



ICRC

independent competition and regulatory commission

Regulatory framework for
licensing utilities in the ACT

October 2012

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1 Introduction

The *Utilities Act 2000* (Utilities Act) provides a regulatory framework for utilities in the ACT. The Act establishes industry and technical codes that apply to utilities operating in the ACT.

The Independent Competition and Regulatory Commission (the Commission) is responsible for administering the licensing framework; the Director General under Part 5 of the Utilities Act is responsible for the technical regulation obligations of utilities as set out in technical codes and in certain plans or rules established under those codes; and the ACT Civil and Administrative Tribunal (ACAT) is responsible for handling complaints about the supply of energy and water by the utilities that are licensed to operate in the ACT.

Part 3 of the Utilities Act deals with the licensing of utilities. The Commission's responsibilities include:

- granting, varying, transferring and revoking utilities licences
- determining and monitoring compliance with licence conditions
- granting exemptions from compliance with licence conditions
- determining licence fees.

This document provides an overview of the utilities licensing framework in the ACT.

2 Persons required to hold a licence

A person must not provide a utility service except in accordance with a licence (Utilities Act: section 21).

Utility services, defined in Part 2 of the Act, include:

- the distribution and connection of electricity
- the transmission, distribution and connection of gas
- the collection and/or treatment of water for distribution through a water network, and the distribution of water through the network
- the conveyance, collection, treatment and disposal of sewage and sewerage connection services
- the provision of water and sewerage networks for the supply of water and sewerage connection services.

Note: In July 2012 the ACT introduced the National Energy Customer Framework. Energy retailers are now regulated by the Australian Energy Regulator under the National Energy Retail Law and related subordinated legislation. This includes authorisation of electricity and gas retailers.

2.1 Agents

A licensed utility may contract out the provision, construction, operation, management or maintenance of any of the systems or services that are the subject of its licence.

If the person to whom a utility service is contracted provides the utility service as an *agent* of a licensed utility, that person is not required to hold a utility licence in its own right.

The term *agent* refers to a particular type of relationship, which involves an authority or capacity in the agent to create legal relations between the licensee and its customers. For example, an agent of a licensed utility would be authorised to contract with customers on the licensee's behalf, and would provide services on the licensee's behalf.

2.2 Partnerships and other groups

A utility licence granted to a member of a group *on behalf of the group* will be taken to have been granted to the group (Utilities Act: section 33).

In such circumstances, the Utilities Act and the *Independent Competition and Regulatory Commission Act 1997* (ICRC Act) will apply to the group as if it were a single person, but with the following changes:

- a function that would be exercisable by the group may be exercised by any member
- an obligation that would be imposed on the group is instead imposed on each member, but may be discharged by any member
- a liability that would be imposed on the group is instead imposed jointly and severally on each member
- an offence against the Utilities Act or the ICRC Act that would otherwise be committed by the group is taken to be committed by each member.¹

2.3 Exemptions

The Minister may, in writing, exempt a person from the requirement to hold a licence in relation to a utility service (Utilities Act: section 22). An exemption will be granted only in exceptional circumstances. An exemption could be granted, for example, to a large institution that distributes and supplies water to tenants, using its own facilities and network, through business arrangements with its tenants. In such cases the usual licence conditions for the distribution and supply of water to the public may be inappropriate (Utilities Act: section 22(3), Note 1).

An exemption granted by the Minister may be subject to compliance with certain conditions, which will be stated in the instrument of exemption. For example, an exemption may require compliance with certain requirements under the Utilities Act in relation to safety and technical matters.

¹ If a member of the group is taken to have committed an offence on this basis, it is a defence if that member of the group can prove that they did not aid, abet, counsel or procure the relevant act or omission, or that they were not in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of that member of the group).

3 Terms of licences

A licence can be granted for one or more stated utility services (for example, distribution and connection services) or for the provision of services to one or more classes of customer (for example, franchise and non-franchise customers) (Utilities Act: section 23).

A licence may be in force indefinitely or for a specific term stated in the licence (Utilities Act: section 24).

3.1 General conditions

All utility licences are subject to the general conditions listed in section 25 of the Utilities Act. Section 25 provides that a utility must comply with all of the following conditions:

- any requirement under the Utilities Act or the ICRC Act
- a requirement under any other law in force in the Territory that applies to the utility in relation to the provision of a utility service
- each industry code that applies to the utility
- each technical code that applies to the utility
- a direction given to it by the Commission under the Utilities Act or the ICRC Act
- a direction given to it by the Director General under Part 5 of the Utilities Act.

