



**Applications by Services Sydney for Declaration of Sewage
Transmission and Interconnection Services**

Further Submission to the National Competition Council

19 July 2004

1. INTRODUCTION

This document contains the further submissions of Services Sydney Pty Ltd (**Services Sydney**) to the National Competition Council (**Council**). This further submission is in response to the submission of Sydney Water Corporation (**Sydney Water**) dated 4 June 2004 (**Sydney Water submission**) in relation to Services Sydney's Application for declaration of sewage transmission and interconnection services provided by Sydney Water dated 1 March 2004 (**Application**).

The Sydney Water submission raises a number of issues in relation to Sydney Water's sewage collection service operations and Services Sydney's 'Sustaining the City' proposal which are not relevant to the Council's assessment of the Application. Services Sydney considers that it is only necessary to address the critical matters that Sydney Water claims have not been established by the Application and upon which the Council must be satisfied in order to make a recommendation with respect to declaration.¹ These matters concern whether:

- (a) the transmission of sewage is in a separate market from the Sewage Collection Market as defined in the Application;
- (b) declaration will enhance the environment for competition in the Sewage Collection Market;
- (c) the costs that would necessarily be borne in establishing the mechanism to enable the system necessary for the Services Sydney proposal to operate as proposed would be outweighed by the benefits which can be achieved; and
- (d) the Sydney Sewage Reticulation Network constitutes a facility for the purpose of Part IIIA of the *Trade Practices Act 1974* (Cth) (the **TPA**) or three separate facilities namely, the NSOOS, BOOS and SWSOOS sewers.

These matters are addressed separately below. Unless otherwise stated, this further submission adopts the defined terms set out in the Application and Services Sydney's submission dated 4 June 2004 (**Services Sydney's submission**).

¹ Sydney Water submission, para 11.

2. SEPARATE SEWAGE TRANSMISSION MARKET

2.1 Overview

The Council has stated that in order for markets to be regarded as functionally separate:

“the layers at issue must be separable from an economic point of view (economically separable). That is, the transaction costs in the separate provision of the good or service at the two layers cannot be so large as to prevent such separate provision from being feasible. In effect, to be different markets, vertical integration must not be inevitable.”²

Sydney Water claims that there is no separate market for sewage transmission services as it is not possible to establish a commercial interface between sewage transmission services and the sewage collection function.³ This is based on an assertion that:

- (a) the heterogeneity of sewage means there is no basis upon which a price for transmission services can be determined;⁴ and
- (b) there are extensive transaction costs involved in the competitive provision of sewage collection services so that separate provision is not economically viable.⁵

2.2 Heterogeneity of sewage

Before addressing Sydney Water’s arguments with respect to heterogeneity, it is important to note that there are other sewage collection markets in which the transmission function has been separated from sewage treatment and disposal. For example, Melbourne's water industry is split into three separate government-owned retail businesses City West Water, South East Water and Yarra Valley Water, and one wholesaler, Melbourne Water Corporation. Melbourne Water is responsible for managing Melbourne's water catchments and storages, and supplies bulk water to the three retail businesses. The three retail companies supply different sections of Melbourne.⁶

Further, in Auckland, the sewage collection and transmission function is performed by four local operators in the Auckland area: Manukau City Council, Waitakere City Council, Metro Water Ltd and United Water. The sewage treatment provider, Watercare Services Limited, then takes

² *The National Access regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part B Declaration*, National Competition Council, December 2002, para 5.23.

³ Sydney Water submission, para 13.

⁴ Sydney Water submission, paras 77 – 90.

⁵ Sydney Water submission, paras 91 – 125.

⁶ See http://www.melbournewater.com.au/system/mainFrameset.asp?path=/about_us/about_us.asp

sewage from these local operators at approximately 2200 interconnection points and transmits this sewage through an extensive bulk network to a single sewage treatment plant.⁷

Services Sydney acknowledges that the inputs to the Sydney Sewage Reticulation Network at the boundary trap of each sewage collection customer are not uniform and that the output of the Sydney Sewage Reticulation Network at the Interconnection Points comprises an intermingled sewage product with the average pollution load of all inputs. However, the fact that sewage is heterogeneous does not preclude the determination of appropriate prices and terms and conditions for transmission services, either through commercial negotiation or arbitration, sufficient to sustain functional separation of transmission from collections and/or treatment.

