Schedule (Reg 6B Trade Practices Regulations 1974)

1. State or Territory:

New South Wales

2. Responsible Minister:

The Hon. Nathan Rees MP
Premier, and Minister for the Arts

3. Contact Officer:

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4. Description of regime:

The NSW access regime for water industry infrastructure services established by Part 3 of the *Water Industry Competition Act 2006* (NSW) and the Water Industry Competition (Access to Infrastructure Services) Regulation 2007, copies of which are enclosed.

5. Description of services:

The storage, conveyance or reticulation of water or sewage by means of "water industry infrastructure" [as defined – see below], including the provision of connections between any such infrastructure and the infrastructure of the person for whom water or sewage is stored, conveyed or reticulated, but:

(a) not including the storage of water behind a dam wall, and
(b) not including:
    (i) the filtering, treating or processing of water or sewage, or
    (ii) the use of a production process, or
    (iii) the use of intellectual property, or
    (iv) the supply of goods (including the supply of water or sewage),
    except to the extent to which it is a subsidiary but inseparable aspect of the storage, conveyance or reticulation of water or sewage.

"Water industry infrastructure" is defined as "water infrastructure" or "sewerage infrastructure".

"Water infrastructure" is defined as any infrastructure that is, or is to be, used for the production, treatment, filtration, storage, conveyance or reticulation of water, but does not include:

(a) any pipe, fitting or apparatus that is situated downstream of a customer's connection point to a water meter, or
(b) any pipe, fitting or apparatus that is situated upstream of a customer's connection point to a storm water drain.

"Sewerage infrastructure" is defined as any infrastructure that is, or is to be, used for the treatment, storage, conveyance or reticulation of sewage, including any outfall pipe or other work that stores or conveys water leaving the infrastructure, but does not include any pipe, fitting or apparatus that is situated upstream of a customer's connection point to a sewer main.

6. Grounds on which it is claimed that the regime is an effective regime:

Section 44M of the *Trade Practices Act 1974* (Cth) provides that, in deciding what recommendation to make, the NCC must assess whether an access regime established by a State or Territory is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement (CPA).

Clause 6(3) of the CPA provides that for a State or Territory access regime to conform to those principles, 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 subclause (5)

<u>Clause 6(3)(a) – Criteria for application of access regime</u>

Section 23 of the *Water Industry Competition Act 2006* (NSW) (the "Act") sets out the "declaration criteria" by which services are to be assessed for coverage.

Consistent with the CPA, these include that access would not be contrary to the public interest (cf., section 44G(f) of the *Trade Practices Act 1974* (Cth)) and that:

(a) the infrastructure is of "State significance", having regard to its nature and extent and its importance to the State economy (s.23(a));

(b) it would not be economically feasible to duplicate the facility (s.23(b));

(c) access (or an increase in access) to the service by third parties is necessary to promote a material increase in competition in an upstream or downstream market (s.23(c)); and

(d) safe use of the infrastructure by access seekers can be ensured at an economically feasible cost and, if there is a safety requirement, that appropriate regulatory arrangements exist (s.23(d)).

To protect against inappropriate application of the access regime, the processes for applying for a coverage declaration require a formal application, independent assessment by the Independent Pricing and Regulatory Tribunal (IPART), and a Ministerial decision (Part 3, Division 2).

An application for a coverage declaration can only be made by the service provider, an access seeker who has tried but failed to reach agreement through commercial negotiation, or, in the case of public water utilities' infrastructure services, the Minister (s.24(1)). Applications for a coverage declaration must be subject to public consultation and independent assessment (by IPART) against the coverage criteria (s.25(1)-(3)). The decision on coverage must be made by the Minister, following consideration of IPART's advice (s.26(1)-(2)). The Minister's notice of the decision and reasons for the decision must be published by IPART (s.26(5)-(6)).

To ensure that infrastructure services which cease to meet the coverage declaration do not continue to be covered, the access regime allows service providers to apply for revocation of a coverage declaration (Part 3, Division 3).

To facilitate efficient investment, the Act (Part 3, Division 4) allows for the making of binding non-coverage declaration for a period of up to ten years, in cases where new water industry infrastructure services are to be provided (s. 31).

This allows for service providers to obtain certainty, before investing in new infrastructure, as to whether the declaration criteria apply.

The maximum duration of a non-coverage declaration is ten years (s.35(1)). Having regard to the nature of the industry, and the significant resources and time associated with new investment in water industry infrastructure investments, it is unlikely that there would be sufficiently large changes in industry or market structure within a 10 year period such that an infrastructure service assessed as not meeting the declaration criteria would, within that 10 year period, later be assessed as meeting the criteria.

To ensure, however, that a non-coverage declaration does not continue to apply to infrastructure that is significantly modified or expanded in such a way that, if assessed afresh, the infrastructure would meet the declaration criteria, the Act (s.36) provides that a binding non-coverage declaration has effect only for so long as the relevant infrastructure has substantially the same capacity, and serves substantially the same geographical locations, as specified in the original application for the declaration.

Further, section 37 of the Act provides for revocation of a no-coverage ruling if it is later discovered that the application contained false or misleading information or failed to contain all of the information that it was required to contain.

Applications for a non-coverage declaration are subject to public consultation (s.33(1)) and independent assessment by IPART against the declaration criteria (s.33(2)-(3)). The decision is made by the Minister, following consideration of IPART's advice (s.34(1)-(2)). The Minister's decision, and reasons for the decision, must be made available to the public on IPART's website (s.34(4)-(5)).

Clause 6(3)(b) – Principles to be reasonably incorporated in access regime

The attached table lists the relevant Competition Principles Agreement principles and identifies particular provisions of the NSW Water Industry Infrastructure Access Regime which give effect to them.

It is noted that section 44DA(1) of the *Trade Practices Act* states that the Competition Principles Agreement principles have the status of guidelines and not binding rules. The Competition Principles Agreement itself requires the principles set out in clauses 6(4) and (5) of that Agreement to be "reasonably" incorporated. It recognises that there may be a range of approaches available to incorporate each principle and provides that, provided the approach adopted represents a reasonable approach to the incorporation of the principle, that principle can be taken to have been reasonably incorporated.

Section 44(4)(b) of the *Trade Practices Act 1974* (Cth) provides that the NCC must not consider any matters other than the relevant principles set out in the Competition Principles Agreement.

Section 44DA(2) provides further that an effective access regime may contain additional matters that are not inconsistent with the Competition Principles Agreement principles.

No matters contained in the NSW Water Infrastructure Industry Access Regime are inconsistent with the Competition Principles Agreement principles.