “For the purposes of section 9 (1) (b) (iii) of the Act,” before “IPART”.

#### **[4] Clause 17 (2)**

Insert at the end of clause 17:

- (2) If the applicant for a licence proposes to connect to or use any of the water industry infrastructure of a public water utility as part of the activities in relation to which the licence is sought, IPART must promptly notify that public water utility of the licence application.

#### **[5] Clause 19A Water industry infrastructure that was formerly exempt from requirement for a licence**

Omit “for a period of 18 months after that commencement” from clause 19A (1).

Insert instead “until the end of 17 June 2013”.

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**[6] Clause 19A (1A)**

Insert after clause 19A (1):

- (1A) Subclause (1) extends to water industry infrastructure regardless of whether it was constructed or installed before or after the commencement of the *Water Industry Competition (General) Amendment (Licensing Exemptions) Regulation 2010*.

**[7] Clause 19A (2) (c)**

Insert at the end of clause 19A (2) (b):

, and

- (c) clause 7A (1) of Schedule 2 is to be construed as if the words “Before commencing to carry out activities under a retail supplier’s licence” were replaced with the words “Within 6 months after being granted a retail supplier’s licence”.

**[8] Clause 27 Establishment of transfer code of conduct**

Insert “or public water utilities (or both)” after “licensed retail suppliers” in clause 27 (1).

**[9] Clause 28A**

Insert after clause 28:

**28A Prescribed water policy document: section 7 (3)**

The *Metropolitan Water Plan* published by the New South Wales Government, as in force from time to time, is prescribed for the purposes of the definition of *prescribed water policy document* in section 7 (3) of the Act.

**Note.** A copy of the latest *Metropolitan Water Plan* is available at the Water 4 Life website ([www.waterforlife.nsw.gov.au](http://www.waterforlife.nsw.gov.au)).

**[10] Schedule 1 Conditions for network operators’ licences**

Omit clause 12 (b) and (c).

**[11] Schedule 2 Conditions for retail suppliers’ licences**

Insert after clause 7:

**7A Retail supply management plans**

- (1) Before commencing to carry out activities under a retail supplier’s licence, the licensee must prepare, and forward to IPART, a retail supply management plan that indicates the



arrangements that the licensee has made, or proposes to make, in relation to:

- (a) the events and circumstances that could adversely affect the licensee's ability to supply water or provide sewerage services (or both), as authorised by the licence, and
  - (b) the probability of the occurrence of any such event or circumstance, and
  - (c) the measures to be taken by the licensee:
    - (i) to prevent the occurrence, or minimise the effect, of any such event or circumstance, and
    - (ii) to arrange for alternative supplies of water or the provision of sewerage services (or both), as authorised by the licence, in response to any such event or circumstance, and
  - (d) the arrangements that the licensee has made, or proposes to make, to ensure that it complies with:
    - (i) its code of practice for complaints by small retail customers and its code of practice for debt recovery from such customers, and
    - (ii) the marketing code of conduct and the transfer code of conduct.
- (2) The licensee:
- (a) must ensure that its retail supply management plan is fully implemented and kept under regular review and, in particular, that all of its activities are carried out in accordance with that plan, and
  - (b) must, if the Minister so directs, amend its retail supply management plan in accordance with the Minister's direction.
- (3) If the Minister or IPART so demands, or if any significant change is made to its retail supply management plan, the licensee:
- (a) must provide the Minister or IPART with a report, prepared by an approved auditor in such manner and form as the Minister or IPART may direct, as to the adequacy of the plan, or
  - (b) must pay the Minister's or IPART's costs of conducting an investigation into the adequacy of the plan.

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**7B Matters to be contained on licensee's website**

- (1) The licensee must have an internet website on which the following matters are available for inspection by members of the public:
  - (a) if the licensee is authorised to supply water under the retail supplier's licence:
    - (i) the licensee's standard water supply contract for small retail customers, and
    - (ii) the existence of any water restriction order that is in force in its area of operations,
  - (b) if the licensee is authorised to provide sewerage services under the retail supplier's licence—the licensee's sewerage service contract for small retail customers,
  - (c) the licensee's retail supply management plan,
  - (d) the licensee's code of practice for complaints by small retail customers,
  - (e) the licensee's code of practice for debt recovery from small retail customers,
  - (f) details of any relevant government policy that applies to the licensee,
  - (g) the most recent auditor's report under clause 7A that applies to the licensee.
- (2) In this clause, *relevant government policy* means government policy with respect to social programs for the supply of water or provision of sewerage services, as referred to in section 13 (3) (a) of the Act.

**[12] Schedule 2, clauses 8, 13, 15 and 18**

Omit the clauses.

**[13] Schedule 2, clause 14 (4)**

Omit "13 (1) (a)". Insert instead "7B (1) (a) (i)".

[Second reading speech made in Legislative Council on 20 October 2011

Agreement in principle speech made in Legislative Assembly on 11 November 2011]

BY AUTHORITY