Most network industries involve inputs which are not identical, with a commingled output, for example gas and electricity. Inputs merely need to be within an acceptable range. In this regard the heterogeneity of sewage is only relevant to the Application to the extent that sewage with different pollution loads imposes different costs on other users of the Sydney Sewage Reticulation Network (**users**) such that it is necessary to identify the source of that difference. Services Sydney is not aware of, and Sydney Water has not identified, any relevant increase in the transmission or treatment and disposal costs of other users arising from the addition of an above average pollution load customer to the Sydney Sewage Reticulation Network. Even if such an increase in costs was incurred by other users, effective access to the interconnection and transmission services can be ensured through the development of arrangements to identify the extent of this increase and the source of the increase so that this increase could be reflected in the price or other terms and conditions for the transmission service.

Sydney Water currently performs these functions as part of its sewage collection operations. As set out in the Sydney Water submission,⁸ Sydney Water categorises customers on the basis of the extent to which its customers increase the average pollution load on the outputs of the Sydney Sewage Reticulation Network. These customer categories broadly include:

- (a) domestic households, which have relatively uniform pollution loads;
- (b) commercial and industrial premises with relatively light pollution loads;
- (c) commercial and industrial premises with notable waste discharge needs; and
- (d) heavy industrial concerns with significant trade waste requirements.

⁷ See <http://www.watercare.co.nz/default,125.sm>

⁸ Sydney Water submission, para 76.

Sydney Water has also developed charging arrangements on the basis of these categories that reflect the pollution load characteristics of each category, and in some circumstances, such as trade waste customers, also differentiates within a category.⁹ While the pollution load of any two customers that are charged on the basis of the same tariff is unlikely to be exactly the same, Sydney Water's tariff system makes it clear that within a certain range, the impact of the pollution load of a customer on the costs of operating Sydney Water's transmission and treatment and disposal assets is not material. As acknowledged by Sydney Water, customers are separated into different pollution load categories that reflect the relevance of making such a distinction so that customers will only be charged different amounts where their impact on Sydney Water's costs is material.¹⁰

The arrangements in support of the competitive provision of Sewage Collection Services could address the heterogeneity of sewage in a similar manner to that currently adopted by Sydney Water. As it is possible to determine or, where required, monitor the average pollution load of each customer within ranges that are material to any impact on the costs of the system, an assessment of the average pollution load of Services Sydney's customers can be made against the average pollution load of intermingled sewage at the Interconnection Points.

To the extent that other users of the Sydney Sewage Reticulation Network are able to demonstrate an increase in their costs as a result of an above average pollution load of Services Sydney's or any other user's customer base, it is possible to design market mechanisms that establish a price and other terms and conditions for the sewage transmission service that take this into account. These include, where the sewage attributable to a customer of a user is materially above the average pollution load of the sewage at the Interconnection Points:

- (a) the price for transmission services could reflect this increase in the average pollution load so that other users would be compensated for any increase in the average cost of treatment and disposal;
- (b) the volume of sewage extracted by the user at the Interconnection Points could be adjusted to reflect this increase in the average pollution load so that there was no increase in the average cost of treatment and disposal of other users;
- (c) the user could be required to ensure that the relevant customer provide for on site treatment of sewage that is outside certain specifications so that the average pollution load of the customer's sewage was lowered to the average pollution load at the interconnection points; or

⁹ Sydney Water submission, paras 77 – 78.

¹⁰ Sydney Water submission, para 77.

- (d) if a market solution could not be developed, the user could be precluded from providing sewage collection services to the particular customer.

It is not clear at this stage which of these or other market mechanisms is the most appropriate in the context of the Application. Declaration criteria (a) does not require Services Sydney to put forward the market mechanism that will ultimately be employed. What is clear is that the ability to classify the pollution load of sewage at the customers boundary trap and the Interconnection Points provides a basis to address the heterogeneity of sewage. Ultimately, the most appropriate market mechanism will be determined through commercial negotiations between Services Sydney or other access seekers and Sydney Water.