A licensee must maintain the capacity, as determined in accordance with the relevant technical and prudential criteria adopted from time to time by the Commission under section 26 of the Utilities Act, to comply with the conditions of its licence and to operate a viable business as a licensee. The criteria are discussed in *Guidelines on technical and prudential criteria for licence applications under the Utilities Act 2000 (ACT)*; the document is available on the Commission's website (www.icrc.act.gov.au).

A licensee must keep all records and documents necessary to enable it to meet any reporting requirement, or any requirement to produce a record or document, under the Utilities Act or a condition of its licence.

A licensee must give the Commission, in accordance with any written requirements by the Commission, an annual report for each financial year in relation to the exercise of its functions under the Utilities Act and its compliance with the conditions of its licence.

3.2 Special conditions

Sections 27 through to 31 of the Utilities Act set out special licence conditions for particular utility services. Licensees will be subject to these conditions, as relevant, in addition to the general conditions discussed above.

3.3 Additional conditions

In addition to the general and special conditions imposed by the Utilities Act, a utility licence may be subject to any other condition stated in the licence by the Commission (Utilities Act:

section 25(1)(b). The Commission may not impose a licence condition that is inconsistent with a requirement of, or under, the Utilities Act or any other law of the Territory.

Additional conditions may, for example, impose special reporting requirements on new entrants to the market, or address identified environmental concerns particular to an applicant.

If the Commission approves the licence subject to an additional condition imposed under section 25(1)(b), the Commission must, on request, give the applicant written notice of its decision to do so and its reasons for that decision.

4 Licence applications

An application for a utility licence must be made to the Commission (Utilities Act: section 34).

To assist interested persons in preparing an application, the Commission has developed the following documents, which are available on the Commission's website (www.icrc.act.gov.au) or from the Commission's offices at Level 8, 221 London Circuit, Canberra City, ACT:

- *Guidelines on technical and prudential criteria for licence applications under the Utilities Act 2000 (ACT)*
- *Applying for a utilities services licence in the ACT.*

Applicants should be familiar with the Utilities Act and the technical and industry codes and guidelines applicable to the provision of the relevant services. They may also benefit from reviewing utility licences issued to current ACT licensees. All of these documents can be viewed on the Commission's website.

4.1 Technical and prudential criteria

The Utilities Act (section 26) requires the Commission to adopt, in writing, technical and prudential criteria for determining whether a utility, or an applicant for a licence, has the capacity to comply with licence conditions and to operate a viable business as a licensee.

It is a general condition of a utility licence (Utilities Act: section 25) that the licensee maintains that capacity throughout the term of its licence. For that reason, the criteria applying to a particular utility can only be varied under the procedure for variation of a utility's licence (see section 5: Variation of licences).

The technical and prudential criteria adopted by the Commission are discussed in the Commission's *Guidelines on technical and prudential criteria for licence applications under the Utilities Act 2000 (ACT)*.

4.2 Grant of a utility licence

On application, the Commission may grant a licence to a person to provide a utility service (Utilities Act: section 37).

The Commission must grant the licence if satisfied that the applicant:

- has the capacity, as determined in accordance with the relevant technical and prudential criteria adopted by the Commission under section 26
 - to comply with the licence conditions
 - to operate a viable business as a licensee
- satisfies any other requirement that is relevant to the Commission’s objects under the Utilities Act.

A licence to provide utility services to franchise customers, whether exclusively or otherwise, may be granted by the Commission only with the approval of the Minister.

The Commission will publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

4.3 Refusal of a utility licence

The Commission will refuse an application for a utility licence where the applicant does not satisfy the technical and prudential criteria adopted under section 26 of the Utilities Act; that is, where the applicant is unable to demonstrate that it is able to comply with the conditions of a utility licence and/or able to operate a viable business as a licensee.

If the Commission refuses an application for a utility licence, or approves a licence with conditions, it must prepare written notice of the decision to refuse the application and its reasons for the decision. A copy of the notice and reasons for decision must be provided to the applicant and will include the applicant’s right to a review of the decision (Utilities Act: section 43A).

