NATIONAL
COMPETITION
COUNCIL

South Australian Water Access Regime

Application for certification under section 44M of the *Competition and Consumer Act 2010* (Cth)

Draft Recommendation

3 March 2017

Table of contents

Abbreviations and defined terms

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Applicant	SA Government
Application	The South Australian Government's application for a recommendation for certification of the SA Water Access Regime received on 11 November 2016
CCA	*Competition and Consumer Act 2010* (Cth)
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement, see Appendix A
conciliation	Settlement of a dispute by reference to ESCOSA
Council	National Competition Council
CPA	Competition Principles Agreement
declaration criteria	The criteria for declaration set out in ss44G(2) and 44H(4) of the CCA
ESC Act	*Essential Services Commission Act 2002* (SA)
Exposure Draft	Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*
ESCOSA	The Essential Services Commission of South Australia
Guide	The Council's Guide to Certification of State and Territory Access Regimes, November 2013 (version 5)
IGA	Intergovernmental Agreement on Competition and Productivity-enhancing Reforms between the Commonwealth of Australia and New South Wales, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory, dated 9 December 2016
Minister	The Minister of the Government of South Australia with responsibility for administering the WI Act
Pilbara	*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36
Pipelines	The water pipelines operated by SA Water referred to in clause 4(2)(a)(ii) of the Proclamation (namely Murray Bridge to Onkaparinga; Mannum to Adelaide; Swan Reach to Paskerville; Myponga to Adelaide; Morgan to Whyalla; Tailem Bend to Keith; Eyre Peninsula; Glenelg to Adelaide)
Pipeline Services	The services provided by the Pipelines, including infrastructure and infrastructure services (such as treatment plants, pumping stations, storage tanks and

	surge protection units and valves) the use of which is necessary to transport water through the Pipelines
Prescribed Provisions	Sections 86F (other than subsection (1)(c) and (d)), 86H, 86ZO and 86ZP of the WI Act
Proclamation	*Water Industry (Third Party Access) Proclamation 2016* (SA) made under ss5A and 86B of the *Water Industry Act 2012* (SA)
Regime	The regime for regulating third party access to water and sewage infrastructure services in South Australia, established by Part 9A of the WI Act, as it applies in full to the Pipeline Services
Remaining Services	The water distribution networks to which SA Water's licence relates (clause 4(2)(a)(i) of the Proclamation) and the bulk sewage and local sewage networks to which SA Water's licence relates (clause 4(2)(b) of the Proclamation), including infrastructure and infrastructure services the use of which is necessary for the transport of water or sewage (as the case may be) such as treatment plants, pumping stations, storage tanks and surge protection units and valves (clause 4(3) of the Proclamation)
SA Government	South Australian Government
SA Water	South Australian Water Corporation established by the *South Australian Water Corporation Act 1994* (SA)
Water Act Cth	*Water Act 2007 (Cth)*
WI Act	*Water Industry Act 2012* (SA)
WCIR	*Water Charge (Infrastructure Rules) 2010*

1 Draft recommendation

1.1 In accordance with s 44M of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the Council has considered whether it should recommend that the South Australian water access regime established by Part 9A of the *Water industry Act 2012* (SA) (**WI Act**), as it applies in full to the Pipeline Services (defined in paragraph 3.5 below), (**Regime**) be certified as an effective access regime.

1.2 The Council's preliminary view is that the Regime meets the requirements for certification, having regard to the clause 6 principles and the objects of Part IIIA of the CCA.

1.3 The Council proposes to recommend that the Commonwealth Minister certify the Regime as effective for a period of 10 years.

2 The certification application and the Council's process

Application and public consultation

2.1 On 11 November 2016, the Council received an application from the Premier of South Australia, the Hon Jay Weatherill MP, for a recommendation pursuant to s44M(2) of the CCA that the Regime be certified as an effective access regime (**Application**).

2.2 The Council gave public notice of the Application in 'The Australian' newspaper on 18 November 2016 and published the Application and related documents on its website (www.ncc.gov.au). The Council also invited interested parties to make written submissions on the Application by 19 December 2016. The Council did not receive any submissions.

2.3 The Council has considered the Application in developing its draft recommendation, and has also undertaken its own inquiries and research.

Draft recommendation and public consultation

2.4 The Council now seeks written submissions in response to the draft recommendation. Information on making a submission is available on the Council's website (www.ncc.gov.au). The deadline for submissions is **5.00pm on 20 March 2017**.

2.5 Submissions (with a completed cover sheet) should be emailed to the Council at sawatercertification@ncc.gov.au (in both MS Word and PDF formats), with a hard copy sent to:

SA Water Submissions
National Competition Council
GPO Box 250
Melbourne VIC 3001

2.6 The Council will consider submissions received by the closing date in developing its final recommendation to the Commonwealth Minister.

2.7 Section 44NC of the CCA requires the Council to make a recommendation to the Commonwealth Minister within 180 days of receiving the Application, subject to any extensions as provided for by that section. As the Application was received on 11 November 2016, the Council must provide its final recommendation to the Commonwealth Minister by 9 May 2017.

3 The South Australian Water Access Regime

3.1 The Regime is established by Part 9A of the *Water industry Act 2012* (SA) (**WI Act**) and commenced on 1 July 2016. The infrastructure services that are subject to the Regime are set out in the *Water Industry (Third Party Access) Proclamation 2016* (**Proclamation**).

3.2 Copies of this legislation can be found at http://www.legislation.sa.gov.au. The key legislative definitions used in the WI Act and Proclamation are set out in Appendix B.

3.3 The South Australian Water Corporation (**SA Water**) is a statutory corporation established by the *Water Corporation Act 1994* (SA). SA Water is a vertically integrated supplier of water and wastewater services to around 1.6 million customers in Adelaide and regional towns across South Australia. It operates the following infrastructure:

- bulk water supply pipelines across the state, and local water storage, treatment and distribution systems for drinking water
- local networks and treatment plants for the removal and treatment of sewage and water recycling for non-potable use, and
- a desalination plant for the supply of drinking water to Adelaide.

3.4 Under clause 4 of the Proclamation, SA Water is declared to be a 'regulated operator' under the Regime in respect of the following classes of water and sewerage infrastructure and infrastructure services:

- the water distribution networks to which SA Water's licence relates
- the following pipelines operated by SA Water:
    - Murray Bridge to Onkaparinga
    - Mannum to Adelaide
    - Swan Reach to Paskerville
    - Myponga to Adelaide
    - Morgan to Whyalla
    - Tailem Bend to Keith
    - Eyre Peninsula, and
    - Glenelg to Adelaide

  (**Pipelines**).
- the bulk sewage and local sewage networks to which SA Water's licence relates, and
- associated infrastructure and infrastructure services (such as treatment plants, pumping stations, storage tanks, surge protection units and valves) necessary for the transport of water or sewage (as the case may be) in the infrastructure referred to above.

3.5 The Proclamation provides that the Regime applies *in full* to the infrastructure services provided by the Pipelines (including associated infrastructure and infrastructure services such as treatment plants, pumping stations, storage tanks, surge protection units and valves that are necessary for the transport of water through the Pipelines) (**Pipeline Services**). In other words, all of the provisions in Part 9A of the WI Act apply to the Pipeline Services.

3.6 For the remaining infrastructure services (that is, the water distribution networks, bulk sewerage and local sewerage networks to which SA Water's licence relates, and necessary associated infrastructure services) (**Remaining Services**), the Proclamation provides that only the following sections in Part 9A of the WI Act apply:

- s86F (other than subsection (1)(c) and (d)) – the requirement to provide an information brochure to potential access seekers upon request
- s86H – the requirement to provide information to potential access seekers on a non-discriminatory basis
- s86ZO – the requirement to provide copies of any access contracts to ESCOSA, and
- s86ZP – the requirement to give specified information or documents about the water/sewerage service business to ESCOSA upon request,

(**Prescribed Provisions**).

3.7 It is important to note from the outset that the SA Government (**Applicant**) seeks certification of the Regime as it applies in full to the Pipeline Services. It does not seek certification in respect of the partial application of the regime (that is, the Prescribed Provisions) to the Remaining Services. This means that the Remaining Services may be the subject of an application for declaration under Part IIIA of the CCA.

3.8 Accordingly, the Council's draft recommendation assesses the Regime as it applies in full (that is, all of the provisions in Part 9A of the WI Act are assessed) to the Pipeline Services.

Overview of the Regime as it applies to the Pipeline Services

3.9 The Council understands that almost all of the water transported by the Pipeline Services is ultimately for urban use (residential, commercial and non-residential) and not for irrigating farms.

3.10 For example, the Murray Bridge to Onkaparinga pipeline and the Mannum to Adelaide pipeline transport untreated (i.e. non-potable) water from the Murray River to Adelaide and to areas south east of Adelaide. Treatment is undertaken prior to distribution. The Glenelg to Adelaide pipeline transports recycled (i.e. non-potable) water from the Glenelg Sewerage Treatment Plant to and around Adelaide. The other Pipelines transport potable water (i.e. treatment is undertaken prior to transport) from the Murray River and other sources to Adelaide and South Australian regional

areas. The Pipelines range in length from 27km to 386km and the total bulk water network comprises around 1700km of pipeline.

3.11 Under the Regime, a regulated operator (SA Water) must provide an 'information brochure' on the written application of any person. The information brochure must contain, amongst other things, the terms and conditions on which the regulated operator is prepared to make its infrastructure available for access seekers to use, the costs associated with providing access, and a copy of the regulated operator's standard access agreement. If a regulated operator does not comply with this requirement, they are guilty of an offence and subject to a maximum penalty of $20,000.

3.12 A person who wants access to regulated infrastructure (a 'proponent') can make a written proposal to the regulated operator setting out the nature and extent of the access they require, and proposed terms and conditions of access. A regulated operator has a duty to negotiate in good faith with a proponent with a view to reaching an access agreement.

3.13 If the regulated operator, the proponent and any interested third parties cannot reach agreement within two months after the date of the access proposal, an access dispute is deemed to arise. A party may refer the dispute to the Essential Services Commission of South Australia (**ESCOSA**), which is South Australia's independent regulator for essential services. In the first instance, ESCOSA must try to resolve the dispute by conciliation.

3.14 If reasonable conciliation attempts fail, or if the dispute is not resolved within six months after the referral, ESCOSA may appoint an independent arbitrator and refer the dispute for arbitration. The arbitrator is subject to a six month time limit, with the ability to 'stop the clock' to exercise information gathering powers.