We note that to the extent that it is not possible for an access seeker to agree a price for the transmission service through commercial negotiations, it is within the power of the Australian Competition and Consumer Commission (**Commission**) under Part IIIA of the TPA to set a price or other terms and conditions for the transmission service that addresses the issue of the heterogeneity of sewage. Section 44V(2) of the TPA provides that a Commission access determination:

“may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

- (a) require the provider to provide access to the service by the third party;*
- (b) require the third party to accept, and pay for, access to the service;*
- (c) specify the terms and conditions of the third party's access to the service;*
- (d) require the provider to extend the facility; and*
- (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.”*

Further, s 44X of the TPA sets out certain relevant matters the Commission must consider in making a determination as follows:

- (1) The Commission must take the following matters into account in making a determination:*
 - (a) the legitimate business interests of the provider, and the provider's investment in the facility;*

- (b) *the public interest, including the public interest in having competition in markets (whether or not in Australia);*
 - (c) ***the interests of all persons who have rights to use the service;***
 - (d) *the direct costs of providing access to the service;*
 - (e) *the value to the provider of extensions whose cost is borne by someone else;*
 - (f) *the operational and technical requirements necessary for the safe and reliable operation of the facility; and*
 - (g) *the economically efficient operation of the facility.*
- (2) *the Commission may take into account any other matters that it thinks are relevant.*

These examples and principles, which are not exhaustive, clearly provide scope for the Commission to make determinations that address any issues that arise as a result of access to services provided by that facility being granted to a third party including heterogeneity of sewage inputs. In fact, s44X(1)(a) and (c) of the TPA expressly require the Commission to take these matters into account in making an access determination.

2.3 Transaction costs

Sydney Water claims that the costs that would necessarily be borne in establishing the appropriate mechanism for the Services Sydney proposal to operate would outweigh the benefits which can be achieved.¹¹ Sydney Water asserts that the following transaction costs may arise in connection with the introduction of competition into the Sewage Collection Market:¹²

- (a) capital and operating costs that may be borne by Services Sydney in relation to:
 - (i) engineering works required at the Interconnection Points;
 - (ii) the new trunk main sewer to connect the Sydney Sewage Reticulation Network at the Interconnection Points;

¹¹ Sydney Water submission, paras 91 – 125.

¹² Sydney Water submission, para 91.

- (iii) establishing a relationship with sewage collection customers;
- (b) regulatory costs that may be borne by the community including the cost of determining the price of transmission services, developing consumer protection arrangements, conducting environmental impact statements and the ongoing costs of regulating new entrants; and
- (c) capital and operating costs that may be borne by Sydney Water in relation to the impact of reduced sewage flows arising from the implementation of Services Sydney proposal on Sydney Water's existing sewage treatment plants.

The costs that Sydney Water have identified as likely to be incurred by Services Sydney in developing and implementing the Sustaining the City proposal are not relevant to the Application. These costs have been taken into account in Services Sydney's business model with respect to the supply of sewage collection services in competition with Sydney Water. The business model demonstrates that these costs will be outweighed by efficiency and environmental and natural resource benefits arising from the Sustaining the City proposal and Services Sydney's ability to market those benefits to retail customers. A copy of Services Sydney's business model has been provided to Sydney Water's legal and economic advisers.

The costs Sydney Water claims may be incurred by the community as a result of declaration relate to market design issues that have arisen from the introduction of competition into other industries. Sydney Water does not establish or claim that these costs will actually be incurred as a result of declaration. Further, Services Sydney does not consider that the regulatory changes identified by Sydney Water are required to facilitate the introduction of competition to the Sewage Collection Market. There can be no presumption that government or regulatory bodies would incur regulatory costs which are not essential in circumstances where such costs are not outweighed by benefits to the community.

To the extent that there could be any costs borne by Sydney Water in relation to the impact of reduced sewage flows on Sydney Water's existing sewage treatment plants, these are costs arising from competition in sewage treatment and disposal and not arising from the provision of access to the Sydney Sewage Reticulation Facility. Competition in the supply of sewage collection services will provide an incentive for Sydney Water to reduce its average cost of treatment and disposal operations. Whether Sydney Water elects to achieve this by reducing operating costs or making investments in new technology is a commercial decision for Sydney Water and not a relevant consideration for the Council in assessing the Application.

To the extent that the Council considers costs borne by Sydney Water in relation to the impact of reduced sewage flows on Sydney Water's existing sewage treatment plants to be relevant, Services Sydney does not accept that these costs are significant. As noted by Sydney Water,

the risk of ingress of seawater into Sydney Water’s ocean outfalls could be addressed by simply shutting a number of the nozzles that form part of the outfall diffusers.¹³

In fact, the provision for such an arrangement would be consistent with Sydney Water’s ultimate statutory goal of eliminating dry weather discharges of sewage to waters, including ocean outfalls, under the *Sydney Water Act 1994* (NSW).¹⁴

3. PROMOTION OF COMPETITION

3.1 Overview

In considering criteria (a) in the context of applications for declaration the Council has adopted¹⁵ the position of the Australian Competition Tribunal (**Tribunal**) in the *Sydney Airports* decision¹⁶ as follows:

“the notion of promoting competition in s. 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say the opportunities and environment for competition given declaration would be better than they would be without declaration.”