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

5 Variation of licences

The Commission may, in writing, vary a utility’s licence either on application by the licensee or on the Commission’s own initiative (Utilities Act: section 38).²

Generally, the Commission can vary a licence on its own initiative only if it:

- has given the licensee reasonable notice of the proposed variation and its reasons for the variation
- has allowed the licensee a reasonable opportunity to make representations to the Commission about the proposal
- has taken account of any representation
- is satisfied that the variation is appropriate.

² The procedure for variation of a utility’s licence under section 38 also applies to variation of the technical and prudential criteria for determination of a utility’s capacity to comply with, and operate a viable business under, a utility licence, as adopted by the commission under section 26.

However, the Commission may vary a licence on its own initiative without giving notice to, and without considering representations by, the licensee if it is satisfied that the variation:

- is necessary or convenient
 - to give effect to a direction by the Minister under section 19 of the Utilities Act
 - following a review of the licence under section 46 of the Utilities Act
 - because of an amendment of an Act or subordinate law

or

- is unlikely to adversely affect anyone and would not materially alter the licence.

A variation takes effect on the day that the Commission gives written notice of the variation to the licensee, unless the notice specifies a later date of effect.

If, on an application by a licensee, the Commission refuses to vary a licence, it must give the licensee written notice of the refusal and the reasons for the refusal including the applicants right to a review of the decision (Utilities Act: section 43A).

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

6 Exemption from licence conditions

A licensed utility may apply to the Commission for an exemption from compliance with a condition of its licence in relation to a stated activity, or in stated circumstances (Utilities Act: section 39). An exemption from compliance with a licence condition will be for a stated period, and may be subject to stated conditions.

For example, a utility may apply for an exemption from a particular annual reporting requirement on the basis that it is not actively supplying services subject to that requirement. The exemption could be granted for an identified reporting period, on condition that the utility does not commence provision of the relevant services within that period.

An exemption may be given in relation to conditions, whether imposed by the Utilities Act or by the Commission.

The Commission's decision to grant or refuse an application for exemption from compliance will be notified in writing to the applicant.

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

7 Transfer of licences

Section 40 of the Utilities Act provides for the transfer of a utility licence from one person to another. For example, if a licensed utility merges with another company to form a new legal entity, the licence could be transferred to the new entity.

A licence cannot be transferred from one person to another without the Commission's written agreement.

The Commission can agree to the transfer of a licence only if it is satisfied that the intended licensee has the capacity, as determined in accordance with the technical and prudential criteria adopted by the Commission under section 26, to comply with the conditions of the licence and to operate a viable business as a licensee, and satisfies any other requirement that is relevant to the Commission's objects under the Utilities Act. In making this assessment, the Commission will assess the intended licensee's capacity as though it were an applicant for a new utility licence under section 34.

A transfer takes effect on the day the Commission gives written notice of its agreement to the transfer to the licensee, unless the notice provides for a later date of effect.

If the Commission refuses to agree to the transfer of a licence, it must give the licensee written notice of the refusal and its reasons for the refusal including the right to a review of the decision (Utilities Act: section 43A).

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

8 Surrender of licences

A utility may surrender its licence by giving written notice of surrender to the Commission (Utilities Act: section 41).

The surrender takes effect 90 days after the written notice is given to the Commission, or, if the Commission accepts an earlier surrender, on the day the Commission gives written notice of the acceptance to the utility.

The Commission must prepare written notice of the surrender of a utility licence as soon as possible after the date of surrender.

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

9 Revocation of licences

In limited circumstances, the Commission may revoke a utility's licence (Utilities Act: section 42).

The Commission may, in writing, revoke a utility licence in either of the following circumstances:

- in the past five years, the licensee has been convicted of two or more offences against the Utilities Act (other than a daily offence³)
 - the offences must involve a contravention of one or more licence conditions
 - the Commission must be satisfied that each contravention is material to the licensee's continuing operations, having regard to the nature and scope of the activities to which the licence relates
- an annual licence fee, or any instalment, remains unpaid for more than 28 days after it is due for payment in accordance with the notice of the relevant determination under section 45.⁴

The Commission must prepare a written notice of the revocation of a licence, including a statement about the rights available under section 53 of the Utilities Act in relation to documents about the matter.

Before the Commission revokes a utility's licence, it must:

- in writing, give the utility reasonable notice of the proposed revocation and its reasons for the revocation
- allow the utility a reasonable opportunity to make representations to the Commission
- take account of any representation
- comply with any other requirements about revocation set out in the licence.