3.15 The WI Act obliges the arbitrator to take into account various principles relating to the parties' interests and a range of other matters set out in section 86P of the WI Act. The *Commercial Arbitration Act 2011* (SA) applies to arbitrations under the Regime to the extent it can operate consistently with the provisions of the WI Act. The WI Act otherwise regulates the conduct of arbitrations and gives both the Minister and ESCOSA the right to participate in an arbitration. It also gives the arbitrator various procedural powers, including the power to obtain documents and information.

3.16 At the conclusion of arbitration the arbitrator makes an award in relation to the access dispute. Parties aggrieved by an arbitration award may appeal to the Supreme Court of South Australia on a question of law.

3.17 ESCOSA is responsible for enforcing and monitoring the Regime. ESCOSA must give a report to the Minister, within three months of the end of each financial year, about the work ESCOSA has done under the Regime during that year. The Minister must also give a copy of the report to both Houses of the Parliament of South Australia.

4 Certifying an access regime

Background to certification and the Competition Principles Agreement

4.1 At the 1994 meeting of the Council of Australian Governments, all Australian governments agreed to the principles for a national competition policy as outlined in the report of the Hilmer Committee. That agreement is embodied in the Competition Principles Agreement (as amended to 13 April 2007) (**CPA**).

4.2 Clause 6 of the CPA concerns reforms relating to third party access to significant infrastructure under which Australian governments agreed that the Commonwealth would establish a generic national third party access regime. This regime is established in Part IIIA of the CCA and provides for regulated access to infrastructure services that are declared on a case-by-case basis or subject to an access undertaking. Governments also agreed that states and territories would retain the ability to regulate access to services within their jurisdiction and that the national access regime would not apply to services covered by effective state or territory regimes.

4.3 An effective state or territory regime is one that conforms to the set of principles set out in clause 6 of the CPA (**clause 6 principles**). The process for access regimes to be certified as effective is set out in Division IIA of Part IIIA of the CCA. A state or territory that is a party to the CPA may apply to the Council for a recommendation to the Commonwealth Minister that an access regime be certified as an 'effective access regime'. It is the Responsible Minister, namely the Premier of a state or Chief Minister of a territory, who makes the application to the Council for a recommendation.

4.4 Where the designated Commonwealth Minister has made a decision that an access regime is effective (that is, the regime has been certified), services subject to the regime cannot be declared under Part IIIA of the CCA (ss 44G(2)(e) and 44H(4)(e)) or be the subject of an access undertaking to the Australian Competition and Consumer Commission (**ACCC**) (s44ZZA(3AA) of the CCA).

4.5 Services that are subject to a certified state or territory access regime (so exempt from declaration) might potentially be open to declaration where there has been a 'substantial modification' of the access regime or the clause 6 principles such that the access regime is no longer effective (ss 44G(2)(e)(ii) and 44H(4)(e)(ii) of the CCA). An applicant for declaration would need to establish this is the case.

4.6 Certification is only available for state or territory access regimes. While a state or territory government is not required to have an access regime certified and such a regime will be enforceable whether or not it is certified, certification provides access seekers, infrastructure operators, developers and other parties with certainty about how access will be regulated.[1]

[1] Services may also be made exempt from declaration if made subject to an access undertaking approved by the ACCC under s 44ZZA of the CCA (ss 44G(1) and 44H(3)).

4.7 Further information about certification is available in the Council's Guide to Certification of State and Territory Access Regimes (November 2013) (**Guide**).

The Council's approach to considering an application for certification

4.8 Section 44M(4) of the CCA provides that in deciding what recommendation it should make to the Commonwealth Minister, the Council must:

- assess whether the access regime is an 'effective access regime' by applying the relevant principles set out in the CPA
- have regard to the objects of Part IIIA of the CCA (in s44AA), and
- not consider any other matters (subject to s44DA).

4.9 Parallel requirements apply to the Commonwealth Minister in deciding whether to certify an access regime as effective (s44N(2) of the CCA).

4.10 There are 23 clause 6 principles, a number of which have several elements. An effective access regime must satisfactorily address each of the clause 6 principles.

4.11 The Council's consideration of whether the clause 6 principles are satisfied is subject to several other requirements:

- each principle must be treated as having the 'status of a guideline rather than a binding rule' (s44DA(1) of the CCA)
- an effective access regime may contain additional matters that are not inconsistent with the clause 6 principles (s44DA(2) of the CCA)
- clause 6(3)(b) of the CPA requires that in order to conform with the clause 6 principles, an access regime must 'reasonably incorporate' each of the principles in clause 6(4) of the CPA. Clause 6(3) also acknowledges that 'there may be a range of approaches available to a state or territory party to incorporate each principle.'

4.12 Clause 6(3A) of the CPA provides that in assessing whether an access regime is an effective access regime, the assessing body:

- should, as required by the Trade Practices Act 1974,[2] and subject to s44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under the access regime; and
- should recognise that, as provided by s44DA(2) of the Trade Practices Act 1974, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

4.13 The objects of Part IIIA are set out in s44AA as follows:

[2] The *Trade Practices Act 1974* (Cth) was replaced by the *Competition and Consumer Act 2010* (Cth) on 1 January 2011. At the time of writing the CPA had not been amended to reflect this change.

The objects of this Part are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

4.14 In its Guide and in previous recommendations on applications for certification, the Council has expressed the view that the certification process does not involve an assessment of the merits of an access regime, or whether that regime provides the most effective means of achieving efficient access outcomes.

4.15 Rather, certification only requires an assessment as to whether an access regime satisfactorily addresses the clause 6 principles and accords with the objects of Part IIIA. In other words, the clause 6 principles do not impose a high threshold for an access regime to be certified.

4.16 A failure to secure certification of a particular state or territory access regime does not affect the enforceability or operation of that regime. Certification does, however, remove the potential for services subject to that regime to be declared under Part IIIA of the CCA.[3] Certification is therefore likely to provide greater certainty to asset owners/service providers and to access seekers.

Intergovernmental Agreement on Competition and Productivity-Enhancing Reforms

4.17 On 9 December 2016, the Commonwealth of Australia and the governments of New South Wales, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory signed an Intergovernmental Agreement on Competition and Productivity-enhancing Reforms (**IGA**). The IGA is intended to build upon the achievements of previous agreements, including the CPA, to promote productivity and competition reforms across Australia's economy.

4.18 The IGA, amongst other things, sets out revised principles (in Appendix C.1) which are intended to replace the clause 6 principles in the CPA "upon agreement by all parties to this Agreement" (see clause 11 of Appendix C). At the time of writing the draft recommendation, South Australia, Victoria and Queensland have not signed the IGA.

4.19 In the Council's view, the IGA does not have the effect of amending the CPA until all parties to the CPA have signed the IGA. Accordingly, the Council considers that it is bound by s44M(4) of the CCA to assess the Regime against the clause 6 principles in their present form in the CPA.

[3] Section 44H(4)(e) of the CCA provides that the designated Minister cannot declare a service if access to the service is already the subject of an effective access regime under section 44N of the CCA.

Structure of this draft recommendation

4.20 In assessing the Application, the Council has organised its consideration of the Regime against the clause 6 principles and the objects of Part IIIA of the CCA into six categories:

- the scope of the access regime–6(3), 6(4)(d)
- the treatment of interstate issues–6(2), 6(4)(p)
- the negotiation framework–6(4)(a)–(c), (e), (f), (m), (n),
- dispute resolution–6(4) (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
- efficiency promoting terms and conditions of access–6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b)
- the objects of Part IIIA in s44AA of the CCA.

4.21 The Council considers that these categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements of an effective access regime. The categories do not replace the clause 6 principles and the objects of Part IIIA as the basis for assessing a regime's effectiveness.

4.22 Further details about the Council's approach to certification are available in the Guide.

5 Assessment against the clause 6 principles

Scope of the Regime (clause 6(3)(a))

5.1 Clause 6(3)(a) of the CPA requires that for a regime to be certified as effective, its application should be limited to a narrow range of infrastructure services—namely, those provided by significant infrastructure facilities that are not economically feasible to duplicate. Clause 6(3)(a) further requires that access to the services removes barriers to competition in upstream and downstream markets. Finally, access should be available only where any safety issues can be addressed at a reasonable cost.

5.2 Access regimes may utilise different mechanisms for infrastructure services to be covered by them. For example, under the National Access Regime (Part IIIA of the CCA), an access seeker may apply to the Council for a recommendation to the designated Minister that a particular service be declared (s44F of the CCA). In making a recommendation, the Council must be satisfied that all of the criteria in s44G(2) of the CCA (**declaration criteria**) are met. The designated Minister must also be satisfied that all of the declaration criteria are met before declaring a service (s44H(4)). Once a service is declared under Part IIIA, access seekers may negotiate access with the service provider. If the parties are unable to reach agreement, the ACCC is available to arbitrate an access dispute.

5.3 An alternative approach is for a state or territory access regime to declare a particular infrastructure service(s) as being covered by the regime from the outset. This is the approach adopted in a number of state-based access regimes. For example, the NSW Water Industry Access Regime and Queensland's Dalrymple Bay Coal Terminal Access Regime each declare certain services to be covered from the outset. These regimes also include a process for access seekers to apply to have other infrastructure services covered (similar to the process under Part IIIA, in which criteria that mirror the declaration criteria must be met).

5.4 By contrast, under the South Australian Rail Access Regime certain rail infrastructure services are proclaimed to be covered from the commencement of the regime (by a proclamation by the Governor), with no mechanism for access seekers to apply to have other infrastructure services covered. The WA Rail Access Regime similarly declares specified railway infrastructure services to be covered by that regime from the outset. However, the WA Rail Access Regime requires the Minister, in deciding whether to include or remove infrastructure services from coverage by the regime, to have regard to declaration criteria and to conduct a public consultation process.

The Regime

5.5 The Regime applies the same approach to the coverage of infrastructure services as the South Australian Rail Access Regime. That is, specified water and sewerage infrastructure services are proclaimed to be covered from the outset. It is the Governor of South Australia who has the power to make the proclamation (s5A of the

WI Act). As outlined in chapter 3 of this draft recommendation, the Proclamation provides that the Regime applies in full to the Pipeline Services.