As a result, it is not necessary for Services Sydney to demonstrate that the level of competition will actually be increased by declaration but rather that declaration will improve the environment for competition by unlocking a bottleneck service.

Sydney Water relevantly asserts that even if there is a separate market for sewage transmission services, declaration would not promote competition because:

- (a) regulatory constraints prevent Sydney Water from having market power with respect to the Sewage Collection Market;¹⁷
- (b) underpricing of sewage collection services by the Independent Pricing and Regulatory Tribunal (**IPART**) and the regulatory approvals required mean that profitable entry to the sewage collection market is not possible; and¹⁸

¹³ Sydney Water submission, para 121.

¹⁴ Section 27(1) *Sydney Water Act 1994* (NSW).

¹⁵ *The National Access regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part B Declaration*, National Competition Council, December 2002, para 2.14.

¹⁶ *Re: Review of Declaration of Freight Handling Services at Sydney International Airport* (2000) ¶ATPR 41-754 at para 106.

¹⁷ Sydney Water submission, para 134 – 140.

¹⁸ Sydney Water submission, para 141 – 154.

- (c) any competition resulting from third parties providing alternative treatment and disposal services is available through sewer mining without the need for declaration.¹⁹

3.2 Market Power of Sydney Water

Sydney Water acknowledges that whether competition is promoted by declaration depends upon whether the service provider has market power in the primary market that it could use to adversely effect competition in a dependent market.²⁰ Sydney Water then claims that because of pricing and service quality constraints imposed by IPART, Sydney Water does not have the ability to adversely affect competition in the Sewage Collection Market.

This analysis ignores Sydney Water's ability to engage in strategic behaviour designed to leverage its market power as the monopoly supplier of interconnection and transmission services into the Sewage Collection Market. This practice has been acknowledged by the Council as a means of exercising market power.²¹ Sydney Water is able to exercise this market power by refusing competitors in the Sewage Collection Market access to the primary interconnection and transmission services. Such refusal would adversely affect competition in the Sewage Collection Market in that competition would be extinguished.

Clearly, Sydney Water has market power with respect to the provision of sewage transmission and interconnection services. By providing third parties with a regulated right of access and the ability to obtain arbitrated terms and conditions of access with respect to the interconnection and transmission services, declaration will promote competition in the dependant Sewage Collection Market.

3.3 Profitable entry to the Sewage Collection Market

Sydney Water claims that underpricing of sewage collection services by IPART and the regulatory approvals required prevent profitable entry to the Sewage Collection Market.²² In doing so, Sydney Water asserts that:

- (a) for competition to be introduced into the Sewage Collection Market the current integrated tariff for sewage collection services determined by IPART would need to be unbundled to

¹⁹ Sydney Water submission, para 8 and 204.

²⁰ Sydney Water submission, para 135.

²¹ *The National Access regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part B Declaration*, National Competition Council, December 2002, para 5.87.

²² Sydney Water submission, para 141 – 154.

determine a separate charge for the use of the Sydney Sewage Reticulation Network;²³
and

- (b) the asset base and rate of return adopted by IPART in determining the tariff for sewage collection services provided by Sydney Water is not adequate.²⁴

Sydney Water does not address the viability of the business model developed by Services Sydney. This business model demonstrates that entry into the Sewage Collection Market is feasible.

Services Sydney does not envisage any difficulty in unbundling the current integrated tariff for sewage collection services determined by IPART. This is because the cost exercise required to support this process has already been undertaken by Sydney Water. Details of Sydney Water's unbundled annual operating costs, being retail, collection, treatment and load based pollution licence fees are set out in Sydney Water's submission to IPART²⁵ in relation to IPART's current determination.²⁶

Provided that interconnection and transmission services are supplied to third parties on a competitively neutral basis, Sydney Water cannot maintain that the feasibility of entry into the Sewage Collection Market will be impacted by the price charged by Sydney Water for interconnection and transmission services. In a competitive Sewage Collection Market, the price of these monopoly inputs would be passed through to customers by Sydney Water and competing service providers as part of the retail price for sewage collection services. To the extent that Sydney Water contends that it is under-recovering with respect to its sewage treatment and disposal operations, this would only enhance Services Sydney's competitive position.

