



New South Wales

# Water Industry Competition Amendment Bill 2021

## Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

## Overview of Bill

The object of this Bill is to amend the *Water Industry Competition Act 2006* (the *principal Act*) as follows—

- (a) to change the current licensing regime from a system of licensing private sector entities that supply water and sewerage services to a system of—
  - (i) scheme and operational approvals, authorising the construction and operation of certain water industry infrastructure schemes, respectively, and
  - (ii) operator licences and retailer licences,
- (b) to clarify the types of water infrastructure to be covered by the regime,
- (c) to enable certain local councils to apply for an approval or licence,
- (d) to increase the maximum penalty for an offence against the principal Act if the operation of infrastructure causes serious potential or actual harm to public health or safety,
- (e) to provide for deemed contracts for water or sewerage services between certain owners of premises and licensed operators and licensed retailers of a regulated scheme,
- (f) to establish last resort arrangements and require contingency planning for the continued provision of certain essential services under the principal Act,
- (g) to increase certain penalties for offences,
- (h) to establish enforcement powers for IPART and its inspectors,
- (i) to expand the auditing and reporting functions of IPART.

The Bill also makes consequential amendments to various Acts and regulations.

## Outline of provisions

**Clause 1** sets out the name, also called the short title, of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** repeals the *Water Industry Competition Amendment (Review) Act 2014*.

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

**Schedule 1[1]** makes a consequential amendment to the long title of the principal Act.

**Schedule 1[2]** introduces objects of the principal Act.

**Schedule 1[3]** defines *classes* of water industry infrastructure for the purposes of the principal Act.

**Schedule 1[4]** substitutes Part 2 to introduce a system of scheme and operational approvals, authorising the construction and operation of certain water industry infrastructure, respectively, and operator (currently network operator) and retailer (currently retail supplier) licences. The proposed Part contains the following—

- (a) **Proposed Division 1**, which establishes the scope and objects of the proposed Part. The proposed Division specifies the types of water industry infrastructure to which the proposed Part applies and sets out additional objects to be considered in deciding whether to grant or vary an approval or licence or what conditions to impose,
- (b) **Proposed Division 2**, which prohibits the construction and operation of water industry infrastructure to which the proposed Part applies and the sale of water or sewerage services from regulated schemes unless certain approval, licensing and related requirements are satisfied,
- (c) **Proposed Division 3**, which deals with the grant or variation of an approval by IPART and the imposition, variation and revocation of conditions,
- (d) **Proposed Division 4**, which deals with the grant or variation of a licence by the Minister and the imposition, variation and revocation of conditions,
- (e) **Proposed Division 5**, which enables the regulatory authority to give a *public health and safety direction* to any person to deal with a risk to public health or safety arising from the construction or operation of water industry infrastructure and makes it an offence to contravene a direction and increases the maximum penalty for an offence against the principal Act if the operation of infrastructure causes serious potential or actual harm to public health or safety,
- (f) **Proposed Division 6**, which deals with the enforcement and cancellation of approvals and licences,
- (g) **Proposed Division 7**, which sets out the circumstances in which an application for an administrative review of certain decisions may be made to the Civil and Administrative Tribunal and appeals against certain decisions may be made to the Land and Environment Court,
- (h) **Proposed Division 8**, which stipulates application requirements, including manner and form, content and accompanying fee. The proposed Division also makes it clear that a later agreement between a registered operator for a regulated scheme and a licensed retailer for the sale of the same water or sewerage service is of no effect while an earlier agreement remains in effect.

**Schedule 1[5] and [6]** increase the maximum penalty for an individual for an access regime offence under Part 3, Division 7.

**Schedule 1[7]** amends the heading to Part 5 to more accurately capture the scope of the Part.

**Schedule 1[8]** inserts proposed Division 1AA into Part 5 to deal with customer contracts for regulated schemes. The proposed Division contains the following—

- (a) **Proposed section 46AA** which contains definitions for the proposed Division,
- (b) **Proposed section 46AB** which deems a small retail customer who is an owner of premises to have entered into a contract for water or sewerage services with both the registered operator and the registered retailer for the regulated scheme, on terms and conditions to be set out in the regulations and for the standard contract charges referred to in proposed section 46AC,
- (c) **Proposed section 46AC** which requires a regulated scheme licensee to publish contract charges on its website and to give customers at least 6 months written notice of an increase, unless IPART approves a shorter notice period, with the exclusion of certain increases,
- (d) **Proposed section 46AD** which supports arrangements for the transfer of land by requiring a licensee to, on an application approved by IPART, issue a certificate as to the contract charges payable for water or sewerage services provided to specified premises,
- (e) **Proposed section 46AE** which makes it clear that the new owner of premises to which water or sewerage services are provided by means of a regulated scheme is liable for any unpaid contract charges,
- (f) **Proposed section 46AF** which allows a lessee to pay any unpaid charges due from the lessor and to recover the amount as a debt or to claim it as a deduction.

