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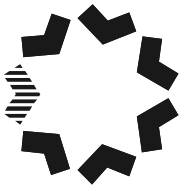

Water Industry Competition Act 2006 (NSW)

Application for certification of the NSW water industry infrastructure services access regime

Draft Recommendation

2 April 2009

Table of contents

Abbreviations and defined terms

Abbreviation	Description
Act	Water Industry Competition Act 2006 (NSW)
ADT	Administrative Decisions Tribunal
CAA	Commercial Arbitration Act 1984 (NSW)
Clause 6 principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement
Council	National Competition Council
CPA	Competition Principles Agreement
DWE	Department of Water and Energy (NSW)
Hunter Water	Hunter Water Corporation
ICRC	Independent Competition and Regulatory Commission (ACT)
IPART	Independent Pricing and Regulatory Tribunal of NSW
IPART Act	Independent Pricing and Regulatory Tribunal Act 1992 (NSW)
National Access Regime	Part IIIA of the Trade Practices Act 1974 (Cth)
National Gas Law	Schedule to the National Gas (South Australia) Act 2008 which is applied as law in the following jurisdictions: National Gas (New South Wales) Act 2008, National Gas (ACT) Act 2008, National Gas (Tasmania) Act 2008, National Gas (Queensland) Act 2008, National Gas (Victoria) Act 2008 and National Gas (Northern Territory) Act 2008
NSW	New South Wales
Part IIIA	Part IIIA of the Trade Practices Act 1974 (Cth)
Regulation	Water Industry Competition (Access to Infrastructure Services) Regulation 2007
Services Sydney	Services Sydney Pty Ltd
Sydney Water	Sydney Water Corporation
TPA	Trade Practices Act 1974 (Cth)
Tribunal	Australian Competition Tribunal
WICA Access Regime	The water infrastructure services access regime established under Part 3 of the Act and the Regulation
WSAA	Water Services Association of Australia

1 Draft recommendation

1.1 The NSW Government's water infrastructure services access regime (WICA Access Regime) is established by the *Water Industry Competition Act 2006* (Act) and the *Water Industry Competition (Access to Infrastructure Services) Regulation 2007* (Regulation). In accordance with s44M of the Trade Practices Act (TPA), the Council has considered whether it should recommend that the WICA Access Regime be certified as an effective access regime.

1.2 The Council's preliminary view on the information available to date is that the WICA Access Regime meets the requirements for certification and, accordingly, that it should recommend that the Commonwealth Minister (the Minister for Competition Policy and Consumer Affairs) certify the regime. In the event that the Council's final recommendation is that the WICA Access Regime be certified, then the Council will also recommend, of its own volition and without additional inquiry, that the designated Minister revoke the declaration made in *Re Services Sydney* (see [2.5]-[2.7].

1.3 The Council's preliminary view relies significantly on the NSW Government's stated purpose in regulating access to water infrastructure services, as follows:

> Principally the NSW Government's objective in introducing the WIC Access regime is to promote greater efficiency in the water industry through facilitating competitive service provision. Efficiency in this regard includes especially dynamic efficiency (innovation), such as in the development of new water sources, particularly recycling.
>
> The NSW Government supports appropriate access arrangements as a means of achieving these objectives (correspondence dated 17 February 2009).

1.4 The Council would be concerned if the regime, in the event that it is certified, does not provide for appropriate access outcomes (so not achieving the objectives of efficiency in water infrastructure use and investment and promotion of competition). If there is evidence that the stated purpose of the regime is not being given effect to and appropriate access outcomes are not being achieved, then this could in the Council's view amount to a substantial modification to the WICA Access Regime. If such a situation arose, then the exemption from declaration under Part IIIA of the TPA arising from certification may cease to operate.

1.5 The Council has identified several areas where it seeks additional information and opinions from potential access seekers and other parties to assist it in making its final recommendation. Specifically, the Council seeks additional information in relation to the following aspects of the regime:

- the effectiveness of the safeguards in the regime (such as the processes for decision making and arrangements for reviewing decisions) regarding coverage, revocation of coverage and binding non-coverage declarations, given the broad discretions given to IPART and decision makers and the involvement of the NSW Government in the NSW water sector through

ownership of Sydney Water Corporation (Sydney Water) and Hunter Water Corporation (Hunter Water)(see [5.29]-[5.37])

- the implications of the ability for the Premier to add geographic areas to Schedule 1, so having the effect of expanding the services that are subject to the WICA Access Regime (see [5.38]-[5.45]), and
- the impact of the requirements for water licences, and in particular whether the requirement that parties seeking a licence for retail water supply obtain sufficient quantities of water from non public utility sources (sub-section 10(4)(d)) would have the effect of unduly limiting the use that might be made of the WICA Access Regime (see [5.46]-[5.54]).

