

**Attachment –
Assessment of the NSW Water Industry Access Regime against the Competition Principles Agreement principles**

Competition Principles Agreement (CPA)		NSW Water Industry Infrastructure Access Regime
Clause 6(4)(a)	Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.	<p>Section 39(1) of the <i>Water Industry Competition Act 2006</i> (NSW) (the “Act”) provides that the terms on which access is to be provided are to be set out: (a) in an agreement between the service provide and the access seeker; or (b) if no such agreement can be reached, in an access determination.</p> <p>Section 40(1) of the Act provides that the Independent Pricing and Regulatory Tribunal (IPART) may refuse to accept an application for an access determination if it is not satisfied that the applicant has attempted good faith negotiation.</p>
Clause 6(4)(b)	Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.	<p>Section 39(1)(b) of the Act provides that if access terms cannot be agreed, they are to be set out in an access determination.</p> <p>Section 40 of the Act confers a right on service providers and access seekers to apply to IPART for a dispute about access terms to be determined by arbitration.</p>
Clause 6(4)(c)	Any right to negotiate access should provide for an enforcement process.	<p>Section 40 of the Act provides for binding arbitration in the event that agreement cannot be reached by negotiation.</p> <p>Under section 40(4) of the Act, an access determination is enforceable in accordance with the <i>Commercial Arbitration Act 1984</i> (NSW).</p>
Clause 6(4)(d)	Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be revoked.	<p>A coverage declaration made under Division 2 of Part 2 of the Act must state the period for which it is to have effect (section 27).</p> <p>IPART is required to include a recommendation on the period for which a coverage declaration should have effect in its report to the Minister (section 25(3)(b)).</p> <p>The expiry or revocation of a coverage declaration does not affect existing access rights and obligations (whether under an access</p>

		agreement or an access determination).
clause 6(4)(e)	The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of a person seeking access.	<p>The availability of legally binding arbitration (section 40) creates an incentive for service providers to accommodate reasonable endeavours of access seekers.</p> <p>Further, under clause 8(3) of the Water Industry Competition (Access to Infrastructure Services) Regulation 2007 (the "Regulation"), IPART is required to develop negotiation protocols. These must include an obligation on the service provider to use all reasonable endeavours to accommodate the access seeker's requirements (clause 8(3)(b)).</p> <p>Failure to comply with these negotiation protocols is a matter which IPART must take into account when determining whether or not the parties have, in good faith, attempted to negotiate the terms of access. Under section 40(2) of the Act, IPART is permitted to refuse to accept an application for arbitration if the party applying for arbitration has not attempted to negotiate in good faith.</p>
clause 6(4)(f)	Access to a service for persons seeking access need not be on exactly the same terms and conditions.	<p>Nothing in the access regime requires access to a service for different access seekers to be on the same terms and conditions.</p> <p>The Act voids provisions in access agreements that prohibit a service provider from providing a service to other users on more advantageous terms (section 39(2)(b)).</p> <p>The Act also requires that the arbitrator must have regard to pricing principles when determining a dispute in relation to price (section 41) (see below) and those principles include that the price of access should allow multi-part pricing and price discrimination when it aids efficiency.</p>
clause 6(4)(g)	Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.	<p>Section 40 of the Act provides that if a dispute exists between a service provider and an access seeker as to the terms on which the access seeker is to be given access to a service the subject of a coverage declaration or access undertaking either party may apply to IPART for the dispute to be determined by arbitration.</p> <p>The Act applies the <i>Commercial Arbitration Act 1984</i> to access</p>

		<p>arbitrations (section 40(4)). Section 34(1) of the <i>Commercial Arbitration Act</i> provides for the arbitrator to make costs orders. These include in relation to the costs of the arbitrator (see clause 11 of the Regulation, clause 7 of the Independent Pricing and Regulatory Tribunal Regulation 2007, and section 34 of the <i>Commercial Arbitration Act</i>).</p>
<p>clause 6(4)(h)</p>	<p>The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.</p>	<p>The Act applies relevant sections of the <i>Independent Pricing and Regulatory Tribunal Act 1992</i> (the "IPART Act") (section 40(5)). Section 24D of the IPART Act requires the parties to an arbitration to give effect to the arbitration determination.</p> <p>The Act also applies the <i>Commercial Arbitration Act 1984</i> to access arbitrations (section 40(4)). Section 28 of the <i>Commercial Arbitration Act</i> provides that an award made by the arbitrator is final and binding on the parties and section 33 provides for enforcement of awards made under an arbitration agreement by the courts. Existing appeal rights under the <i>Commercial Arbitration Act</i> apply (section 38).</p>
<p>clause 6(4)(i)</p>	<p>In deciding on the terms and conditions for access, the dispute resolution body should take into account:</p> <ul style="list-style-type: none"> (i) the owner's legitimate business interests and investment in the facility; (ii) the costs to the owner or providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets; (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake; (iv) the interests of all persons holding contracts for the use of the facility; (vi) the operational and technical requirements necessary for the safe and reliable operation of 	<p>The Act applies relevant sections of the IPART Act 1992 to arbitrations (section 40(5)).</p> <p>In particular, section 24B(3)(a) of the IPART Act requires that, in the arbitration of a dispute, the arbitrator must take into account the matters set out in clause 6(4)(i),(j), and (l) of the Competition Principles Agreement.</p>