3.4 Sewer Mining

Sydney Water claims that any competition resulting from third parties providing alternative treatment and disposal services is currently available through sewer mining, without the need for declaration.²⁷ Services Sydney strongly disagrees with this proposition. Sydney Water's analysis ignores the fact that sewer mining does not provide Services Sydney with:

- (a) an enforceable right of access with respect to interconnection and transmission services;

²³ Sydney Water submission, para 141.

²⁴ Sydney Water submission, para 141 – 154.

²⁵ Sydney Water submission to IPART - Prices for Water, Sewerage and Stormwater (2000-2004) dated 20 December 1999. Table 3.5 p 34

²⁶ Independent Pricing and Regulatory Tribunal of New South Wales – Sydney Water Corporation – Prices of Water Supply, Wastewater and Stormwater Services – Determination 4, 2003 – May 2003.

²⁷ Sydney Water submission, para 204.

- (b) the ability to market outcomes relating to both price and quality directly to retail customers; or
- (c) a commercial price for the transmission of sewage from the boundary traps of Sydney Water's customers to the point of extraction by Services Sydney.

While Sydney Water acknowledges that an effective access regime does not exist with respect to the provision of transmission services it does claim the interconnection services are the subject of an access regime.²⁸

The principles relevant to determining whether an effective access regime exists with respect to a service are set out in clause 6(4) of the Competition Principles Agreement. Clause 6(4)(g) of the Competition Principles Agreement provides that where there is a dispute in relation to the terms and conditions of access to the relevant service, the parties should be required to appoint and fund an independent body to resolve the dispute.

This ability to enforce rights of access is fundamental to any effective access regime and is not present in the sewer mining regime administered by IPART. As a result, the only conclusion available to the Council is that no effective access regime exists with respect to both interconnection and transmission services.

Further, sewer mining has not been and is not able to stimulate competition in the Sewage Collection Market. Customer choice remains limited to the outcomes offered by Sydney Water as a monopoly provider of sewage collection services. Competition will be enhanced as a result of declaration as declaration will enable third parties seeking to attract customers on the basis of improved outcomes, such as environmental and natural resource outcomes, to market these outcomes directly to retail customers.

Nor does sewer mining provide third party sewage treatment and disposal service providers with a commercial price for the transmission of sewage from the boundary traps of Sydney Water's customers to the point of extraction. Firstly, Sydney Water receives a regulated return for both its sewage transmission operations (for which it is a monopoly service provider) and its sewage treatment and disposal operations (which are theoretically contestable, as acknowledged under sewer mining). In circumstances where a third party extracts sewage for treatment and disposal, the zero charge for sewer mining under the current IPART determination means Sydney Water continues to receive a regulated return with respect to a service that it is not providing. In fact, the efficient price for sewer mining should be negative.

²⁸ Sydney Water submission, para 201- 202.

Secondly, sewer mining does not provide third party sewage treatment and disposal service providers with a commercial timeframe within which to compete with Sydney Water. The current IPART determination²⁹ with respect to sewer mining is applicable from 1 July 2003 to 1 July 2005. This timeframe is wholly inadequate to provide third parties the commercial certainty required to engage in the provision of sewage treatment and disposal services on any significant scale.

3.5 Other dependant markets

The Sewage Collection Market could be further divided into markets for the provision of sewage treatment and disposal services, retail management services and facilities management services. Declaration is likely to enhance the environment for competition in each of these markets.

Declaration will also promote competition in the supply of reclaimed water. Services Sydney's business case is not dependent upon its ability to market reclaimed water, but this is an area Services Sydney will explore once the infrastructure has been established. In the short term however, Services Sydney envisages that declaration will enable and encourage smaller scale water reclamation projects that will compete in the supply of water (most likely for 'grey' water applications) as an alternative to potable water supplied by Sydney Water.

4. FACILITY v FACILITIES

The Council's Issues Paper raised the issue of whether the Sydney Sewage Reticulation Network constitutes a facility for the purpose of Part IIIA of the *Trade Practices Act 1974* (Cth) (the **TPA**) or three separate facilities, namely; the NSOOS, BOOS and SWSOOS sewers.³⁰

The Sydney Water submission claims that each of the NSOOS, BOOS and SWSOOS sewers is a distinct facility because:³¹

- (a) the three systems are not physically interconnected;
- (b) the three systems have different size, population density and wastewater quality condition;
- (c) the three systems are operated independently;

²⁹ Independent Pricing and Regulatory Tribunal of New South Wales – Sydney Water Corporation – Prices of Water Supply, Wastewater and Stormwater Services – Determination 4, 2003 – May 2003.