1.6 Notwithstanding its preliminary view that the WICA Access Regime meets the criteria for effectiveness, the Council considers that some aspects, including those noted at [1.5], would benefit from further consideration by the NSW Government, and by other governments developing third party access arrangements for water infrastructure services. In particular, the Council considers that a better approach would be to provide greater certainty by delineating the scope of a regime's application at the outset (in the Council's view a process for declaring particular water infrastructure services on a case by case basis is unnecessary[1]) and incorporating arrangements for limited merits review of critical decisions, particularly where a government has a significant ownership interest in the water businesses that are potentially exposed to competition from access seekers.

1.7 The NSW Government's approach to regulating third party access to water infrastructure services essentially involves the application of a localised version of Part IIIA of the TPA (albeit without provision for the merits review of regulators' decisions and some different institutional arrangements) to the state's water sector. When compared to, for example, the jurisdictional regimes for access regulation of gas pipelines—which rationalise the process of determining what pipelines are regulated, allow for light and fuller forms of regulation and use a national regulatory body—or the jurisdictional regimes for regulation of the electricity sector—which apply the relevant regulation to virtually all transmission and distribution infrastructure without requiring case by case declaration or coverage decisions—the WICA Access Regime does not seem to add refinement or certainty to the more generally applicable national scheme for access regulation in Part IIIA of the TPA.

1.8 Compared to the pre-existing regulatory scheme under Part IIIA, the WICA Access Regime:

[1] The WICA Access Regime could, for example, have declared all water infrastructure services operated by Sydney Water and Hunter Water to be covered, thereby enabling access seekers to proceed to negotiate access terms and conditions with the service provider and have recourse to dispute arbitration processes, without being first required to apply to the Premier for the service to be coverage declared.

- retains the role of the NSW Premier as the decision maker in relation to coverage declaration decisions (as is the case for declaration decisions relating to NSW Government-owned facilities under Part IIIA) but provides for recommendations to be made by IPART and removes merits review
- incorporates a mechanism for determining which water infrastructure is regulated (a similar process exists for determining which specific gas pipelines are covered) but prior to the application of that mechanism outside the areas of Sydney Water and Hunter Water, there is a requirement for the Premier to add an area to Schedule 1 of the Act—rather than reducing the decision steps required before access regulation is applied to water infrastructure, the WICA Access Regime adds an additional step in these cases
- adopts many of the criteria that apply under Part IIIA, but introduces apparently minor wording differences which add scope for additional legal dispute and potentially litigation
- redistributes regulatory functions without eliminating costs, such that different bodies provide advice on or decide similar issues.

1.9 The CPA envisages states and territories implementing jurisdictional access regimes. Where, in particular, the nature of access issues arising in an industry or sector within one or more jurisdictions call for a specific regulatory arrangement, the implementation of sector or industry specific jurisdictional access arrangements may be warranted. However, a state or territory access regime that merely replicates the negotiate/arbitrate approach already available under the general provisions of Part IIIA of the TPA would appear to offer little benefit while arguably adding to cost and uncertainty.

1.10 The Council's preliminary view is that the duration of certification of the WICA Access Regime should be 10 years. The proposed duration reflects in particular that the role of third parties (entities other than traditional public utility providers of water and wastewater infrastructure and services) in the water industry is at an embryonic stage of development and the nature and level of demand for access to existing infrastructure services is uncertain. The proposed duration also reflects the character of the WICA Access Regime, which provides only a principles-based framework for decision making and leaves several critical elements to be determined by IPART or by the decision making Minister. In the Council's view there would be significant benefit in reviewing at a relatively early stage how the WICA Access Regime has operated to facilitate access, with the opportunity taken for any necessary fine-tuning. This opportunity would arise in consideration of an application to extend the initial certification (see Subdivision C of Part IIIA of the TPA) or for the certification of any modified regime.

Invitation to make submissions

1.11 The Council invites written submissions on the draft recommendation. There is a period of 30 days for submissions. The closing time and date for submissions is **5.00pm on Monday 4 May 2009**. Submissions on the draft recommendation should be made to the Council under the cover of a completed Submission Cover Sheet. Information on making a submission is available on the Council's website (www.ncc.gov.au).