5.6 The Regime does not provide any legislative or regulatory process for an access seeker to apply to have water or sewerage infrastructure services not covered by the Regime to be covered. Nor does the Regime set out the matters the Governor should have regard to in deciding which water or sewerage infrastructure services to proclaim. Further, the Regime does not provide a process for a party to apply to have a Proclamation that applies the Regime to water or sewerage infrastructure services revoked. It is also not clear what matters the Governor may have regard to when deciding whether to vary or revoke a Proclamation.

5.7 The Council sought clarification from the SA Government about these matters. The Council understands from the SA Government that the Governor acts on the advice of the Executive Council, and that the Executive Council is informed by the independent advice and reporting provided by ESCOSA. The SA Government further advised that any access and coverage issues will be canvassed by ESCOSA in its annual and periodic reports which are tabled in Parliament. In this way, the SA Government submits that decisions about the coverage (and revocation of coverage) of the Regime will be made through the Parliamentary process and informed by ESCOSA's independent reports.

5.8 The Council considers that the process outlined by the SA Government means it is unlikely that water and sewerage infrastructure services that are economically feasible to duplicate would be covered by the Regime in a proclamation by the Governor.

5.9 Further, if the Pipeline Services that are the subject of the Proclamation changed significantly in the future, this may amount to 'substantial modifications' of the Regime for the purposes of s 44G(2)(e)(ii) of the CCA. The consequence of there being a 'substantial modification' is that certification may no longer present a bar to declaration of the services under Part IIIA.[4] The Council also notes that if new water or sewerage infrastructure services were provided in South Australia and not proclaimed under the Regime, and access issues were to arise, a party may apply for declaration under Part IIIA of the CCA.

5.10 While noting these possibilities, the Council considers there are unlikely to be developments that will raise material concerns in the foreseeable future. In any case, ESCOSA's regulatory role is likely to be sufficient to address situations where coverage becomes inappropriate, as discussed below in the context of clause 6(4)(d) of the CPA.

[4] Note there are proposed amendments to these provisions which are outlined in Appendix C. The proposed amendments will provide a process for the revocation of a certification decision in lieu of the 'substantial modification' consideration in s44G(2)(e)(ii) of the CCA.

Application

5.11 The Applicant submits that the Pipeline Services are large and long lived assets with high sunk costs and low variable costs. The transport services provided by the Pipelines would exhibit increasing returns to scale and are designed to meet foreseeable demand for transportation of Murray River water to Adelaide and other significant regional areas in South Australia for urban use.

5.12 Further, the Applicant submits that:

- South Australia is not aware of any proposals to develop similar transport and interconnection services.
- It is unlikely that an investment in further significant water infrastructure is necessary or viable in South Australia given the current (and future forecasted) water demands and the management of water resources.

5.13 Regarding the other matters for assessment of an effective access regime under clause 6(3)(a) of the CPA, the Applicant submits that the Regime is expected to stimulate competition in the established market for Murray River water entitlements as it applies to the transport of water from the Murray River to significant economic locations in South Australia. The Applicant notes also that the Glenelg to Adelaide pipeline could be used as a water source by larger customers looking for alternate water sources for non-potable use.

5.14 The Applicant sets out the pre-existing regulatory arrangements in South Australia relating to public health, safety and the environment that the Regime is subject to, and notes that the arbitrator must accept any advice provided by a department of the Public Service which administers these arrangements.

The Council's assessment

5.15 Clause 6(3)(a)(i) of the CPA provides that for a state or territory access regime to conform to the principles set out in that clause, it should apply to services provided by means of significant infrastructure facilities where it would not be economically feasible to duplicate the facility.

5.16 In assessing the infrastructure services covered by an access regime against clause 6(3)(a)(i) of the CPA, the Council considers it should have regard to the 'private profitability test' established by the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (***Pilbara***), rather than a test of natural monopoly. The reasons for this view are outlined in **Appendix C**. In summary, the 'private profitability test' means that the Council should consider whether it would be economical (that is, profitable) for anyone to develop another facility (or facilities) to provide the Pipeline Services.

5.17 The Council accepts that the Pipeline Services covered by the Regime are by their nature likely to be assets with high fixed costs, low variable costs and cyclic excess capacity. In addition, the Council is satisfied that it would not be profitable for a person to develop another facility to provide the Pipeline Services.

5.18 In reaching this conclusion, the Council has had regard to the SA Government's advice that it is unlikely that an investment in further significant water infrastructure is necessary or viable in South Australia. The SA Government's view recognises that a step change decline in water demand occurred during the millennium drought and demand is not expected to return to pre-drought levels due to permanent water savings measures and water conservation in South Australia.[5]

5.19 The Council notes also that the development of Adelaide's desalination plant, which has the capacity to supply around half of Adelaide's water needs,[6] has mitigated Adelaide's reliance on Murray River water and related pipeline infrastructure. In addition, the Council has had regard to SA Water's regulatory proposal to ESCOSA for its 2016-2020 Regulatory Determination, which does not include plans for investment in additional bulk water pipelines. This reflects SA Water's forecast of water demand which shows a negligible increase in demand over the four year period (i.e. < 1% p.a.),[7] which reflects forecasts of population and economic growth in South Australia over the period.

5.20 With the outlook for water demand in South Australia, the Council does not consider it would be profitable in the foreseeable future for a person to duplicate the Pipelines. It is unlikely that a person could reasonably expect to obtain a sufficient return on capital from investing in new water infrastructure facilities to provide the Pipeline Services.

5.21 The Council accepts that access to the Pipeline Services will assist in removing barriers to competition in dependent markets and there are processes in place so that access can be provided safely.

5.22 The Council is also satisfied that adequate public health, safety and environmental regulations exist in South Australia so that access seekers can use the Pipelines safely and at an economically feasible cost.

5.23 Accordingly, the Council considers that the Regime is consistent with clause 6(3)(a).

Review of the right to negotiate access (clause 6(4)(d))

5.24 CPA clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. A facility might at the present time not be economically feasible to duplicate (so warranting access regulation) but this situation may change over time removing the need for access regulation.

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5 http://www.escosa.sa.gov.au/ArticleDocuments/334/20160606-Water-SAWaterRegulatoryDetermination2016FinalReport.pdf.aspx?Embed=Y, p.63.

6 https://www.sawater.com.au/community-and-environment/our-water-and-sewerage-systems/water-sources/desalination/adelaide-desalination-plant-adp.

7 https://www.sawater.com.au/__data/assets/pdf_file/0020/26921/RBP-2016.pdf, p.117.

The Regime

5.25 The Regime includes several mechanisms under which its operation will be monitored and reviewed by ESCOSA, the Minister and Parliament. The WI Act provides that ESCOSA must review the Regime to assess whether it should continue to apply to the infrastructure services that are the subject of the Proclamation. ESCOSA must conduct its first review by 30 June 2019 and every five years thereafter. The review must be advertised and ESCOSA must consider submissions made in connection with the review.

5.26 ESCOSA is required to provide a report with the review's conclusions to the Minister which must be tabled in Parliament. The report should state whether the Regime should continue to apply or should expire. The Regime will expire at the end of 'a prescribed period'[8] unless ESCOSA has recommended in its report to the Minister that the regime should continue for a further prescribed period and a regulation has been made extending the period of its operation accordingly.

5.27 The Applicant also notes that ESCOSA is required to report to the Minister annually about work that it has carried out under Part 9A of the WI Act during that financial year. This report must also be tabled in Parliament.

5.28 To enable ESCOSA to fulfil its reporting obligations, the regulated operator, namely SA Water, must provide ESCOSA with a copy of the information brochures given to any access proponents and details of those proponents. ESCOSA must also receive on a confidential basis a copy of every access contract made with the SA Water. SA Water may also be required to provide specific information or documents within a certain time or at stated intervals to ESCOSA.

5.29 The Applicant notes that all these requirements are subject to penalty provisions. It submits that these provisions ensure that ESCOSA has sufficient powers to undertake its reporting and review obligations.

5.30 The Applicant makes the following points in relation to specific access arrangements:

- Firstly, if parties reach an access agreement this could be expected to be embodied in an access contract which the parties could enforce against each other under the usual principles of contract law.
- Secondly, if an award confers a right of access as a result of arbitration, the award must state the period for which the proponent is entitled to access. Unless the Supreme Court specifically decides to suspend the operation of an award until the determination of an appeal, the appeal does not suspend the operation of an award.
- Lastly, existing awards are enforceable as if they were a contract, and will be unaffected by a change in the Regime, as will any commercially negotiated

[8] Section 86ZR(7) states that 'prescribed period' means the first prescribed period ending 30 June 2019 and each successive period of 5 years thereafter.

arrangements. The expiry or revocation of a coverage proclamation does not affect existing access rights and obligations.

The Council's assessment

5.31 The Regime contemplates that the rights to negotiate access will 'lapse after a defined period unless reviewed and subsequently extended' by requiring ESCOSA to assess the services covered by the Regime and to recommend whether the Regime should continue or expire (s86ZR). Also, existing contractual rights are not automatically revoked.

5.32 The Council is satisfied that the Regime is consistent with clause 6(4)(d).

Treatment of interstate issues (clauses 6(2), 6(4)(p))

5.33 Clause 6(2) establishes principles for the treatment of a service(s) provided by a facility with an influence beyond a jurisdictional boundary or where there are difficulties because the facility providing the service that is subject to a regime is located in more than one jurisdiction. Clause 6(4)(p) is aimed at ensuring there is a single seamless process for obtaining access to a service, so promoting timely and efficient outcomes. Clause 6(4)(p) provides that where there is more than one state or territory access regime which applies to a service those regimes should be consistent.

The Regime

5.34 In relation to clause 6(2) the Applicant submits that as the Pipeline Services covered under section 86B of the WI Act are provided by infrastructure solely within South Australia, issues in relation to clause 6(2) of the CPA do not arise.

5.35 In relation to clause 6(4)(p), the Applicant submits that charges made by water industry entities in South Australia, including SA Water and South Australian irrigation trusts, may be subject to the Commonwealth *Water Charge (Infrastructure) Rules 2010* (**WCIR**). The Applicant further submits that the WCIR are intended to exclude urban water supply activities and urban water supply networks from their remit. However, the precise scope of their application is not always easy to determine. The Applicant states that there is potential inconsistency between the Regime and the WCIR where both regimes apply to the same infrastructure operator in relation to:

- a WCIR non-discrimination rule for commercially negotiated charges, and
- a WCIR requirement for infrastructure operators to publish prices.

