



Mr Paul Reid
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via email to: publicsubmissions@erawa.com.au

Dear Mr Reid

WATER LICENCE REVIEW 2019

Thank you for the opportunity to make a submission to the Economic Regulation Authority's Water Licence Review 2019. The Department of Health (DOH) supports the water licence review process set out in the Issues Paper published in April 2019.

In relation to performance standards specifically, I am advised that the Economic Regulation Authority (ERA) is of the view that setting performance standards for water licensees is a policy matter for Government.

Accordingly, the DOH considers that there would be considerable merit in establishing a licence requirement for licensees providing sewerage services, to enter into a Memorandum of Understanding (MoU) with the DOH to assist in managing public health risk associated with the operation of sewerage services, in a manner following that for the current MoU about drinking water. This is set out in more detail within the attached document.

The DOH would appreciate the opportunity to explore this matter in more detail with the ERA, as well as water industry and local government stakeholders.

Should you have any queries or would like any further information, please do not hesitate to contact Mr Richard Theobald, Managing Scientist, Water on (08) 9222 6409.

Yours sincerely



Dr Michael Lindsay
**A/EXECUTIVE DIRECTOR
ENVIRONMENTAL HEALTH DIRECTORATE**

10 May 2019

Att.

Obligations under (the new) section 7 of the licence template – potable water services

The new section 7.1.1 is proposed to read text from section 6.1.1 of the current licence, viz.:

“Where the licensee is, or intends to, provide potable water, the licensee must enter into a MoU as described in this clause 7.1 with the Department of Health as soon as practicable after the commencement date or as otherwise agreed with the Department of Health.”

It is recommended that you take this opportunity to correct the wording of this, so as to read:

Where the licensee provides potable water, the licensee...

The reason for the change is that the Department of Health (DOH) does not customarily enter into a Memorandum of Understanding (MoU) until after the supply of potable water has been established. An intention to provide potable water at some future time, and in the absence of providing it, need not generate an immediate obligation. The licensee intending to provide potable water in the future, but not yet doing so, will be expected to be aware of the requirement under this Clause, becoming active once they do so.

Please also note that, whilst the MoU’s principally refer to the provision of drinking water, they may refer from time to time to non-potable water (non-drinking water) supplied by that licensee, to avoid circumstances where non-potable water being supplied or provided by that licensee may be mistaken for drinking water. This is a standard component of drinking water quality risk management pursuant to the ‘*Australian Drinking Water Guidelines*’ and is likely to be relevant for licensees that provide both potable and non-potable water supply services.

Whilst the DOH is of the view that this non-potable aspect of a MOU does not require any redrafting of the terms of section 7 of the licence template, as it is not new, it may be worth placing this on the record, in a guidance document, for the avoidance of doubt.

Obligations under (the new) section 7 of the licence template – sewerage services

In light of the Economic Regulation Authority’s (ERA) view that setting performance standards for water licensees is a policy matter for Government, the DOH proposes a licence requirement for licensees providing sewerage services to enter into a MoU with the DOH, to assist in managing public health risk associated with the operation of sewerage services.

This would operate in a manner following that for the current MoU about drinking water, and would require a simple additional clause to section 7, similar to 7.1.1, but reading words to the effect of:

Where the licensee provides sewerage services, the licensee must enter into a MoU as described in this clause 7.1 with the Department of Health as soon as practicable after the commencement date, or as otherwise agreed with the Department of Health.

The remaining clauses (numbered 7.1.2, 7.1.3, 7.1.4, 7.1.5 and 7.1.6) apply equally to potable water as to sewerage services and thus require no amendment, apart from sequential renumbering. Please note that the proposed new clause does not include the wording “or intends to”.

In both cases (potable water services and sewerage services) the wording permits deferral of such a MOU if that is agreed between the licensee and the DOH, based on circumstances applicable to a specific licensee. It is anticipated that this deferral would apply to smaller sewerage service licensees.

For the avoidance of doubt, the clause about MOU’s with the DOH should be drafted to make clear that the DOH contemplates a MOU in relation to drinking water, and a separate MOU in relation to sewerage services (i.e. not one combined MOU covering both topics). All other references to MOU’s should thus be plural, rather than singular.

Audits for potable (drinking) water

The operating licences for licensees that provide potable water (drinking water) services contemplate two kinds of audits:

1. An **operational audit** pursuant to section 25 of the Act which is administered by the ERA; and
2. An audit pursuant to the MoU between the DOH and the licensee for drinking water required under a potable water service licence. This audit is administered by the DOH in accordance with the terms of the MoU and generates an **audit report**.

The terms “**operational audit**” and “**audit report**” are defined terms listed in the operating licence, and relate to specific and separate auditing activities and documents.

It is therefore essential that the licence template maintains this clarity in terminology, and is written to assist licensees, auditors, regulators and other stakeholders in understanding the separate roles of the two audits and the separate procedures associated with each audit.

Accordingly, we recommend that the new section 7.1.2 (b) of the licence template includes an explanatory note stating to the effect that:

For the avoidance of doubt, an audit under a Memorandum of Understanding between the Department of Health and the licensee for drinking water is not the operational audit referred to in section 4.3 of the Operating Licence.

Similarly, we recommend that the definition of “**audit report**” is amended as per:

***Audit report** means a signed, written document that presents the purpose, scope and results of the audit by the Department of Health on compliance by the licensee of its obligations under a MoU, [INSERT] pursuant to section 7.1.2 of this licence.*

Requirement to report under (the new) section 7

The new section 7.1.6 is proposed to read text from section 6.1.6 of the current licence, viz.:

“The licensee must publish any other reports required by the Department of Health or set out in the MoU on the licensee’s website quarterly or at a reporting frequency specified by the Department of Health.”

