



Water Advisory Bulletin

Licensing arrangements for the water retail industry

June 2020

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Glossary of terms

Act	<i>Water Industry Act 2012</i>
Commission	Essential Services Commission, established under the <i>Essential Services Commission Act 2002</i>
ESC Act	<i>Essential Services Commission Act 2002</i>
Treasurer	Treasurer for the South Australian Government
Minister	Minister for Environment and Water
Regulator	Technical Regulator

Purpose

This Bulletin outlines the processes to be followed in applying for a licence under the *Water Industry Act 2012* (the **Act**) authorising the provision of retail services in the water industry in South Australia, and for the variation, transfer and surrender of such licences.

Legislative Framework

Section 17 of the Act declares the water industry to be a regulated industry for the purpose of the *Essential Services Commission Act 2002* (**ESC Act**)

The ESC Act provides the Essential Services Commission of South Australia (the **Commission**) with broad regulatory powers in relation to regulated industries including price setting, licensing, compliance monitoring and enforcement, making of codes and rules and performance monitor

Part 3 of the Act specifies in detail the role of the Commission in regulation of the water industry, including its role in licensing of water industry entities. A licence is required under the Act for the provision of retail services.

The ESC Act and the Act can be viewed on the South Australian Legislation website, www.legislation.sa.gov.au. Prospective licence applicants are strongly encouraged to peruse the relevant legislation before making a licence application to the Commission.

1 Licence Application Procedure

1.1 Who should apply

Part 4 of the Act provides that a person must not provide a retail service in the water industry for which a licence is required without holding a licence authorising the relevant service.

The Act defines the services for which a licence is required as:

- ▶ the sale and supply of water to a person for use where the water is conveyed by a reticulated system
- ▶ the sale and supply of sewerage services which is a service constituted by the collection, storage, treatment or conveyance of sewage through the use of a reticulated system, or
- ▶ other activities specified by regulations.

Retails services will include services such as:

- ▶ drinking water services
- ▶ sewerage services
- ▶ recycled water/stormwater services
- ▶ other non-drinking water services, or
- ▶ other miscellaneous water and sewerage services.

The Commission recognises that there may be many different types of organisations that may be providing (or intending to provide) retail services that will require a licence. For example, the Commission understands that local governments and private companies/enterprises provide a range of retail services outside of the areas serviced by SA Water.

1.2 Application procedure

A person or entity seeking a retail services licence must make an application by filling out the *Application Form for the Issue of a Licence by the Essential Services Commission of SA under the Water Industry Act 2012*. This form is available on the Commission's website (www.escosa.sa.gov.au), on the licensing page. Applicants must provide all information requested in the form. Failure to provide this information will result in delays in processing the application.

When two or more applicants wish to apply to hold a licence jointly, each of the applicants should complete a separate application form. These forms should be submitted to the Commission together with a covering letter explaining that the application is for a licence to be held jointly.

Applicants may send their completed application form electronically (preferred) or in writing.

- ▶ Electronically to: licensing@escosa.sa.gov.au
- ▶ In writing to: Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5001

Applicants should allow the Commission a minimum of 16 weeks to consider an application, as a public consultation period of at least 4 weeks forms part of the application process.

1.3 Information to be submitted with an application

Licence applicants must provide sufficient information with the application to enable the Commission to make an assessment of the suitability of the applicant to hold the licence requested. The application form indicates the information to be submitted. As a minimum, applicants will be required to submit information addressing the following matters:

1.3.1 Corporate and legal information

- ▶ details in relation to the identity of the applicant (i.e. the person/entity who is going to be providing the retail services to customers)
- ▶ details regarding the nature and scope of the operations for which a licence is sought, and
- ▶ sufficient information to enable the Commission to make an assessment of the suitability of the applicant and its officers and major shareholders (if applicable) to hold the licence requested, using the assessment criteria as detailed in section 20 of the Act.

1.3.2 Regulatory information

- ▶ information to satisfy the Commission that the applicant can meet relevant licence conditions (set out in section 25 of the Act), and
- ▶ information to satisfy the Commission that the issuing of a licence is consistent with its objectives under section 6 of the ESC Act.

1.3.3 Technical and human resource information

- ▶ details in relation to the technical capacity of the applicant to comply with the conditions of the licence
- ▶ information that evidences that the infrastructure to be used in connection with the relevant service is appropriate for the purposes for which it will be used, and

- ▶ evidence that the applicant can properly and safely conduct the business authorised by the licence, including copies of its risk management strategy.

1.3.4 Financial information

- ▶ Sufficient information to enable the Commission to determine the applicant's current and ongoing financial capacity to provide the services for which it will be licensed. This could include the provision of past financial statements, bank guarantees, credit history and business continuity arrangements. Copies of business plans including strategic direction and objectives, identified opportunities in the market place and forecast results should also be provided.