5.36 The Applicant notes that in relation to the publication of prices, an operator can apply for an exemption under the WCIR, in part addressing the potential inconsistency between the Regime and the WCIR. The Applicant also notes that the ACCC has proposed amendments to the WCIR in relation to the non-discrimination rule as part of its Water Charge Rules Review Advice (17 November 2016) that may go some way to resolving inconsistencies.

5.37 Also, the Applicant has referred to section 5A of the WI Act, which provides the SA Governor with the power to make a proclamation to exclude or displace the operation of the WCIR in the event that any such inconsistency arises (as allowed for under section 250D of the *Water Act 2007 (Cth)*) (**Water Act Cth**)). If such a proclamation to exclude the Pipelines Services from any regulatory coverage by the WCIR were to be considered, the SA Government states in the Application that it will consult the Commonwealth Government.

The Council's assessment

5.38 In relation to clause 6(2), the Council considers that the Regime operates with respect to intrastate services located exclusively within the jurisdiction of South Australia, hence the Regime does not raise issues in relation to clause 6(2).

5.39 As noted above, clause 6(4)(p) provides that where there is more than one state or territory access regime which applies to a service, those regimes should be consistent. The Council understands that the Pipeline Services which are the subject of the certification application are used primarily for the supply of drinking water by SA Water to Adelaide and to towns in regional South Australia. The Pipeline Services are therefore used for urban water supply activities. Under the Water Act Cth**,** urban water supply activities are excluded from regulation under the WCIR.[9] Further, s86B(3) of the WI Act provides that the Regime does not (and cannot) apply in relation to infrastructure operated by an irrigation infrastructure operator that may be subject to the WCIR.

5.40 The Council considers that although there may be uncertainty regarding whether the WCIR would apply to the Pipeline Services, the WCIR being Commonwealth legislation do not constitute a 'state or territory access regime', that is within the literal meaning of clause 6(4)(p). Despite this, the Council recognises there may be scope for regulatory overlap and inconsistency between the Regime and the WCIR that could potentially undermine timely and efficient outcomes under the Regime. The Council has considered the provisions in the WCIR and the WI Act (as noted by the Applicant and discussed above) intended to mitigate and address this risk. The Council is satisfied that these provisions are likely to address potential issues regarding the effectiveness of the Regime that may arise due to the operation of the WCIR and any inconsistency between the WCIR and the Regime.

5.41 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(p).

The negotiation framework (CPA clauses 6(4)(a)–(c), (e), (f), (m), (n))

Clauses 6(4)(a)–(c): negotiated access

5.42 Clauses 6(4)(a)-(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate

[9] Section 91(3) of the Water Act Cth provides that the WCIR does not apply to charges in respect of urban water supply activities.

access negotiations. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.

5.43 Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes, while clauses 6(4)(b) and (c) complement and underpin the principle in clause 6(4)(a). They recognise that regulatory measures can provide a means for dealing with situations where access providers and access seekers are unable to reach agreement through private commercial negotiations by providing legislative rights and obligations to negotiate (clause 6(4)(b)) and an independent and credible dispute resolution procedure (clause 6(4)(c)).

5.44 The negotiation framework established by clauses 6(4)(a)-(c) is supported by the requirements for a dispute resolution procedure set out in clauses 6(4)(g)-(l), 6(4)(o) and 6(5)(c) of the CPA.

5.45 In some circumstances access seekers may have insufficient information and bargaining power to negotiate with large incumbent service providers. Therefore an effective access regime should appropriately address information asymmetries, so that access seekers can enter into meaningful access negotiations. This involves a balance between obliging the service provider to disclose sufficient information so that the access seeker can make informed decisions, while ensuring that the disclosure requirements are not overly onerous.

The Regime

5.46 The Applicant submits that the Regime establishes the right for proponents to negotiate access. To the extent that commercial arrangements cannot be agreed, the access regime provides for a dispute resolution process where either party can request ESCOSA to settle the dispute through conciliation. If ESCOSA is unable to resolve the dispute by conciliation, or if it appears to ESCOSA that the dispute is not capable of resolution by conciliation, ESCOSA may refer the dispute to arbitration.

5.47 The Applicant states that the Regime does not prevent parties from negotiating and agreeing on terms and conditions of access outside the framework of the Regime. The Regime encourages negotiated commercial outcomes by establishing:

- mechanisms to ensure that access seekers can obtain information from operators that they would reasonably require to make informed decisions about seeking access, and
- a procedure for access seekers to make an access proposal.

<u>Information provision</u>

5.48 A regulated operator must provide an ‘information brochure’ on the written application of any person. For the Pipeline Services, the brochure must contain:

- the terms and conditions by which the infrastructure is available for use by others
- procedures that the regulated operator will apply in determining a proposal for access to any regulated infrastructure and infrastructure services
- information about relevant prices and costs associated with gaining access to (and using) regulated infrastructure and infrastructure services
- a copy of a standard access arrangement used by the operator and details of the representative's contact point for queries; and
- other information prescribed by the regulations.

5.49 The information brochure must be provided within 30 days (or a longer period allowed by ESCOSA) after the regulator receives the application. The operator must within 14 days of providing the brochure give a copy to ESCOSA including details of the person who has been provided with the information. The information brochure requirements are enforceable with a maximum penalty of up to $20,000 for failure to comply.

Negotiation

5.50 Division 4 of the WI Act provides for the negotiation of access. A person can make a written proposal to the regulated operator setting out the nature and extent of the access required or variation, and the terms and conditions for the provision of access or for making the variation that the person thinks reasonable and commercially realistic.

5.51 The proposal may require an alteration of or addition to infrastructure. The operator may also request the proponent provide further information that the operator reasonably requires in order to assess and respond to the proposal. Within one month from receipt of the access proposal the operator must give notice to the regulator and person whose rights would be affected by the implementation of the proposal. A regulated operator must negotiate in good faith with the proponent of an access proposal.

The Council's assessment

5.52 The Council accepts that the Regime satisfactorily addresses information asymmetries. The WI Act provides that prior to the negotiation process a regulated operator, namely SA Water, must provide an access seeker with an information brochure that contains information about terms and conditions, prices and costs, and a standard access agreement.

5.53 The Council considers that the regulatory measures put in place by the Regime provide incentives for parties to reach agreement by commercial negotiation, in accordance with clause 6(4)(a) of the CPA.

5.54 Where agreement cannot be reached, the Regime establishes a right for parties to the negotiations to refer the dispute to ESCOSA for conciliation or arbitration. ESCOSA may refer a dispute to arbitration if the dispute is not resolved by conciliation after

reasonable attempts to do so, or if it is unlikely to be resolved within 6 months. ESCOSA selects the arbitrator and the *Commercial Arbitration Act 2011 (SA)* applies to arbitrations under the Regime, to the extent it can operate consistently with the provisions of the WI Act.

5.55 ESCOSA has been established as an independent regulator and decision maker with specific functions under the Regime. This is important as the Council considers that for an access regime to be effective it should incorporate regulatory processes that are transparent and consultative, and undertaken by an independent regulator. In respect of dispute resolution, the respective roles of ESCOSA in conciliation and the arbitrator in arbitrating access disputes means that commercial negotiations are supported by credible dispute resolution mechanisms. Arbitration awards are enforceable by South Australia's Supreme Court, while arbitration of any disputes is subject to a six month time limit, and appeals from arbitrations may be made on a point of law. This strikes an appropriate balance between encouraging parties to reach negotiated outcomes and providing for regulatory intervention where necessary.

5.56 The Council is satisfied that the Regime is consistent with clauses 6(4)(a)-(c).

Clause 6(4)(e): reasonable endeavours

5.57 Clause 6(4)(e) requires that an effective access regime provides for a service provider to use all reasonable endeavours to facilitate the requirements of access seekers. The Council considers that an access regime may either incorporate clause 6(4)(e) expressly, or through general provisions that have the same effect.

The Regime

5.58 The Applicant submits that the Regime meets the clause 6(4)(e) requirement as the WI Act contains a number of provisions that ensure that the operator uses all reasonable endeavours to accommodate the requirements of persons seeking access.

5.59 The WI Act imposes an obligation on the operator to negotiate in good faith with the proponent to meet the reasonable requirements as set out in the access proposal. Specifically, the operator must provide an access seeker with information reasonably requested about:

- the extent to which the regulated operator's infrastructure is currently being utilised
- the extent to which it would be necessary and economically feasible to alter or add to the operator's infrastructure so that it could meet the access seeker's requirements; and
- whether the operator would be prepared to provide access to specific regulated infrastructure services, and if so the general terms and conditions and, if not, the reasons.

5.60 The proponent is entitled to refer an access dispute to the regulator within two months of the receipt of the access proposal.

The Council's assessment

5.61 The Council is satisfied that the Regime is consistent with the requirements of clause 6(4)(e). A regulated operator is obliged to negotiate in good faith, maintain and provide an information brochure, and respond to information requests in a timely manner.

Clause 6(4)(f): access need not be on exactly the same terms

5.62 Clause 6(4)(f) requires that an effective access regime should allow for access to be provided on different terms and conditions to different users. An access regime should not limit the scope for commercial negotiation, which is consistent with the principles of commercial negotiation enshrined in clause 6 of the CPA.

The Regime

5.63 The Applicant submits that the Regime provides parties with the flexibility to negotiate their own access arrangements. Failing agreement, access on commercial terms may be determined by arbitration. In both cases different terms and conditions may result for different users.

5.64 The Applicant states that the Regime does not impose any constraints on the terms and conditions for access that may be agreed between the parties, but in the case of an award by an arbitrator, the arbitrator must take into account the principles set out in s86P. The Regime provides that these matters do not preclude the making of awards on different terms and conditions for different users.

The Council's assessment

5.65 The Council considers that the Regime provides for SA Water to agree to provide access on different terms and conditions for different access seekers. Where an arbitration occurs, the Regime contemplates that an award may grant access on different terms and conditions for different access seekers. Arbitrators must take into account the pricing principles, which do not preclude different pricing outcomes appropriate for the circumstances of different access proposals.

5.66 The Council is satisfied that the Regime is consistent with clause 6(4)(f).

Clause 6(4)(m): hindering access

5.67 Clause 6(4)(m) requires that an effective access regime prohibit conduct for the purpose of hindering access. This principle applies both to existing users (to address the risk of problems such as hoarding) and facility owners.

The Regime

5.68 The Applicant submits that the Regime satisfies the requirements of clause 6(4)(m) by providing:

- a right for access seekers to negotiate access, with recourse to conciliation and/or arbitration in the event of a dispute, and
- that an award by an arbitrator is enforceable as a contract between the parties.