³⁰ National Competition Council - Application by Services Sydney for declaration of sewage transmission and interconnection services provided by Sydney Water - Issues Paper – April 2004.

³¹ Sydney Water submission, para 42.

- (d) the system hydraulic characteristics are unique to each of the three systems;
- (e) the New South Wales Department of Environment and Conservation treats these systems as three separate systems with three separate licences;
- (f) each system drains to geographically and topographically distinct areas; and
- (g) the ratio of dry to wet weather flows is a distinct characteristic of each network.

Services Sydney does not accept this description of the Sydney Sewage Reticulation Network. For example the Department of Environment and Conservation licences are virtually the same with regards to discharge requirements into the ocean. The hydraulic characteristics of the NSOOS, BOOS and SWSOOS are the same in that they generally utilise gravity flows towards the ocean with pumping stations where necessary. As set out in the Services Sydney submission, there is little difference in the topography across Greater Sydney and the NSOOS, BOOS and SWSOOS are constantly evolving in terms of interconnection.³²

In any event, the Sydney Water submission fails to address:

- (a) why these characteristics should influence the Council in determining the relevant facility for the purpose of the Application; and
- (b) the meaning of the term ‘facility’ in the context of Part IIIA of the TPA.

These issues were addressed in Services Sydney’s submission.³³ In summary, the relevant facility should be defined by reference to the relevant purpose of Part IIIA of the TPA, the identification of a service, the declaration of which will promote competition in an upstream or downstream market. An applicant makes an application for declaration of a service. This is the starting point of the analysis. In this case, Services Sydney has sought declaration of a transmission service and an interconnection service. Having identified the service for which declaration is sought, the service must have certain characteristics.

Access to the service must be likely to promote competition in a relevant upstream or downstream market, being the Sewage Collection Market (comprising retail collection, treatment and disposal – which activities may also be relevantly considered as being potentially supplied in distinct markets). In this regard, Services Sydney also notes it makes no practical sense, and serves no useful purpose, to identify markets by reference to areas less than the metropolitan region of Sydney.

³² Services Sydney submission, p 7.

³³ Services Sydney submission, p 4 – 7.

Then the service must be provided by means of a facility. The purpose of identifying a facility is to ascertain whether the assets or infrastructure (to use another term) by which the service is provided have certain characteristics which, for public policy reasons, are important in determining whether third party access should be granted to particular services provided by means of those assets or infrastructure. Those criteria are whether a facility is uneconomic to duplicate and whether a facility is of national significance. This is why the word ‘facility’ is used in Part IIIA of the TPA, not because it is important in and of itself, but rather because it provides a vehicle through which those public policy questions can be resolved.

The word ‘facility’ is not included in ss 44G(2) and 44H(4) of the TPA for the purpose of requiring some particularly close forensic task be undertaken to identify precisely a set of particular assets which comprise the one right facility. In much the same way that in market definition analysis under the TPA, there is not necessarily one right market definition.

In this regard it is not the purpose of ss 44G(2) and 44H(4) of the TPA that the Council assess whether all the assets which comprise a facility identified as provided the service for which declaration is sought are connected or not, but whether those assets taken as a whole can constitute a facility, by which the applied for service is provided and which has the relevant characteristics identified above.

Accordingly, the absence of physical interconnection between a set of assets can not be determinative of whether a set of assets may be considered a ‘facility’ utilised in the provision of a service that is the subject of an application for declaration under Part IIIA of the TPA.

Furthermore, it is entirely open to the Council to read the word facility as including ‘facilities’, as is required by the Acts Interpretation Act, unless a contrary intention appears. There is of course no express contrary intention in Part IIIA of the TPA and the above analysis makes it clear that no relevant contrary intention can be implied in Part IIIA. Accordingly, if a set of related but physically distinct assets utilised for the provision of common services may be more appropriately viewed as separate facilities, these separate facilities may be utilised in the provision of a single service for the purpose of Part IIIA of the TPA.³⁴ In this regard, the criteria in s 44G(2)(b) and (c) (s 44H(4)(b) and (c)) are to be applied to the combination of ‘facilities’.

As a result, it is open to the Council to adopt the Sydney Sewage Reticulation Facility as defined in Services Sydney’s submission as the relevant facility for the purpose of the Application.³⁵ Further, Services Sydney considers that this is the most appropriate approach for the Council to take in the context of the Application.

³⁴ See Services Sydney submission, p 4.
³⁵ Services Sydney submission, p 2 – 3.