**Schedule 1[9] and [10]** clarify the operation of section 47 that deals with the internal review of certain decisions disputed by a small retail customer.

**Schedule 1[11]–[16]** make minor and consequential amendments to sections 49 and 50 relating to approved ombudsman schemes.

**Schedule 1[17]** amends section 50 to require a licensed operator deemed to have entered into a contract with an owner of premises under proposed Division 1AA to join an approved ombudsman scheme and to comply with a decision of the ombudsman relating to a dispute or complaint.

**Schedule 1[18]** inserts proposed section 50A into Part 5, Division 1 to require an insolvency official appointed for a licensee to facilitate the resolution of a dispute or complaint about the licensee.

**Schedule 1[19]** substitutes Part 5, Division 2 to make consequential and other amendments to provisions relating to monopoly services and suppliers. The proposed amendment makes further provision regarding the determination of pricing methodologies by IPART and makes it clear that a methodology may be determined for connection charges relating to a monopoly service. The amendment also omits Part 5, Division 3 (Retailers of last resort).

**Schedule 1[20]** inserts proposed Part 5A into the principal Act to replace Part 5, Division 3 (Retailers of last resort). The proposed Part contains last resort arrangements and contingency planning requirements, including provision for last resort providers to take the place of providers of essential services during certain declared failures. The proposed Part contains the following—

- (a) **Proposed Division 1**, which sets out the matters that IPART must be satisfied of in determining that a scheme is *essential infrastructure* and the process of revoking a determination,
- (b) **Proposed Division 2**, which deals with the designation of a last resort provider of an essential service and obligations relating to contingency planning,
- (c) **Proposed Division 3**, which deals with the declaration of a failure of an essential service provider and last resort events,
- (d) **Proposed Division 4**, which provides for the review of a declared failure, its resolution and the declaration of the end of the failure,
- (e) **Proposed Division 5**, which contains general provisions including provisions dealing with how an application under the proposed Part is to be made, the enforcement of obligations

under the proposed Part and restrictions on the use and disclosure of confidential or commercially sensitive information and customer information,

**Schedule 1[22], [23] and [31]** relocate provisions.

**Schedule 1[24] and [25]** make amendments to section 58A, as renumbered, regarding work connected with the construction, maintenance or removal of water industry infrastructure that forms part of a scheme in or under a public road or public reserve.

**Schedule 1[26]** makes it clear that water industry infrastructure is owned by the person that constructs or installs it, or on whose behalf it is constructed or installed, or a person that subsequently acquires title to it.

**Schedule 1[27]** removes the subsection that states that certain water industry infrastructure 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.

**Schedule 1[29]** increases the maximum penalty for the offence of a meter reader failing to produce their identify certificate on the request of a person who appears to be the occupier of the premises.

**Schedule 1[30] and [32]–[46]** make amendments, including consequential amendments, relating to the power of registered operators of schemes to enter land for specified purposes.

**Schedule 1[47]** inserts proposed section 66A into the principal Act to make it an offence for a person, other than a public water utility, to on-sell a drinking water service to another person, unless—

- (a) the person also supplies a sewerage service to the other person, and
- (b) both services are the subject of a single contract between the person and the other person.

**Schedule 1[50] and [51]** increase the maximum penalties for certain offences in Part 7, Division 1.

**Schedule 1[53]** substitutes sections 71 and 72 which contain offences dealing with the discharge of substances into stormwater drains or sewer mains that forms part of a scheme and the taking, wasting, diversion, consumption or use of water conveyed by water industry infrastructure that forms part of a scheme.

**Schedule 1[54]** substitutes section 73(1) and (2) to deal with the persons who are authorised to do plumbing or drainage work on infrastructure that is connected or is intended to be connected to a water main or sewer main that forms part of a scheme.