	<p>the facility;</p> <p>(vii) the economically efficient operation of the facility;</p> <p>(viii) the benefit to the public from having competitive markets.</p>	
clause 6(4)(j)	<p>The owner may be required to extend, or to permit extension of, the facility that is used to provide the service but this would be subject to:</p> <p>(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;</p> <p>(ii) the owner's legitimate business interests in the facility being protected;</p> <p>(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.</p>	<p>The Act applies relevant sections of the IPART Act 1992 to arbitrations (section 40(5)).</p> <p>In particular, section 24B(3)(a) of the IPART Act requires that, in the arbitration of a dispute, the arbitrator must take into account the matters set out in clause 6(4)(i),(j), and (l) of the Competition Principles Agreement.</p>
clause 6(4)(k)	<p>If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.</p>	<p>Section 40 of the Act provides that, if a dispute exists between a service provider and an access seeker (including as to any matter arising under an existing access agreement or determination), either party may apply to IPART for the dispute to be determined by arbitration.</p>
clause 6(4)(l)	<p>The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.</p>	<p>The Act applies relevant sections of the IPART Act 1992 to arbitrations (section 40(5)).</p> <p>In particular, section 24B(3)(a) of the IPART Act requires that, in the arbitration of a dispute, the arbitrator must take into account the matters set out in clause 6(4)(i),(j), and (l) of the Competition Principles Agreement.</p>

clause 6(4)(m)	The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.	Section 43 of the Act makes it an offence for the provider or user of a service (or a related body corporate) to engage in conduct for the purpose of preventing or hindering any other person from obtaining or exercising rights of access to that service.
clause 6(4)(n)	Separate accounting arrangements should be required for elements of a business which are covered by an access regime.	<p>Section 42 of the Act requires service providers whose infrastructure services become the subject of a coverage declaration to keep separate accounts for those services and to prepare a cost allocation manual for approval by IPART. The Act creates an offence for failure to comply with this section (section 42(10)).</p> <p>Within three months of a coverage declaration, service providers must keep separate accounts for relevant infrastructure services and submit a cost allocation manual to IPART, setting out the basis on which the service provider proposes to establish and maintain accounts for covered services (section s.42(1)-(2)).</p> <p>Within three months of IPART's approval, the service provider must ensure that costs are allocated in accordance with the manual (section 42(5)).</p> <p>Copies of the cost allocation manual must be made available for inspection free of charge by the service provider (section s.42(7)).</p>
Clause 6(4)(o)	The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to the service.	<p>Service providers must develop cost allocation manuals for IPART approval, keep accounts in accordance with the manual, and make the manual publicly available (section 42).</p> <p>Section 40(5) of the Act applies relevant sections of the <i>IPART Act</i> to arbitrations. The <i>IPART Act</i> (sections 22 and 24B(4)) empowers the arbitrator to require any person to send information or documents, or to attend at a hearing to give evidence.</p> <p>The Act also applies the <i>Commercial Arbitration Act 1984</i> to access arbitrations (section 40(4)). Section 18 of the <i>Commercial Arbitration Act</i> provides for court enforcement of requests to attend arbitration or produce documents. Section 37 of the <i>Commercial Arbitration Act</i> requires parties to an arbitration to, at all times, do all things which the arbitrator requires to enable a just award to be made, and prohibits</p>

		actions to delay or prevent an award being made.
clause 6(4)(p)	Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.	Not applicable.
clause 6(5)(a)	Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream and downstream markets.	Section 21 of the Act provides that the object of the access regime is to establish a scheme to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream or downstream markets.
clause 6(5)(b)	<p>Regulated access prices should be set so as to:</p> <ul style="list-style-type: none"> (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved; (ii) allow multi-part pricing and price discrimination when it aids efficiency; (iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and (iv) provide incentives to reduce costs or otherwise improve productivity. 	<p>Section 41 of the Act sets out the pricing principles which must IPART and/or the arbitrator must have regard when determining access terms, as follows:</p> <ul style="list-style-type: none"> (i) the price of access should generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; (ii) the price of access should allow multi-part pricing and price discrimination when it aids efficiency; (iii) the price of access should not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent to which the cost of providing access to other operators is higher; and (iv) the price of access provide incentives to reduce costs or otherwise improve productivity. <p>To ensure consistency with existing determinations and policy for the pricing of water supply and sewerage services, section 41(3) of the Act</p>

		provides that the above pricing principles are to be implemented in a manner that is consistent with any existing determinations.
clause 6(5)(c)	Where merits review of regulatory decisions is provided, the review will be limited to the information submitted to the regulator.	Not applicable (merits review not provided).