Applicants must take all reasonable steps to ensure the information provided in the application form is complete, true and correct and are required to make a declaration to that effect in the application form. Failure to disclose information or misrepresent any matter relevant to such information may result in a licence not being issued or the suspension or cancellation of a licence at a later date.

Applicants are encouraged to consult with the Commission prior to submitting an application.

1.4 Assessment

In performing its water licensing functions, the Commission must have as its primary objective the protection of the long-term interests of South Australian consumers with respect to the price, quality and reliability of the water industry, and must also have regard to the factors outlined in section 6(1) of the ESC Act. These factors include the need to:

- ▶ promote competitive and fair market conduct
- ▶ prevent misuse of monopoly or market power
- ▶ facilitate entry into relevant markets
- ▶ promote economic efficiency
- ▶ ensure consumers benefit from competition and efficiency
- ▶ facilitate maintenance of the financial viability of regulated entities and the incentive for long term investment, and
- ▶ promote consistency in regulation with other jurisdictions.

Subject to the above factors, key criteria for the assessment of a licence application are outlined in Part 4 of the Act and include:

- ▶ that the applicant and its officers are suitable persons to hold a licence and have the ability to operate a viable business; and
- ▶ that the applicant will be able to meet reasonably foreseeable obligations under any contracts for the sale or supply of water or the supply of sewerage services (or both); and
- ▶ that the water infrastructure or the sewage infrastructure (or both) to be used in connection with the relevant service is appropriate for the purposes for which it will be used; and
- ▶ that the applicant is capable of providing the services safely and to appropriate standards; and
- ▶ how the grant of the licence would be consistent with criteria (if any) prescribed by regulation for a licence of the relevant category.

In deciding whether an applicant is a suitable person to hold a licence, the Commission may consider the following:

- ▶ the applicant's previous commercial dealings and the standard of honesty and integrity shown in those dealings
- ▶ resources available to the applicant – financial, technical and human
- ▶ whether the applicant and the officers and major shareholders (where applicable) of the applicant have shown, in their past commercial and other dealings, honesty and integrity, and
- ▶ any other matters prescribed by regulation.

Each licence issued by the Commission contains a variety of conditions. Mandatory licence conditions, which the Commission must include in each licence (unless the applicant has been granted an exemption from a condition), are specified in section 25 of the Act. Prospective licence applicants should review and familiarise themselves with these licence conditions.

The licence conditions include requirements:

- ▶ to comply with applicable industry codes made by the Commission (the Commission's Water Retail Code will be able to the majority of licensees)
- ▶ requiring a licensee, at the request of designated customer, to provide designated services at the licensee's standard contract price contractual terms and conditions
- ▶ requiring a licensee to comply with code provisions in force from time to time relating to the provision of pricing information to designated customers
- ▶ requiring a licensee to include in each account for services provided to designated customers, any information prescribed by regulations
- ▶ requiring a licensee to maintain specified accounting records and to prepare accounts according to specified principles
- ▶ requiring a licensee to implement and follow specified processes to resolve disputes between the licensee and its customers
- ▶ if the licensee provides designated services to designated customers, requiring the licensee to participate in an Ombudsman scheme approved by the Commission
- ▶ requiring the licensee to monitor and report as required by the Commission on indicators of service performance determined by the Commission
- ▶ if requested by the Commission, requiring the licensee to provide information to the Commission regarding the licensee's financial or other capacity to provide services or to continue operations or activities under the licence
- ▶ requiring the licensee to maintain specified kinds and levels of insurance
- ▶ requiring the licensee to have all or part of its services, operations or activities audited and to report the results of the audit to the Commission
- ▶ requiring the licensee to notify the Commission about changes to officers and, if applicable, major shareholders of the licensee
- ▶ requiring the licensee to provide information to the Commission from time to time

- ▶ requiring the licensee to comply with the requirements of any scheme approved and funded by the Minister for the provision by the State of customer concessions or the performance of community service obligations, and
- ▶ requiring the licensee to comply with the requirements of any scheme approved and funded by the Minister for the purposes of providing specified exemptions from the requirement to pay for the provisions of specified services.

In imposing licence conditions, the Commission will have regard to the scale and nature of the operations of the applicant and will be available to consult with applicants in respect of this during the application process.

1.5 Confidentiality

Applicants must clearly inform the Commission if information provided in respect of a licence application is confidential information and where that is the case, also provide a non-confidential version of the application for public release.

The Commission reserves the right, pursuant to Part 5 of the ESC Act, to release or refer to a licence application, part of a licence application or information provided in support of an application, notwithstanding a claim of confidentiality, if the Commission believes that to do so is in the public interest.

1.6 Consultation

Unless confidentiality is claimed in respect of a licence application, part of a licence application or information provided in support of an application, the application and/or information will be made available on the Commission's website and in hard copy from the Commission's office

The Commission will consult with relevant government, industry and consumer groups in the conduct of its licensing functions through a public consultation process. If that consultation requires the release of confidential information, the Commission will first advise the applicant and seek consent to the release of information. The Commission has established a Charter of Consultation and Regulatory Practice which is available on the Commission's website at www.escosa.sa.gov.au.