**Schedule 1[55]** inserts the following proposed offence provisions into the principal Act—

- (a) **Proposed section 73A** makes it an offence for an owner of water industry infrastructure or the premises on which it is located to prevent the continuing operation of the infrastructure,
- (b) **Proposed section 73B** makes it an offence for a person to obstruct or hinder an auditor in the exercise of their functions under the principal Act,
- (c) **Proposed section 73C** makes it an offence for a person to provide false or misleading information to an auditor in connection with an audit,
- (d) **Proposed section 73D** makes it an offence for a person to provide false or misleading information to the Minister, IPART or an inspector,
- (e) **Proposed section 73E** prohibits persons taking actions that detrimentally affect the employment of another person, or threaten to do so, because that other person has assisted IPART, the Minister, an auditor or inspector in the performance of auditing or regulatory functions or in an investigation under the principal Act.

**Schedule 1[56] and [62]** omit Part 7, Division 2 and insert proposed Part 7A to deal with the enforcement powers of inspectors. The proposed Part contains—

- (a) **Proposed Division 1**, which sets out the purposes for which a function may be exercised under the proposed Part and allows the Minister or IPART to appoint inspectors, and
- (b) **Proposed Division 2**, which contains powers to obtain information and records, and
- (c) **Proposed Division 3**, which deals with an inspector's power to enter and search land, and
- (d) **Proposed Division 4**, which contains general provisions, including a proposed offence dealing with failure to comply with a requirement made under the proposed Part, threatening, hindering, obstructing or delaying an inspector in the exercise of the inspector's functions under the proposed Part and impersonating an inspector.

**Schedule 1[57]** enables IPART to appoint an authorised official with the power to issue a penalty notice under section 82.

**Schedule 1[58]** inserts provisions dealing with the privilege against self-incrimination in relation to complying with requirements under the principal Act to provide information or records or to answer a question. The amendment also provides for increased criminal penalties for offences against the principal Act if it is proved that an operation of infrastructure contrary to the Act caused harm to the health or safety of human beings.

**Schedule 1[61]** enables IPART to direct a registered operator of an approval to keep records or provide certain information.

**Schedule 1[64]** inserts provisions relating to IPART's compliance functions including the conduct of compliance audits.

**Schedule 1[69] and [70]** relocate the offence of refusing or failing to comply with a notice under section 87 to the end of that section. The offence of providing false or misleading information to IPART under section 88 is relocated to proposed section 73D and the offence of victimisation is relocated to proposed section 73E.

**Schedule 1[71]** deals with IPART's annual report to the Minister.

**Schedule 1[72]** inserts proposed Division 1A in Part 8 to require IPART to maintain a register of the following and make the register publicly available, free of charge, on IPART's website—

- (a) schemes and associated approvals,
- (b) licences,
- (c) registered operators,
- (d) registered retailers.

The proposed Division makes further provision regarding the register.

**Schedule 1[73]** requires IPART, on request, to provide advice to the Minister about the operation or administration of the principal Act if requested.

**Schedule 1[74]** inserts proposed sections into Part 8, Division 3 as follows—

- (a) **Proposed section 93A** enables IPART to extend the application of specified provisions of Parts 6 and 7 to a *declared operator*, being an owner or operator of water industry infrastructure to which Part 2 does not apply, as if they were the registered operator of a scheme,
- (b) **Proposed section 93B** requires the Minister and IPART to determine an application as quickly as reasonably practicable and enables the regulations to specify a time limit for a decision after which an applicant may apply to the Minister for a direction to IPART requiring the decision to be made within a time fixed by the Minister.

**Schedule 1[75] and [76]** makes amendments to section 94 regarding the delegation of functions of the Minister.

**Schedule 1[77]** provides for the disclosure of information between the Minister and IPART.

**Schedule 1[78]** deals with the service of documents and the extraterritorial application of certain provisions of the principal Act.

**Schedule 1[79]** substitutes a section to adopt the latest standard exclusion of personal liability provision.

**Schedule 1[80]** imposes an additional penalty, for a continuing offence, of up to one-tenth of the maximum penalty prescribed for the offence for each day it continues.

**Schedule 1[82]** amends the list of offences attracting executive liability to include not having the necessary approval or licence or failing to comply with the conditions of an approval or licence. **Schedule 1[81]** is a consequential amendment.

**Schedule 1[83]** inserts a displacement provision into Part 9 to allow the proposed provisions concerning the obligations and rights of insolvency officials to take precedence over inconsistent provisions of Chapter 5 of the *Corporations Act 2001* of the Commonwealth.