The Council's assessment

5.69 The Council considers that there are appropriate provisions in place in the WI Act to discourage the hindering of access by the regulated operator. For example, section 86F(2) requires the regulated operator to provide an access seeker with an information brochure within 30 days of receipt of an application. If the regulated operator fails to meet any of the information brochure requirements (set out in s86F) the operator is liable to pay a penalty (s86F(4)).

5.70 The Council notes that section 86J of the WI Act imposes an obligation on the regulated operator to negotiate in good faith with the proponent to meet reasonable requirements as set out in an access proposal. Further, an access seeker is entitled to refer an access dispute to ESCOSA within two months of receipt of an access proposal. Where ESCOSA refers a dispute to arbitration and an arbitrator makes an award on the terms and conditions of access, the Regime provides that the award is enforceable as if it were a contract between the parties to the award (s86ZI).

5.71 If a regulated operator hindered access following the making of an award, the Supreme Court of South Australia may grant an injunction restraining the operator from contravening the award, or requiring the operator to comply with the award. The Supreme Court may also order compensation for persons who have suffered loss or damage as a result of a party's contravention of an award.

5.72 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(m).

Clause 6(4)(n): separate accounting

5.73 Clause 6(4)(n) requires that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the Regime. That is, facility owners must maintain financial information that focuses exclusively on the elements of their business subject to the Regime. The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access.

5.74 To satisfy clause 6(4)(n), the Council considers that an effective access regime should include provisions that require a service provider to at least:

- maintain a separate set of accounts for each service that is the subject of an access regime

- maintain a separate consolidated set of accounts for all of the activities undertaken by the service provider, and
- allocate any costs that are shared across multiple services in an appropriate manner.

The Regime

5.75 The Regime requires a regulated operator to maintain the segregation of accounts and records for its water businesses separate from its other businesses. A regulated operator must also keep accounts and records for that part of its water business proclaimed as being subject to the Regime.

5.76 A regulated operator is required to keep accounts and records in a way that gives a true and fair view of:

- income and expenditure derived from, or relating to, water/sewerage infrastructure; and
- assets and liabilities of the regulated operator's business so far as they relate to water/sewerage infrastructure (s86E).

5.77 The Applicant submits that the accounting requirements applicable to a regulated operator in the Regime satisfy clause 6(4)(n).

The Council's assessment

5.78 The Council accepts that the Regime imposes a requirement on a regulated operator to maintain separate accounting arrangements for the elements of its business that are subject to the Regime.

5.79 Access seekers may want access to services provided by a particular pipeline given that the Pipeline Services transport water to different locations in South Australia. Therefore SA Water would need to maintain appropriate accounting separation for the Pipeline Services to determine access prices for a specific pipeline under the Regime's pricing approach (discussed under clause 6(5)(b)). Transparent accounting will also be important to an arbitrator making access prices under an award.

5.80 The Council notes ESCOSA's responsibility for enforcing and monitoring the Regime and that it has powers regarding access to financial information (see discussion under clause 6(4)(o)). SA Water is also subject to price regulation by ESCOSA and is therefore required to provide cost information to the regulator for this purpose. The Council notes that the Regime does not contain an explicit requirement for SA Water to keep accounting information for each of its Pipeline Services. Therefore the Council considers that it is incumbent on ESCOSA, as the body responsible for enforcing and monitoring the Regime, to facilitate appropriate financial record keeping by SA Water so that access prices can be set to reflect the Regime's pricing approach.

5.81 The Council sought clarification from the SA Government about these matters. The Council understands from the SA Government that SA Water maintains detailed cost

data regarding its avoidable costs and will be able to provide this information if required (e.g. if ordered to do so for the purposes of an arbitration).

5.82 In light of the above, the Council is satisfied that the Regime is consistent with clause 6(4)(n).

Dispute resolution (clauses 6(4)(g), (h), (i), (j), (k), (l), (o), 6(5)(c))

Clause 6(4)(g): independent dispute resolution

5.83 The clause 6 principles recognise the need for an independent arbitration mechanism to complement and encourage genuine negotiations. Clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes to promote confidence among the parties.

5.84 Clause 6(4)(g) also provides that an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute. At the same time, the costs of arbitration should not deter parties from seeking access.

5.85 An important element of the negotiation framework in an effective access regime is the requirement that if commercial negotiations and/or agreements between service providers and access seekers break down, then there are appropriate dispute resolution procedures in place. The decisions of the dispute resolution body must bind the parties and be enforceable.

The Regime

5.86 The Regime provides that if parties to an access negotiation haven't agreed on terms of access within two months of a proposal being made, then a dispute exists. A party to the dispute may refer the dispute to ESCOSA. ESCOSA must, in the first instance, attempt to settle the dispute by conciliation.

5.87 If a dispute is not resolved after ESCOSA has made reasonable attempts to do so, or if it is unlikely conciliation will be successful, or if the dispute is not resolved within 6 months of referring the dispute to ESCOSA, Division 6 of the WI Act provides ESCOSA with the power to refer the dispute to arbitration.

5.88 Following referral of a dispute, the arbitrator has the power to resolve the dispute by making a binding award. The WI Act provides that an award must be made within 6 months from the date on which the dispute is referred to arbitration. The *Commercial Arbitration Act 2011* (SA) applies to arbitrations under the Regime, to the extent it may operate consistently with the provisions of the WI Act (s86O).

5.89 The costs of arbitration are borne by the parties in proportions to be decided by the arbitrator, or in equal portions. If the proponent terminates arbitration or elects not to be bound by an award, the entire cost of arbitration is borne by the proponent.

5.90 The Applicant submits that the Regime provides a process to encourage parties to negotiate and reach terms and conditions of access. In the event of a dispute the Regime provides for independent conciliation and arbitration within a set time frame. The Applicant also notes the features of the Regime that accord with clause 6(4)(g) of the CPA.

The Council's assessment

5.91 The Council considers that where an access dispute exists, the Regime provides for dispute resolution in a manner envisioned by clause (6)(4)(g). In particular, the Council considers that the time limits imposed by the Regime – namely two months for the initial access negotiations, with a dispute being referred to arbitration if it has not been resolved within six months of being referred to ESCOSA[10] – promote the timely and efficient resolution of disputes.

5.92 ESCOSA is responsible for appointing an arbitrator in consultation with the parties to a dispute. The arbitrator must be a person that is independent of the parties to the dispute, not subject to control of the South Australian Government in any capacity, properly qualified and with no direct or indirect interest in the dispute. Division 6 of the WI Act also provides that if for some reason an arbitrator does not complete an arbitration, the regulator may, after consultation with the parties, make a fresh appointment.

5.93 One feature of the Regime that is of potential concern is the requirement that an access seeker who terminates an arbitration, or who elects not to be bound by an arbitrator's award, must bear the costs of the arbitration in their entirety (that is, the access seeker must pay the regulated operator's costs as well as their own – see s86ZH(2) of the WI Act). While this may be appropriate in some cases, there are other situations in which such a requirement may be less suitable. An example might be where an access seeker terminates the arbitration, or elects not to be bound by an award, because the arbitrator's proposed terms and conditions of access would not result in a viable business case for the access seeker. There is a risk that this requirement, which does not provide an arbitrator the discretion to award costs based on the individual circumstances of each arbitration, may unduly deter access seekers from participating in an arbitration.

5.94 Notwithstanding this concern, the Council is satisfied that the dispute resolution provisions under the Regime are broadly consistent with clause 6(4)(g).

Clause 6(4)(h): binding decisions

5.95 Clause 6(4)(h) provides that an effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding and effective. The regime should give effect to the enforcement process through legislative provisions, with appropriate sanctions and remedies for non-compliance.

[10] ESCOSA may also refer a dispute to arbitration if the dispute is not resolved by conciliation after reasonable attempts to do so, or if it is unlikely to be resolved within 6 months.

5.96 State or territory access regimes may allow for appeal of the decision of a dispute resolution body. To satisfy clause 6(4)(h), the ultimate decision of the appeal body must also bind the parties.

5.97 To satisfy clause 6(4)(h), an effective regime should not diminish any existing rights for appeal of an arbitrator's decision. This does not require the insertion of new appeal provisions.

The Regime

5.98 The Regime provides that an arbitrator's award is enforceable as if it were a contract between the parties to the award (s86ZI). Further, an appeal from an award on a question of law may be made to the Supreme Court of South Australia The Supreme Court of South Australia may grant an injunction restraining a person from contravening the award, or requiring a person to comply with the award. The Supreme Court may also order compensation for persons who have suffered loss or damage as a result of a party's contravention of an award.

5.99 Decisions made by ESCOSA under the Regime, such as determining whether an access dispute exists and the appointment of an arbitrator, may also be subject to judicial review in the Supreme Court of South Australia..

5.100 The Applicant submits that the features of the Regime as noted above accord with clause 6(4)(h) of the CPA.

The Council's assessment

5.101 The Council considers that the Regime meets the clause 6(4)(h) requirement that 'decisions of the dispute resolution body must bind the parties.' The Regime provides for the enforcement of an arbitrator's award as if it were a contract between the parties. The Regime further provides for injunctive relief and compensation for non-compliance with an award upon application to the Supreme Court of South Australia.

5.102 Regarding the second limb of clause 6(4)(h), that 'rights of appeal under existing legislative provisions should be preserved', the Regime does not preclude judicial review by the Supreme Court of South Australia of:

- decisions made by ESCOSA in its capacity as industry regulator (e.g. a decision to undertake conciliation or to refer a dispute to arbitration)
- an award made by an arbitrator.

5.103 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(h).

Clause 6(4)(i): principles for dispute resolution

5.104 Clause 6(4)(i) sets out eight matters that a dispute resolution body in an access regime should take into account in deciding on the terms and conditions of access.

5.105 The Council considers that clause 6(4)(i) applies to any body responsible for determining the terms and conditions of access—that is, both arbitrators and

regulators. Clause 6(4)(i) covers both price and non-price terms and conditions of access. Where relevant, the dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices.

The Regime

5.106 Section 86P of the of the WI Act sets out the principles that an arbitrator must take into account in deciding on the terms of an award. Included in these principles are the eight matters under clause 6(4)(i) of the CPA that a dispute resolution body in an access regime should take into account.