The Commission will, as necessary, seek independent expert advice on specific licence applications. The Commission may also engage external consultants to conduct fit and proper searches and evaluate financial reports.

1.7 Application fees

A licence application must be accompanied by the appropriate application fee, which is set by the Treasurer pursuant to Part 4 of the Act (section 19(2)). The Commission cannot start assessing a licence application until the application fee has been received in cleared funds.

1.8 Licence Fees

Annual licence fees are payable by each licensee towards administrative costs as defined by the Act. Licence fees are fixed by the Treasurer. A licence cannot be issued until the first annual licence fee has been paid.

1.9 Reviews and appeals

If the Commission refuses to issue a licence to an applicant, the applicant may, pursuant to Part 8 of the Act, apply for a review of the decision.

Similarly, an existing licensee may apply to the Commission for review of a decision of the Commission to:

- ▶ refuse the variation of the terms or conditions of a licence
- ▶ suspend or cancel a licence, or
- ▶ vary the terms or conditions of a licence.

A licence applicant (or existing licensee) dissatisfied with a decision as confirmed, amended or substituted by the Commission arising from any of the above reviews (as relevant), may appeal against the decision to the Administrative and Disciplinary Division of the District Court of South Australia.

The Act permits the Minister responsible for administering that Act to intervene, personally or by counsel or representative, in a review or appeal.

2 Variation, Transfer and Surrender of Licences

2.1 Variation

As part of the Commission's licensing function, it has the power to vary (or add to) conditions that are imposed on a licence it has issued. Specifically, under section 28 of the Act, the Commission has the power to vary a licence at any time, subject to statutory procedural requirements, including providing a licensee with reasonable notice of a proposed variation and allowing it the opportunity to make representations on that variation.

There is a broad range of factors that might be potential 'triggers' for the Commission to consider varying a licence, or adding new conditions. These include factors both external and internal to a licensee, and may include (without limitation):

- ▶ material changes in market operations, outcomes or structures
- ▶ changes to applicable national or State legislation, rules or policy
- ▶ the findings of a formal inquiry undertaken by the Commission
- ▶ substantive changes to operations which would have a genuine connections to or impact on the operations authorized under a licence
- ▶ an application by a licensee to vary its licence (for example, to add or remove retail operations), and
- ▶ evidence of upgrades or material changes to a licensee's business or operational practices relating to the operations equipment authorised under a licence.

In considering a potential licence variation, the Commission must consider the factors specified in section 6 of the ESC Act 2002 (which sets out the Commission's primary statutory objective and other relevant considerations), the objects of the Act (as set out in section 3 of that Act). It will also be informed by any information submitted by a licensee to which the variation may apply, through public consultation and by engagement with regulatory industries involved in the water supply industry.

There is no applicable fee for the variation of a water retail licence.

2.2 Transfer

Pursuant to section 29 of the Act, a licence holder may apply to the Commission for the transfer of the licence to another entity with the approval of the Commission. An application for transfer of a licence requires the consent of both transferor and transferee of the licence. The Commission will therefore request that the transferee complete a licence application form before considering the transfer.

The Commission may also impose conditions on the transfer of the licence or vary the terms and conditions of the licence on its transfer. The Commission will not agree to the transfer if the transferee would not be entitled to the issue of the licence.

An application fee is payable when applying for a licence transfer.

2.3 Surrender

In accordance with section 32 of the Act, a licensee may surrender its licence by providing written notice to the Commission so as to comply with a period of notice required under the terms of the licence, unless the licensee and the Commission mutually agree to a shortened period of notice. Licensees should provide sufficient information to enable the Commission to assess the application to surrender

its licence, including information concerning the arrangements in place to transfer its customers, if any, to another licensee.

Annual licence fees due and payable prior to the surrender of a licence must still be paid by the licensee.

3 Exemptions

The Commission can, with the approval of the Minister, issue an exemption from the requirements of Part 4 of the Act, including the requirement to be licensed, pursuant to section 80(1) of the Act (or from various licence conditions). In deciding whether to grant an exemption, the Commission will consider the impact of the proposed exemption on the achievement of the various factors specified in section 6 of the ESC Act, in particular, the need to ensure that the long-term interests of consumers with respect to price, reliability and quality of supply are served.

Exemptions will only be granted by the Commission in exceptional circumstances where the regulatory burden of being licensed would outweigh any benefits the wider community receives. It must be evident to the Commission that licensing is simply not appropriate.

The onus will be on an applicant to demonstrate to the Commission why it should not be licensed (or why it should be exempt from various licence conditions).

4 Further Information

Any queries relating to the licensing arrangements covered by this bulletin should be directed to:

Contact person: Manager, Licensing and Compliance

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GPO Box 2605
Adelaide SA 5001

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