**Schedule 1[84]** substitutes a section to provide that proceedings for offences arising under the principal Act or the regulations to be dealt with summarily before the Land and Environment Court in its summary jurisdiction instead of the Local Court or Supreme Court in its summary jurisdiction.

**Schedule 1[85]** inserts a section to set out the time within which proceedings for an offence against this Act or the regulations may be commenced being—

- (a) not later than 3 years after the date on which the offence is alleged to have been committed, or
- (b) within, but not later than, 3 years after the date on which evidence of the alleged offence first came to the attention of the Minister, IPART or an inspector.

**Schedule 1[86] and [87]** make consequential amendments to section 99 so that it applies to an amount owed by, or penalty imposed on, the holder of an approval.

**Schedule 1[88]** amends section 100 to provide that a certificate signed by the Minister or IPART certifying a particular matter constitutes proof of that matter in proceedings.

**Schedule 1[89]** increases the maximum penalty that can be imposed by the regulations and allows the regulations to make exemptions and to provide for the payment of fees by instalments.

**Schedule 1[90]–[100]** extend and clarify the regulation-making powers under the principal Act.

**Schedule 1[101] and [102]** deal with savings and transitional issues and insert proposed Part 4 into Schedule 4 to the principal Act to provide for arrangements consequent on the enactment of this Act. The proposed provisions relate to the status of an existing licence, the grant of a replacement approval or licence and how a pending application is to be dealt with. The proposed provisions also clarify the position in relation to deemed customer contracts and monopoly supplier declarations and related pricing determinations.

**Schedule 1[103]–[110]** make consequential amendments to the Dictionary schedule.

**Schedule 1[111]** makes global amendments to the principal Act to substitute certain terms and expressions as a result of proposed changes in terminology.

**Schedule 1[21], [23], [28], [37], [42], [43], [46], [48], [49], [52], [60], [63], [65]–[68], [73] and [84]** make minor and consequential amendments.

## **Schedule 2 Consequential amendments to other legislation**

**Schedule 2.1** makes a consequential amendment to the *Conveyancing (Sale of Land) Regulation 2017*.

**Schedule 2.2** makes a consequential amendment to the *Energy and Utilities Administration Act 1987*.

**Schedule 2.3** amends the *Environmental Planning and Assessment Regulation 2000* to ensure that a planning certificate relating to land specifies whether water or sewerage services are, or are to be, provided to the land under the principal Act.

**Schedule 2.4** makes a consequential amendment to the *Fluoridation of Public Water Supplies Act 1957*.

**Schedule 2.5** makes consequential amendments to the *Hunter Water Act 1991*, including by omitting a subsection concerning a matter to be dealt with under the proposed last resort provider provisions to be inserted into the principal Act.

**Schedule 2.6** amends the *Independent Commission Against Corruption Act 1988* to provide that an auditor under the principal Act is a **public official** for the purposes of that Act.

**Schedule 2.7** makes consequential amendments to the *Land and Environment Court Act 1979*.

**Schedule 2.8** makes a consequential amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002* to update a reference to a section of the principal Act.

**Schedule 2.9** amends the *Local Government Act 1993* to enable councils to order that premises be connected to a water supply or sewerage system, whether or not it is the council's supply or system. The proposed amendments make it clear that special rates and charges are not payable in relation to any land in respect of the supply of water, or the provision of a sewerage service, by means of a scheme during the period a scheme is being operated. The proposed amendments also omit a subsection concerning a matter to be dealt with under the proposed last resort provider provisions of the principal Act.

**Schedule 2.10** makes a consequential amendment to the *Local Government (General) Regulation 2005*.

**Schedule 2.11** makes a consequential amendment to the *Plumbing and Drainage Act 2011*.

**Schedule 2.12** makes a consequential amendment to the *Public Health Act 2010*.

**Schedule 2.13** makes a consequential amendment to *State Environmental Planning Policy (Infrastructure) 2007*.

**Schedule 2.14** makes consequential amendments to the *Sydney Water Act 1994*, including by omitting a subsection concerning a matter to be dealt with under the proposed last resort provider provisions of this Act.

**Schedule 2.15** makes a consequential amendment to the *Water Management Act 2000*.

**Schedule 2.16** makes a consequential amendment to the *Water Management (General) Regulation 2018*.

**Schedule 2.16** makes consequential amendments to the *Water NSW Act 2014*, including by omitting a savings and transitional clause consequent on amendments in the *Water Industry Competition Amendment (Review) Act 2014* that are proposed to be repealed and not commenced.