The Council's assessment

5.107 The Council notes that each of the principles in clause 6(4)(i) of the CPA are mirrored in section 86P of the of the WI Act and must be taken into account by an arbitrator. Under sections 86P(1)(j)-(l) of the Act the arbitrator must also take into account:

- any direction given to the regulated operator (in the case of a regulated operator that is a public corporation) by its Minister under the *Public Corporations Act 1993* that is relevant to the arbitration;
- the pricing principles specified in subsection (2); and
- other matters the arbitrator considers appropriate.

5.108 The Council considers there is no apparent conflict between these additional matters and the matters in clause 6(4)(i) of the CPA (mirrored in sections 86P(1)(b)-(i) of the WI Act) that the arbitrator must take into account in deciding on the terms and conditions of access.

5.109 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(i).

Clause 6(4)(j): facility extension

5.110 In some situations, the needs of an access seeker can be met only by an extension of the facility's geographic range or an expansion of its capacity. These matters should be subject, in the first instance, to negotiation between the parties. When parties cannot reach an agreement, however, the arbitrator should be empowered to determine, subject to the clause 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility. The clause 6(4)(j) criteria are:

- such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
- the owner's legitimate business interests in the facility being protected; and
- 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.

The Regime

5.111 The Regime recognises that an access proposal may include a proposal for alteration of or addition to water infrastructure. The Regime also provides that in making an award the arbitrator must take into account the costs to the regulated operator of providing access as sought by the proponent, including the costs of any necessary alteration of, or addition to, existing infrastructure.

5.112 However, under the Regime, the arbitrator cannot make an award that would have the effect of requiring the operator to bear any of the capital costs of any addition or extension to water infrastructure unless the operator agrees. An award cannot be made which would prejudice the rights of an existing industry participant (rights existing under an earlier contract or award) unless the third party agrees.

5.113 Other principles that an arbitrator must take into account include:

- the operational requirements for the safe and reliable operation of the facility
- the operator's legitimate business interests and investment in the facility, and
- the economic value to the regulated operator of any additional investment the proponent proposes to undertake.

5.114 The Applicant submits that the Regime satisfies clause 6(4)(j) having regard to the:

- limitations on an arbitrator's ability to make an award set out in sections 86P(3)(a) and (b) of the of the WI Act, and
- other principles that an arbitrator must take into account under section 86P of the Act when making an award.

The Council's assessment

5.115 The Regime contemplates that an arbitrator may require a regulated operator to alter or add to its existing infrastructure to accommodate the needs of an access seeker through its reference to the principles the arbitrator must take into account in an arbitration (s86P of the WI Act), which include the costs of any necessary alteration of, or addition to, existing infrastructure (s86P(1)(c). However, an arbitrator cannot make an award that would have the effect of requiring the regulated operator to bear any capital cost of such alterations or additions, unless the regulated operator agrees (s86P(3)(a)). These and the other principles in s86P of the WI Act are consistent with the clause 6(4)(j) criteria.

5.116 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(j).

Clause 6(4)(k): a material change in circumstances

5.117 Clause 6(4)(k) provides that 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.

The Regime

5.118 The Applicant submits that the Regime satisfies clause 6(4)(k), noting that s86ZN of the WI Act does not preclude parties who negotiate their own access arrangements from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contract.

5.119 The Applicant notes there is a process for termination or variation of an award (s86ZG of the WI Act). If the parties agree, an award may be terminated or varied. The access proposal and dispute resolution provisions in the Regime also apply to proposals to vary or terminate an award.

The Council's assessment

5.120 The Council considers that the Regime allows parties to apply for a revocation or modification of an arbitrator's award. Section 86ZG of the WI Act provides that:

- an award may be terminated or varied by agreement between all parties to the award
- a variation may include an extension of the period for which the award remains in force
- if a material change in circumstances occurs, a party to an award may propose termination or variation of the award.

5.121 The Council notes that the provisions in Part 9A of the WI Act about an access proposal and the arbitration of a dispute arising from an access proposal similarly apply (with necessary modifications) to a proposal to terminate or vary an award under s86ZG..

5.122 The Council is therefore satisfied that the Regime is consistent with clause 6(4)(k).

Clause 6(4)(l): compensation

5.123 Clause 6(4)(l) provides that a dispute resolution body should only impede a person's existing right to use a facility when it has considered the case for compensating that person. The Council does not interpret this to mean that an access regime need allow a dispute resolution body to impede existing rights. However, where a dispute resolution body can do this, it must also be empowered to consider and, if appropriate, determine compensation.

The Regime

5.124 The Applicant submits that the Regime does not preclude parties who negotiate their own access arrangements from determining what may constitute a material change in their particular circumstances and incorporating provisions to this effect in their access contract.

5.125 Section 86ZG sets out the process for termination or variation of an award. If all parties agree, an award may be terminated or varied as discussed above. Section

86ZL provides that if a person contravenes an award the Supreme Court may on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as result of the breach. An order may be made against the person/s who contravened the award as well as others involved in the contravention.

5.126 The Applicant submits that the Regime satisfies clause 6(4)(l), noting the relevant restrictions on arbitral awards described above.

The Council's assessment

5.127 In light of the above, the Council is satisfied that the Regime provides a framework consistent with clause 6(4)(l).

Clause 6(4)(o): access to financial information

5.128 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeal bodies) with the right to inspect all financial documents pertaining to the covered service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.

The Regime

5.129 As discussed under clause 6(4)(n), the Regime requires a regulated operator to maintain the segregation of accounts and records for its water businesses separate from its other businesses so as to give a true and fair view of that part of the business. A regulated operator must also keep accounts and records for that part of its water business proclaimed as being subject to the Regime.

5.130 Section 86ZP of the WI Act provides that the regulated operator must provide to ESCOSA within a stated time, or at stated intervals, specific information or copies of specific documents. Failure to comply with the requirements of section 86ZP incurs a maximum penalty of $60 000. ESCOSA also has general information gathering powers under the *Essential Services Commission Act 2002 (SA)* and may require a person to give information that ESCOSA reasonably requires for the performance of its functions. Failure to comply may incur a fine of $20 000 or imprisonment for 2 years.

5.131 Section 86Y of the WI Act provides for information gathering powers of the arbitrator, incorporating the following.

- The arbitrator may by written notice require a person to provide specific information or specific documents.
- The documents may be copied or kept for as long as is necessary for the purposes of the arbitration.

- The person providing the information may be required to verify the information or appear as a witness and comply with further requirements to take an oath or affirmation.

5.132 Failure to comply with these requirements incurs a maximum penalty of $20 000. However, a person need not give information or produce a document if—

- it is the subject of legal professional privilege, or would tend to incriminate the person of an offence; and
- the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.

5.133 The Applicant submits that the Regime satisfies clause 6(4)(o) by providing for the information gathering powers of ESCOSA and the arbitrator described above.

The Council's assessment

5.134 In light of the above, the Council is satisfied that the Regime is consistent with clause 6(4)(o).

Clause 6(5)(c): merits reviews of arbitration determinations

5.135 Clause 6(5)(c) provides that where merits review is provided, the review should be limited to information submitted to the original decision-maker.

The Regime

5.136 The Regime does not provide for merits review of an arbitrator's award, although an aggrieved party may seek judicial review (an appeal on a question of law) in the Supreme Court of South Australia (s86ZJ).

The Council's assessment

5.137 Merits review of arbitration outcomes or regulatory decisions is not a mandatory requirement under the clause 6 principles. The Council does not consider that the absence of merits review of arbitration decisions is a basis on which to conclude that the Regime should not be certified.

5.138 As the Regime does not provide for merits review of an arbitration determination, the Council considers that clause 6(5)(c) of the CPA is not applicable.

Efficiency promoting terms and conditions of access (clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b))

5.139 An effective access regime must encourage outcomes that enhance the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition. An effective regime ought to incorporate those matters referred to in clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

5.140 A detailed assessment of clauses 6(4)(a)–(c), (e), (f), (i), (k) and (n) has been discussed above. Clauses 6(5)(a) and (b) are assessed below.

Clause 6(5)(a): Objects clause

5.141 Clause 6(5)(a) of the CPA provides that a state, territory or Commonwealth access regime should incorporate an objects clause in the following manner:

> "objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets."

The Regime

5.142 Section 3 of the WI Act includes a new object to "promote the economically efficient use and operation of and investment in, significant infrastructure so as to promote effective competition in upstream and downstream markets".

The Council's assessment

5.143 The object in section 3(g) of the WI Act is expressed in similar terms to the objects under clause 6(5)(a) of the CPA. The Council therefore considers that the objects in the WI Act, considered in conjunction with the operation of the Regime as a whole, are consistent with clause 6(5)(a).

Clause 6(5)(b): Access pricing

5.144 Clause 6(5)(b) provides that a state, territory or Commonwealth access regime should incorporate a number of principles by which regulated access prices should be set. These are detailed at Appendix A clause 6(5)(b)(i) to (iv).

The Regime

5.145 The Regime aims to encourage access seekers and SA Water to set prices and other terms through commercial negotiation as a first preference. Section 86J of the WI Act requires SA Water and the access seeker to negotiate in good faith with a view to reaching an agreement. The use of the dispute resolution procedures to set prices is intended as a fall back mechanism where negotiations fail.

5.146 When making an award to settle a dispute, an arbitrator must under section 86P of the WI Act take into account the pricing principles specified in subsection (2). These principles replicate clause 6(5)(b) of the CPA.

5.147 The arbitrator must also take into account under section 86P(1) of the WI Act, among other things, any direction given to the regulated operator by its Minister under the *Public Corporations Act 1993 (SA)* that is relevant to the arbitration.

5.148 The Minister for Water and the River Murray (the Minister) directed SA Water under the *Public Corporations Act 1993 (SA)* on 24 June 2016 to 'determine prices for access to *designated services* on the basis of a charge per *customer* calculated using a *retail-minus methodology*' unless otherwise approved by the Minister. Under the Direction:

- '*Retail-minus methodology* means SA Water's retail fees and charges per *customer* calculated in accordance with the *state-wide price* for *retail services* minus SA Water's *avoidable costs* for the *designated services*, plus any facilitation costs to provide the *designated services*.'
- '*Designated services* means all infrastructure services using SA Water's infrastructure except SA Water's infrastructure that is used solely for the transportation of recycled water.'
- '*Avoidable costs* means the costs that SA Water would otherwise incur in the provision of *retail services* to the *customer(s)* that SA Water could avoid in the long term if it completely ceased provision of the *retail service* to the *customer(s)*.'