A revocation takes effect on the day the Commission gives written notice of the revocation to the licensee, unless the notice provides for a later day of effect.

If the Commission revokes a utility licence it must prepare a written notice of the decision to revoke the licence and its reasons for the decision. A copy of the notice and reasons for decision must be provided to the licensee and will include the licensee's right to a review of the decision (Utilities Act: section 43A).

The Commission will also publish a notice of its decision on the Legislation Register (Utilities Act: section 52).

³ Certain contraventions of the Utilities Act (for example, the provision of utilities services without a licence) constitute a separate, additional offence for each day (or part thereof) after the initial date of the contravention, on which the contravention continues. These additional, separate offences are referred to as 'daily offences'.

⁴ Section 45 of the Utilities Act sets out the basis on which the Commission may determine the annual licence fee payable by each utility (see section 10: Annual licence fee).

10 Annual licence fee

The Commission is authorised to determine an annual licence fee for each year, or part of a year, in which a licence is in force (Utilities Act: section 44).

The Utilities Act sets out the method by which the Commission may determine the annual licence fee payable by each utility (Utilities Act: section 45).

The annual licence fee for a particular utility is the amount considered by the Commission to be a reasonable contribution towards the costs incurred, or expected to be incurred by the Commission, ACAT and ACTPLA in the exercise of their functions under the Utilities Act in relation to the relevant utility service.

In determining the contributions payable by each utility, the Commission must have regard to:

- the extent of those costs in relation to each utility
- the annual licence fees payable by all utilities
- the relative scope and nature of the services provided by all utilities.

The Commission is not limited in its determination to considering the matters listed above.

The Commission's determination must be in writing, and must state the following matters:

- the Commission's findings on the contribution payable by each utility, with reference to the considerations listed above
- the amount of the fee and the way it has been worked out
- the Commission's reasons for the amount of the fee and any instalment
- how the fee is to be paid (for example, as a lump sum, or by instalments).

The Commission must give to the utility a copy of the determination of each annual licence fee payable by the utility, and a written notice stating when the fee, or any instalment, is due for payment.

The day on which an annual licence fee, or any instalment, is due for payment must be at least 28 days after the day the notice is given to the relevant utility.

11 Energy industry levy

The *Utilities (Energy Industry Levy) Amendment Act 2007*, which came into effect on 1 July 2007, amended the Utilities Act by inserting a new part, Part 3A, to provide for an energy industry levy. The purpose of Part 3A is to impose a levy on energy utilities to recover national and local regulatory costs incurred by the Territory in relation to the energy industry sectors.

The levies are determined by a levy administrator appointed under the Act. The Chief Executive Officer of the Commission was appointed as the levy administrator in July 2007.

The levy provisions are subject to ACT tax law under the *Taxation Administration Act 1999*, and payment of levies is made to the ACT Commissioner for Revenue.⁵

12 Review of licence conditions

The Commission may review a licence at any time to determine whether the licence conditions are appropriate for achieving the Commission's objects (Utilities Act: section 46).

The Commission must publish notice of a proposed review in a daily newspaper, stating the following:

- the Commission's objects under the Utilities Act
- the purpose of the review
- the identity of the licensee subject to the review
- the utility services to which the licence relates
- where a copy of the licence may be inspected
- where submissions in relation to the review should be lodged
- the closing date for submissions, which must be at least 28 days after the day on which the notice is published.

The Commission must ensure that each licensee subject to the review has a reasonable opportunity to examine submissions lodged with the Commission in response to the notice, and to make representations to the Commission about any matter raised in the submissions.

The Commission cannot finish its review unless it has:

- given the licensee and each person who made a submission in response to the notice a written statement of its expected findings and supporting reasons and the action (if any) that the Commission proposes to take because of the review
- allowed the licensee and each person who made a submission in response to the notice a reasonable opportunity to make further representations to the Commission
- considered the matters raised in all the submissions and representations duly made to the Commission.

When the Commission finishes a review, it must give the licensee a written statement of its findings and supporting reasons and the action, if any, taken by the Commission because of the review. Notice of the Commission's findings must be published in a daily newspaper, stating the place where a record of the statement is available for public inspection.

13 Contravention of licence condition

A utility must not, without reasonable excuse, contravene a condition of its licence (Utilities Act: section 47).

⁵ Licence fees will continue to be determined for licences authorising utility services not covered by Part 3A of the Utilities Act.