Whilst “required by the Department of Health” is clear enough, it is recommended that you take this opportunity to clarify what “set out in the MoU” means. The sentence implies that the reports in question are “set out in the MoU”, which is not the case. If a report is required by the DOH, the MoU would set out a requirement to prepare or submit a report, or guidance on the report’s content and timing, but not set out the report itself. The DOH suggests ‘required by a MoU’ is a more accurate sense than “set out in the MoU”.

Further, if any report required by a MoU contains operationally sensitive information, it may be inappropriate to require publication of such information. It is suggested that ‘in a form agreed with the Department of Health’ is inserted into this clause, to align it with the clause 7.1.4, which has a similar caveat, as per:

The licensee must publish any other reports required by the Department of Health or ~~set out in~~ required by a MoU on the licensee’s website ~~quarterly or~~ at a reporting frequency specified by the Department of Health and in a form agreed with the Department of Health.

Note in this section, changes proposed from ‘the MOU’ to ‘a MOU’, to allow plural.

Reference to Australian Drinking Water Guidelines

The new licence template includes the extant definition that:

*“**potable water** means drinking water in accordance with the Australian Drinking Water Guidelines or as otherwise defined in the MoU between the licensee and the Department of Health.”*

The ‘Australian Drinking Water Guidelines’ is not otherwise explained in the template, despite it being integral to understanding what this defined term means. It is recommended that the ‘Australian Drinking Water Guidelines’ is properly cited in a footnote, viz.:

NHMRC, NRMCC (2011) Australian Drinking Water Guidelines Paper 6 National Water Quality Management Strategy. National Health and Medical Research Council, National Resource Management Ministerial Council, Commonwealth of Australia, Canberra, Version 3.5 Updated August 2018.

Reference to potable water supply services and non-potable water supply services

The new section 2.1 of the licence template is proposed to read text from section 1.1 of the current licence, viz.:

“The licensee is granted a licence for the operating area(s) to provide the following water services in accordance with the terms and conditions of this licence:

- (a) *water supply services:*
 - (i) *potable water supply services*
 - (ii) *non-potable water supply services”*

The new Schedule 3 of the licence template is also proposed to read text from Schedule 3 of the current licence, with a clause renumbering, viz.:

1.1.2 “For the purposes of clause 2.1, a water service does not include non-potable water supply services, except where the non-potable water supply service is supplied on the basis that the customer is responsible for treating the water to make it fit for humans to drink.”

On a prima facie basis, it looks like section 1.1.2 of Schedule 3 constrains section 2.1, such that it excludes certain types of non-potable water supply services from section 2.1, whereas Section 2.1 itself makes no such exclusion. Please clarify if this is intended, i.e. if clause 1.1.2 of Schedule 3 refers to Schedule 3 only, or fundamentally constrains the applicability of Section 2 of the licence when it comes to non-potable water supply services.

In any event, as far as can be ascertained, the template licence subdivides non-potable water supply services into those where *“the customer is responsible for treating the water to make it fit for humans to drink”*, and those not fitting that definition, yet at the same time does not appear to oblige the licensee to inform their customers of their responsibility, or identify to the regulator whether a particular non-potable service is being supplied on that basis.

That appears to be a significant oversight in customer communication obligations and can lead to the kind of situation referred to above about why non-drinking water may need to be referenced under the potable water MoU’s in certain circumstances.

It is recommended that you consider redrafting the terms of the licence to make clear that customers of licensees have no such liability. Any liability should rest with the licensee to properly inform customers that non-potable water supplied by the licensee is not suitable for drinking (or food preparation) without further treatment. If the customer wishes to use that water for drinking or food preparation, then, and only then, would the customer have a common law obligation to themselves to treat the water to the required potable standard, not a contractual obligation under the licence template wording.

Reference to Department of Water

The new licence template proposes that:

*“**Department of Water** means the Department of Water and Environmental Regulation or its successors in Western Australia.”*

However, neither term ‘Department of Water’, or ‘Department of Water and Environmental Regulation’, is referenced anywhere else in the template, making the above definition superfluous.

In any event, the correct terminology would be:

Department of Water and Environmental Regulation means the Department of Water and Environmental Regulation or its successors in Western Australia.

The DOH suggests deletion, unless the licence refers specifically to that Department.

Reference to performance standards in Schedule 2

The Issues paper states that:

“The ERA now proposes to delete the remaining performance standards from the template water licence.

The main reason for deleting the standards is that the ERA remains of the view that setting performance standards for water licensees is a policy matter for Government.”

Nonetheless, section 5.2 of the template licence retains the ability for the ERA to “*prescribe individual performance standards in relation to the licensee of its obligations under this licence or the applicable legislation*”, and sets out approval processes for that.

The ERA is requested to provide more detail of the nature of the individual performance standards being contemplated, as it is difficult to comment on this in the absence of this detail and in light of the ERA’s general position above.

In any event, the DOH requests that a general obligation is retained, such that licensees of **non-potable water services** and/or **irrigation services** must make sure they supply water that is suitable for the intended purpose, where ‘intended purpose’ means the reasonable range of uses intended or contemplated by the licensee in providing the service.

General heading for (the new) section 7

The DOH requests that the general heading for section 7 (copied from the current section 6 of the licence) is changed from “Health” to “Public Health”, to better align with the DOH’s focus in relation to public health under the ‘*Public Health Act 2016*’.