5.149 The Applicant explains that prices for access to SA Water's infrastructure are to be determined based on SA Water's retail price for the relevant service minus avoidable costs of supplying the relevant contestable components plus costs directly attributable to facilitating access to the services.

5.150 The Applicant also notes that:

- the pricing methodology is consistent with the methodology outlined in the ACCC's 2007 Determination of an access dispute under Part IIIA between Sydney Water and Services Sydney
- SA Water's retail services and associated prices are subject to independent economic regulation by ESCOSA.

The Council's assessment

5.151 The Regime promotes the settlement of access prices based on 'good faith' commercial negotiations but provides for prices determined through arbitration when a dispute exists. When making an award to settle a dispute, an arbitrator must take into account principles that mirror clause 6(5)(b) of the CPA (i.e. principles for access prices to promote efficiency).

5.152 The arbitrator must also take into account the Minister's direction to SA Water of 24 June 2016 to determine prices using a retail-minus methodology. In summary, this methodology calculates access prices by subtracting from retail prices levied by an incumbent infrastructure operator, the costs it could avoid in the long term by not supplying retail customers that will be supplied in the future by access seekers. Under this methodology, avoided costs in a water supply context might include the avoided costs of facilities and services used for downstream treatment and distribution of water to retail end users and associated customer services.

5.153 The retail-minus methodology generally allows for an access provider's costs of providing wholesale access to be met. This is because the methodology seeks to derive access prices from retail prices less the avoidable costs of providing services to end users that will be serviced by the access seeker. For access prices established

through the methodology to be efficient in productive and allocative terms,[11] it is important that the retail price from which the access price is derived is not excessive (e.g. monopoly pricing). It follows that it is a more suitable methodology where there is also independent regulation of the access provider's retail price. There is the potential also for the methodology to be less suitable where avoidable costs are not calculated on a long-run basis. This is due to the possibility that the short-run avoided costs of providing retail services to end users (that will be serviced by the access seeker) are negligible and would not provide access seekers with sufficient margin to enter the market or create competitive pressure.

5.154 Retail price regulation and the approach to calculation of avoidable costs are therefore important to addressing potential efficiency issues associated with adopting the retail-minus methodology. However, the methodology has other shortcomings regarding dynamic efficiency[12] which can be more difficult to address. Under the methodology, an incumbent may be indifferent as to whether it or an access seeker services a retail customer, as the incumbent may not incur a loss of profit from providing access based on its retail price minus avoidable costs. Access prices determined through the retail-minus methodology may therefore not lead to the dynamic processes normally associated with competitive markets.

5.155 The Council acknowledges the potential deficiencies in the retail-minus methodology but recognises that all access pricing methodologies have both strengths and weaknesses. Having regard to clause 6(5)(b) of the CPA, the Council considers that the retail-minus methodology adopted under the Regime is capable of providing pricing outcomes consistent with this clause for the following reasons:

- SA Water's retail prices are subject to independent economic regulation by ESCOSA. On the basis that ESCOSA sets retail prices to reflect prudent and efficient costs, access prices derived as a subset of the cost of providing retail services are more likely to approximate costs that are efficient in productive and allocative terms.
- The Minister's direction to SA Water of 24 June 2016 requires that SA Water's avoidable costs be calculated on a long term basis under the retail-minus methodology.
- The methodology does not preclude multi-part pricing and price discrimination where it aids efficiency.
- SA Water, a vertically integrated operator, would be less likely to price discriminate in favour of its own downstream (i.e. retail) operations by transporting bulk water to its retail arm at a lower price than provided to access seekers. This is because under the retail-minus methodology, retail services

[11] That is, prices set at the lowest possible cost to society and reflective of the actual costs providing the service, respectively.

[12] That is, innovation in the services offered, processes of production and meeting the needs of customers.

should incur upstream (i.e. bulk water transport) costs that reflect bulk water transport prices offered to access seekers.

- The methodology provides incentives for cost reduction and improved productivity in the retail water sector as it encourages entry by access seekers that are more efficient in productive and dynamic terms than SA Water in the provision of services to end users.

5.156 The Council recognises that the Minister has the ability to change or replace the direction to SA Water under the *Public Corporations Act 1993 (SA)* on how to determine access prices in the future. To the extent a change or replacement resulted in an approach by SA Water to determining access prices that is inconsistent with clause 6(5)(b) of the CPA, this may amount to 'substantial modifications' of the Regime for the purposes of s 44G(2)(e)(ii) of the CCA. Consequentially, certification may no longer present a bar to declaration of the services under Part IIIA. While the Council notes the possibility for the Minister's direction to be changed or replaced in the future, in its current form the direction is not inconsistent with clause 6(5)(b) of the CPA.

5.157 In light of the above, the Council is therefore satisfied that the Regime is consistent with clause 6(5)(b) of the CPA.

The Council's assessment

5.158 Overall, the Council considers that based on its assessment above the Regime is consistent with the requirements of clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

6 Assessment against the objects of Part IIIA of the CCA

6.1 The Council in recommending the certification of an access regime, and the Minister in making a decision on certification, must have regard to the objects of Part IIIA (ss 44M(4)(aa) and 44N(2)(aa) of the CCA).

6.2 The objects of Part IIIA are set out in s 44AA, and provide that:

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

6.3 In deciding whether to recommend certification having regard for the objects of Part IIIA the Council considers whether certifying the regime would promote those objects. This involves consideration of whether the intent and operation of a regime as a whole, guided by its stated object(s), accords with the objects of Part IIIA. The Council also takes account of the means of regulation (if any) of any other services in the industry to which a regime is relevant that are not covered by the regime. This consideration is in order to address the object that a regime provides a framework for consistent access regulation in each industry.

The Regime

6.4 The Applicant submits that in developing the Regime, South Australia sought to specifically make the WI Act consistent with section 44AA of the CCA by amending the WI Act to include an additional object under section 3 that states:

> 3(g) to promote the economically efficient use and operation of, and investment in, significant infrastructure so as to promote effective competition in upstream and downstream markets.

6.5 The Applicant considers that the Regime successfully achieves the objectives of Part IIIA of the CCA, stating in its Application that the Regime:

- seeks to ensure that access seekers are able to gain access to significant water infrastructure on fair terms and conditions and in a timely manner.
- seeks to facilitate commercial negotiations and ensures that access seekers have information available to them to minimise information asymmetry when undertaking negotiations for access to water infrastructure.
- specifically provides for a negotiate-arbitrate regulatory model, such that it:
  - imposes general requirements on affected operators in relation to accounts, dealing with access seekers and access to regulated services.
  - requires affected operators to provide pricing methodology information brochures and any reasonably requested information about access to access seekers.

- requires an affected operator to negotiate in good faith with an access seeker.
- creates a process whereby ESCOSA may, on request from the access seeker, and where negotiations have broken down, attempt to settle the dispute by conciliation, or refer the dispute to independent arbitration.
- requires the arbitrator to have regard to the CPA pricing principles.

6.6 The Applicant further submits that with a mechanism in place for access to water infrastructure that exhibits natural monopoly characteristics, the Regime will further facilitate competition in dependent markets that are contestable.

The Council's assessment

6.7 The Council considers that the Regime promotes the efficient operation of and investment in water infrastructure, thereby promoting competition in dependent markets. In reaching this conclusion, the Council has had regard to the Applicant's consideration of these issues, as set out above. The Council agrees that the Regime is consistent with and promotes the objects of Part IIIA and, as discussed in chapter 5, notes that the Regime is consistent with the clause 6 principles.

6.8 The Council considers that the Regime provides a framework and guiding principles to encourage a consistent approach to access regulation. The Regime is consistent with the clause 6 principles and therefore represents an approach to access regulation that is broadly consistent with certified access regimes in place in other states and for other industries. Being consistent with the clause 6 principles, the Regime also provides an example for other states and territories considering development of access arrangements for water infrastructure that promote a uniform approach. Further, the Council considers that the Regime provides a consistent approach to access regulation in the South Australian water industry. The Regime applies to SA Water's Pipeline Services, being the main trunk transport network for water supplied to Adelaide and towns across regional South Australia. It provides an access framework that is consistent across the state therefore enabling regulated access to water markets across South Australia's urban and regional areas on a uniform basis.

6.9 The Council therefore considers certification of the Regime would promote the objects of Part IIIA in s44AA of the CCA.

7 The duration of certification

7.1 In making a recommendation to the Commonwealth Minister on the certification of an access regime, the Council must also recommend the period that any certification should remain in force (s44(M)(5) of the CCA).

7.2 A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA. There is currently no mechanism in Part IIIA of the CCA for the revocation of a certification decision, although the Commonwealth Government has proposed amendments to provide for this. [13]

7.3 Where an access regime has been certified as an effective access regime, services to which the regime applies become immune from declaration, unless there have been substantial modifications to the access regime, or to the clause 6 principles, since the regime was certified.

Application

7.4 The Applicant seeks certification for a period of at least 10 years, or for a longer period deemed appropriate by the Council. It submits that an important consideration in determining the duration should be the provision of certainty for the water industry and those seeking access to water infrastructure.

The Council's assessment

7.5 In considering the duration of a certification, the Council considers the need for infrastructure owners/service providers and users to have stability and certainty in the regulatory environment, on the one hand, with the recognition that there may be changes in the market environment and the fact that there is no current mechanism in the CCA for revocation of a certification,[14] on the other. Where relevant, the Council also considers other factors such as whether a regime is proposed as a transitional measure or is being introduced in the early stages of industry reform and whether there are other relevant regulatory proposals such as for the development of a national access regime for an industry.

7.6 Having regard to these matters the Council considers that the certification period should be 10 years to provide long term certainty about the status of the Regime.

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13 See Schedule 13 of the Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* available at https://consult.treasury.gov.au/market-and-competition-policy division/ ed_ competition _law_amendments.

14 A service that is subject to a certified state or territory access regime may nevertheless be declared under Part IIIA where the Council and relevant Minister are satisfied that there have been substantial modifications to the access regime or the relevant principles in the CPA since the regime was certified.

Appendix A — The clause 6 principles

—extract from the Competition Principles Agreement

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

(a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under that access regime;

(b) should recognise that, as provided by ss 44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

6(4) A State or Territory access regime should incorporate the following principles:

(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.

(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.

(c) Any right to negotiate access should provide for an enforcement process.

(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 automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(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.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

  (i) the owner's legitimate business interests and investment in the facility;

  (ii) the costs to the owner of 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 use of the facility;

  (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

  (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

  (vii) the economically efficient operation of the facility; and

  (viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

  (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

  (ii) the owner's legitimate business interests in the facility being protected; and

  (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.