All licensed utilities are required to report all material breaches of their licence as soon as practicable. A Guidance Note is available on the Commissions website to assist licensees with these requirements. If the Commission is satisfied that a utility has contravened, or is likely to contravene, a condition of its licence, it may give a written direction to the utility to take action to ensure compliance with the condition (Utilities Act: section 48). For example, it could direct the utility to take action to rectify the contravention or to avoid the likely contravention.

The Commission can only give such a declaration if it has taken reasonable steps to consult the utility concerned about the giving of the direction.

14 Compliance and Performance Framework

All licensed utilities must comply with a number of regulatory obligations (Utilities Act: section 25). The Commission monitors utility compliance, primarily through requirements to report to it on a wide range of obligations. The licensee must report on its obligations by 1 October each during the term of its licence and must make a summary of its annual report publicly available.

15 Requests for further information

The Commission needs to have sufficient information to assess an application for:

- the grant of a utility licence
- the transfer of a licence
- the variation of a licence
- an exemption from compliance with a licence condition.

The Commission may require the applicant to provide further stated information or documents needed to determine the application (Utilities Act: section 35).

The Commission will request this information in writing from the applicant. It is not required to determine the application until the applicant complies with the requirement.

16 Public consultation

The Commission may give public notice of an application and invite submissions about an application from interested people before it makes a decision to:

- grant or refuse a licence application
- agree to the transfer of a licence
- vary a licence
- grant or refuse an exemption from compliance with a licence condition. (Utilities Act: section 36)

The public notice will be published in a daily newspaper and on the Commission's website (www.icrc.act.gov.au), and will state where copies of the application documents, subject to any information that is considered by the Commission to be confidential, can be inspected. The notice will also explain where submissions can be lodged and give a closing date for submissions that is at least 28 days after the day the notice is published.

If the Commission gives public notice of an application, it cannot make its decision unless it has allowed the applicant a reasonable opportunity to examine submissions lodged with the Commission in response to the notice and to make representations to the Commission about any matter raised in the submissions. In making its decision the Commission must consider the matters raised in all submissions and representations properly made to the Commission.

17 ACT Civil and Administrative Tribunal review of decision

Under section 43B of the Utilities Act, application can be made to the ACT Civil and Administrative Tribunal for review of a decision by the Commission to:

- refuse to grant a utility licence
- grant a utility licence subject to additional conditions
- refuse to vary a licence on application by the licensee
- vary a utility licence on the Commission's own initiative
- refuse to agree to the transfer of a utility licence
- revoke a utility licence.

Notice of the Commission's decision on these matters will be given in accordance with regulation 7 of ACT Civil and Administrative Tribunal Regulation 2009 (made under section 67A of the *ACT Civil and Administrative Tribunal Act 2008*).

18 Public access to information

The Utilities Act (section 53) requires the Commission to make copies of certain documents available for inspection by members of the public.

These documents include:

- each utility licence granted by the Commission
- a record of each decision by the Commission
 - to grant a utility licence
 - to refuse to grant a utility licence
 - to vary a utility licence
 - to determine an annual licence fee
 - to grant an exemption from compliance with a licence condition
 - to agree to the transfer of a utility licence

- to refuse to agree to the transfer of a utility licence
- to revoke a utility licence
- the Commission’s findings on the review of a licence under section 46, and its supporting reasons
- the notice of the surrender of a licence.

The Commission will make these documents available for inspection by members of the public at the Commission’s offices at Level 8, 221 London Circuit, Canberra City, ACT, between 9:00 am and 5:00 pm Monday to Friday. Any person may inspect the documents free of charge, and may make a copy of all or part of the document.

Copies of these documents will also be made available on the Commission’s website (www.icrc.act.gov.au).

If a person requests that a copy of a document be made available in electronic form, the Commission may provide the relevant information on a data storage device or by electronic transmission.

19 Contacting the Commission

If you have any questions about the licensing of utilities in the ACT, please contact the Commission.

Correspondence and other enquiries may be directed to the Commission at the addresses below:

Independent Competition and Regulatory Commission
PO Box 161
Civic Square ACT 2608

Level 8, 221 London Circuit
Canberra City ACT 2601

The Commission may be contacted by telephone on (02) 6205 0799, or by fax on (02) 6207 5887. The Commission’s website is at www.icrc.act.gov.au and its email address is icrc@act.gov.au.