1.12 The Council will consider submissions received in developing its final recommendation to the Commonwealth Minister.

2 Background

The application

2.1 On 19 December 2008 the NSW Government applied to the Council for a recommendation pursuant to section 44M(2) of the TPA that the state's access regime for water industry infrastructure services (WICA Access Regime) is an effective access regime.

2.2 The NSW Government submitted its application just before the Christmas-New Year holiday period. The Council considered that there would be difficulties for effective public consultation close to the Christmas-New Year period so delayed the commencement of public consultation on the application.

2.3 The Council provided notice of its receipt of the application in "The Australian" newspaper on 2 February 2009 inviting interested parties to make written submissions in response to the application. The closing time and date for submissions was 5.00pm on 4 March 2009. A total of five submissions were received (see appendix B). While two submissions were received after the closing date, these raised no unique issues and the Council considered all submissions in developing its draft recommendation.

2.4 After preliminary consideration of the NSW Government's application, the Council wrote to the NSW Government on 13 January 2009 asking it to elaborate on a small number of matters. The NSW Government provided the requested elaboration on 17 February 2009. The Council's request and the NSW Government's response were published on the Council's website.

The services declared in *Re Services Sydney Pty Ltd*[2]

2.5 In September 2005, Services Sydney Pty Ltd (Services Sydney) applied to the Australian Competition Tribunal (Tribunal) for review of the NSW Premier's deemed decision not to declare certain sewerage services under s44H of the TPA.[3] Those services were defined as sewage interconnection and transportation services provided by Sydney Water as part of Sydney Water's Bondi, Malabar and North Head reticulation networks. Services Sydney sought access under Part IIIA of the TPA as part of its plan to offer alternative sewage treatment services in the greater Sydney area.

2.6 The Tribunal was satisfied that the application met all the criteria for declaration. It declared the Sydney Water sewage interconnection and transportation services for a period of 50 years effective from 21 December 2005. In that decision it noted that if

2 *Re Services Sydney Pty Ltd* [2005] ACompT 7

3 The NSW Premier made no decision on the Services Sydney application for declaration of certain services within 60 days of receiving the Council's recommendation to declare the services. Accordingly the Premier was deemed to have refused the application.

an effective access regime were to be established by the NSW Government, then steps would be taken to revoke the declaration.[4]

2.7 A declaration under Part IIIA can be revoked if competitive circumstances change such that the declaration criteria are no longer satisfied. A revocation inquiry may be initiated by any party or of the Council's own volition. The NSW Government advised that while it considers it may be appropriate for the declaration in *Re Services Sydney* to be revoked if the WICA Access Regime is certified, it does not have any present intention of making a revocation request to the Council (correspondence dated 17 February 2009). The NSW Government considered that if the Council does not act on its own initiative to recommend that the declaration be revoked under s44J of the TPA, then it would be a matter for the Board of Sydney Water (as the service provider whose services have been declared) as to whether it should request revocation.

[4] *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [213]–[214]

3 The WICA Access Regime

3.1 The WICA Access Regime is established under Part 3 of the Act and the Regulation. The Act and Regulation are available at www.legislation.nsw.gov.au.

3.2 The Premier of NSW is the responsible Minister for the WICA Access Regime established under Part 3 of the Act while the Minister for Water is the responsible Minister for the remainder of the Act.

3.3 The WICA Access Regime applies in respect of areas listed in Schedule 1 of the Act. At present these comprise the areas of operation of Sydney Water and Hunter Water. Under the regime, the Premier may expand the areas in Schedule 1 by order published in the Gazette (s22). The Act does not specify any process for assessing additions to Schedule 1.

3.4 At present the only water infrastructure services that are the subject of a coverage declaration are the sewerage services provided through Sydney Water's Bondi, Malabar and North Head reticulation networks. These services were deemed to be the subject of coverage declarations upon the commencement of the Act. The period of coverage is from 1 January 2007 to 31 December 2056, subject to any revocation declaration. These services are also the subject of the declaration under Part IIIA of the TPA pursuant to the decision in *Re Services Sydney Pty Ltd* [2005] (see [2.5] above).