(k) 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.

(l) 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.

(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.

(n) Separate accounting arrangements should be required for the elements of a business

which are covered by the access regime.

(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 a service.

(p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

6(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

(b) Regulated access prices should be set so as to:

(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.

(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

(i) may request new information where it considers that it would be assisted by the introduction of such information;

(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

Appendix B — Key defined terms from the *Water Industry Act 2012* (SA)

Term	Definition
Definitions contained in Part 1 – 4 of the WI Act 2012	
SA Water	SA Water means *South Australian Water Corporation* established under the *South Australian Water Corporation Act 1994*
Water Service	Water service means— (a) a service constituted by the collection, storage, production, treatment, conveyance, reticulation or supply of water; or (b) any other service, or any service of a class, brought within the ambit of this definition by the regulations
Water infrastructure	Water infrastructure means— (a) any infrastructure that is, or is to be, used for— (i) the collection or storage of water, including a dam or reservoir, a water production plant or a wetland; or (ii) the treatment of water; or (iii) the conveyance or reticulation of water and includes the connection point; or (c) any other infrastructure used in connection with water and brought within the ambit of this definition by the regulations, but does not include— (c) any pipe, fitting or apparatus that is situated downstream of a customer's connection point; or (d) any pipe, fitting or apparatus that is situated upstream of a customer's connection point to a stormwater drain; or (e) infrastructure situated entirely within one site and not connected to any other infrastructure situated within another site; or (f) any other infrastructure used in connection with water that is excluded from the ambit of this definition by the regulations
Definitions contained in Part 9A – Third Party Access Regime of WI Act 2012	
Access contract	Access contract means a contract giving access to regulated infrastructure and infrastructure services or a contractual variation of an existing access contract affecting access to regulated infrastructure and infrastructure services in a significant way or to a significant extent
Access proposal	Access Proposal is defined in section 86I – a person (the proponent) who wants access to regulated infrastructure or who wants to vary an access contract in a significant way or to a significant extent, may make a written proposal (the access proposal) to the regulated operator of that infrastructure setting out the matters specified in 86I (1) (a) and (b)
Infrastructure services	Infrastructure services means a service provided by means of water infrastructure or sewerage infrastructure and includes— (a) the use of such infrastructure; (b) the service of operating such infrastructure or any associated equipment; (c) other related or ancillary services

Interested Third Party	Interested third party means an interested third party under section 86J(3); An interested third party is an affected third party who by notice given to the proponent or the regulated operator, indicates its interest in the negotiations
Regulated Infrastructure	Regulated infrastructure means infrastructure to which Part9A applies by virtue of the operation of section 86B. Section 86B provides that Part 9A applies in relation to operators of water infrastructure or sewerage infrastructure, and infrastructure services to the extent that it is declared by proclamation to apply.
Regulated operator	Regulated operator means an operator of infrastructure who is subject to the access regime that applies under this Part by virtue of the operation of section 86B (as referred to above)
Regulator	Regulator—refers to section 86C; 86C (1) The Commission (ESCOSA) is the regulator under this Part. (2) The regulator has the function of monitoring and enforcing compliance with this Part (in addition to the other functions conferred under the other provisions of this Act or under the *Essential Services Commission Act 2002*).
Supreme Court	Supreme Court means the Supreme Court of South Australia
Water/sewerage service business	Water/sewerage service business means a business consisting of— (a) the provision of water services or sewerage services; or (b) the service of providing— (i) access to regulated infrastructure to another person; and (ii) infrastructure services associated with such access.

Appendix C — The Council's approach to clause 6(3)(a)(i) of the CPA

C.1 Clause 6(3)(a)(i) of the CPA provides that for a state or territory access regime to conform to the principles set out in that clause, it should apply to services provided by means of significant infrastructure facilities where it would not be economically feasible to duplicate the facility. This principle is broadly equivalent to declaration criterion (b) in ss44G(2) and 44H(4) of the CCA. Criterion (b) of the declaration criteria requires that 'it would be uneconomical for anyone to develop another facility to provide the service'.

C.2 Accordingly, the Council's approach has been to interpret the clause 6(3)(a) principles in a manner consistent with the declaration criteria (to the extent possible), given that a certified access regime precludes declaration of the services under Part IIIA.

Criterion (b) – uneconomical for anyone to develop another facility

C.3 Criterion (b) of the declaration criteria requires that 'it would be uneconomical for anyone to develop another facility to provide the service'. Under clause 6(3)(a)(i) of the CPA, services subject to an effective access regime should be provided by a facility that 'it would not be economically feasible to duplicate'.

C.4 Although the terms 'duplicate' and 'develop' are distinct, the Council considers it appropriate to interpret the tests in the same way. The Council also considers that there is no practical distinction between 'not economically feasible' and 'uneconomical for anyone'.

C.5 Prior to the High Court's decision in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (***Pilbara***), the Council and the Australian Competition Tribunal interpreted criterion (b) as being concerned with the waste of Australian society's resources associated with duplication of facilities that exhibit natural monopoly characteristics – that is, where a single facility could meet all likely demand for a service at less cost than two or more facilities (the 'natural monopoly' test).

C.6 In *Pilbara*, the High Court determined that the criterion (b) test is one of profitability (the 'private profitability' test). It said:

> [criterion (b)] uses the word "uneconomic" to mean "unprofitable" [and] is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. (at [77])

C.7 The meaning of the word 'anyone' in criterion (b)—which does not appear in clause 6(3)(a)(i)—was pivotal in *Pilbara*. According to a majority of the High Court, 'anyone' in criterion (b):

> should be read as a wholly general reference that requires the decision maker to be satisfied that there is no one, whether in the market or able to enter the market for

> supplying the relevant service, who would find it economical (in the sense of profitable) to develop another facility to provide that service. (at [77], see also [83])

C.8 The majority also held that 'anyone' is not limited in application – it 'includes existing and possible future market participants' including the owner of the facility (*Pilbara*, [105]).

C.9 The implication of the High Court's decision for the Council's assessment of an access regime against clause 6(3)(a)(i) of the CPA has not been considered in the context of a certification application until now. The last time the Council made a recommendation to the Commonwealth Minister on an application for certification was in 2011, which pre-dates the *Pilbara* decision.

C.10 The Council is of the view that the absence of the word 'anyone' in clause 6(3)(a)(i) of the CPA is insufficient to distinguish the two tests. Accordingly, the Council considers it is bound to apply the High Court's 'private profitability' test in its consideration of an infrastructure facility that is the subject of a state or territory access regime against clause 6(3)(a)(i).

C.11 In doing so, the Council has been guided by a number of the High Court's observations in *Pilbara*, including the following:

- It would be profitable for a person to develop another facility to provide the service if the person 'could reasonably expect to obtain a sufficient return on capital that would be employed in developing that facility'. (*Pilbara*, [104])
- If development of an alternative facility would be profitable as part of a larger project, it is necessary to consider the rate of return of the development of the alternative facility as part of the *whole* project. (*Pilbara*, [104])
- The question of the profitability of developing an alternative facility is one that requires the making of forecasts and the application of judgment and 'is a question that bankers and investors must ask and answer in relation to any investment in infrastructure.' (*Pilbara,* [106])

Proposal to amend Part IIIA to restore criterion (b) to a 'natural monopoly test'

C.12 On 24 November 2015, the Commonwealth Government released its response to the Productivity Commission's Inquiry Report into the National Access Regime (2013)[15] and the Competition Policy Review for reforming Part IIIA of the CCA.[16] The Government has supported most of the Productivity Commission's recommendations, including the recommendation that criterion (b) be amended to refocus the test under the declaration criteria to a 'natural monopoly' one rather

15 http://www.pc.gov.au/inquiries/completed/access-regime/report.

16 See http://www.treasury.gov.au/PublicationsAndMedia/Publications/2015/National-Access Regime-Response.

than a test of 'private profitability'. The Government has also supported the Productivity Commission's recommendations to amend declaration criteria (a), (e) and (f) in ss44G(2) and 44H(4) of the CCA and to make consequential amendments to clause 6(3) of the CPA, to align those principles with the declaration criteria.

C.13 As part of its process to implement these recommendations, the Government released an Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016* (**Exposure Draft**) for public comment in September 2016.[17] Schedule 13 of the Exposure Draft sets out the proposed amendments to Part IIIA.

C.14 Relevantly, Schedule 13 of the Exposure Draft proposes that criterion (b) will be satisfied where the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market at least cost. The 'cost' in criterion (b) must take into account the costs to the service provider of coordinating multiple users of the facility.[18]

C.15 Until the proposed amendments become law, the Council considers it is bound to apply the High Court's 'private profitability' test when having regard to clause 6(3)(a)(i) of the CPA and the infrastructure services which are covered by a state or territory access regime for which certification is sought.

[17] See https://consult.treasury.gov.au/market-and-competition-policy-division/ed_competition_law_amendments.

[18] See the proposed new section 44CA 'Meaning of *declaration criteria*', Exposure Draft p72.

Appendix D – Information taken into account by the Council

Author	Date	Title	Confidentiality
Applications and submissions			
Government of South Australia	11 November 2016	South Australian Water Access Regime – Application for certification under section 44M of the Competition and Consumer Act 2010 (Cth)	No
References			
COAG (Council of Australian Governments)	1995	*Competition Principles Agreement*, as amended 13 April 2007	No
NCC	2009	*Certification of State and Territory Access Regimes, A guide to Certification under Part IIIA of the Trade Practices Act 1974 (Cth)*	No
NCC	2009	*NSW Water Industry Access Regime - Final Recommendation*	No
Acts and other instruments			
		Competition Policy Reform Bill 1995 (Cth), Explanatory Memorandum	
		Essential Services Commission Act 2002 (SA)	
		Water Industry Act 2012 (SA)	
		Supreme Court Act 1935 (SA)	
		Competition and Consumer Act 2012 (Cth)	
		Water Charge Infrastructure Rules 2010 (Cth)	
		Water Act 2007 (Cth)	
Case law			
		The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2012] HCA 36	

Appendix E – Chronology

Date	Event
11 November 2016	Application received by the Council
18 November 2016	Notice of the application published in *The Australian* and on the Council's website, inviting submissions in response to the application. Interested parties notified.
19 December 2016	Closing date for submissions on the application
3 March 2017	Draft recommendation released
20 March 2017	Closing date for submissions on the draft recommendation