3.5 The WICA Access Regime provides two pathways for access to water industry infrastructure services. Under both an access seeker acquires the right to negotiate access to the covered service, with binding arbitration available for access disputes. The pathways are:

- coverage declarations by the Premier (Part 3 Division 2) and
- voluntary access undertakings by a service provider (Part 3 Division 5).

3.6 Under the coverage declaration pathway an access seeker must in general first make a coverage application for the Premier to declare the water industry infrastructure service to be covered (provided that service is within the areas listed in Schedule 1 of the Act).[5] Then, if the Premier makes a coverage declaration, the access seeker negotiates the terms and conditions for access to the covered service.

3.7 Under the voluntary access undertakings pathway, a service provider may give IPART an access undertaking setting out the service provider's arrangements for access to any one or more of its services. An undertaking does not have effect until approved by IPART.

[5] If access is sought under the WICA Access Regime to a water infrastructure service(s) outside the areas listed in Schedule 1 of the Act, then the access seeker must first persuade the NSW Premier to include the area of the service in Schedule 1 and then apply for the service(s) to be coverage declared.

3.8 The Act also provides for the Premier to make binding non-coverage declarations. The maximum duration of a binding non-coverage declaration is 10 years.

Coverage declarations

3.9 An application for a coverage declaration is made to IPART. Upon receiving the coverage application, IPART undertakes a public consultation process and provides a recommendation to the Premier as to whether or not the declaration criteria are met, and if all criteria are met, a recommendation regarding the terms of a coverage declaration and the period of its effect (s25).

3.10 In assessing whether the declaration criteria are met for the purposes of providing a recommendation to the Premier, IPART uses the methodology set out in its guide to declaration (IPART 2008d).

3.11 A coverage declaration is a ruling made by the Premier that a particular water industry infrastructure service is covered by the WICA Access Regime. In order to make such a ruling the Premier must be satisfied that the declaration criteria in s23 of the Act are met.

Box 3.1: Section 23 of the Water Industry Competition Act 2006

For the purposes of this Part, the following criteria are *declaration criteria* in relation to an infrastructure service provided by water industry infrastructure:

(a) that the infrastructure is of State significance, having regard to its nature and extent and its importance to the State economy,

(b) that it would not be economically feasible to duplicate the infrastructure,

(c) that 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,

(d) that the 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,

(e) that access (or an increase in access) to the service would not be contrary to the public interest.

3.12 In deciding on coverage, the Premier must consider, but is not bound to accept, IPART's recommendation and may seek further advice from IPART. If all of the declaration criteria are satisfied, the Premier must make a coverage declaration (provided that the service is not the subject of an access undertaking or binding non-coverage declaration).

3.13 Once a coverage declaration is in place an access seeker obtains the right to negotiate the terms and conditions of access. The WICA Access Regime seeks to encourage commercial agreement on terms and conditions. The regime provides a binding process for resolving access disputes supervised by IPART.

Access undertakings

3.14 A service provider may submit to IPART a document setting out the service provider's arrangements for providing access to its infrastructure services. Those arrangements must provide for any access disputes to be referred to IPART for resolution in accordance with s40 of the Act (s38(3)).

3.15 In deciding whether to accept an access undertaking IPART must consider (s38(6)):

- the legitimate business interests of the service provider
- the public interest, including the public interest in having competition in markets
- the interests of prospective access seekers
- any guidelines IPART has issued pursuant to s92 of the Act
- any other matters that IPART considers relevant and
- the pricing principles in s41 of the Act.

3.16 Disputes regarding access undertakings must be referred to IPART for resolution.

3.17 Services subject to an access undertaking approved by IPART cannot be coverage declared under the WICA Access Regime. An access undertaking may be approved over a service(s) that is the subject of a coverage declaration, in which case the coverage declaration will have no effect over that service(s).

Binding non-coverage declarations

3.18 The WICA Access Regime provides for the making of binding non-coverage declarations. An application for a binding non-coverage declaration may only be made by the service provider for that service before the water industry infrastructure by means of which the service will be provided has been commissioned (s32).

3.19 IPART considers an application and makes a recommendation to the Premier. The Premier must make a binding non-coverage declaration if any of the declaration criteria are not met and the service is not the subject of a coverage declaration or an access undertaking (s34). The maximum duration of a binding non-coverage declaration is 10 years (s35).

4 Certifying an access regime

4.1 States and territories may establish their own regimes for access to services and for regulating the prices and other terms and conditions for such access. A state or territory that is a party to the Competition Principles Agreement (CPA) may apply to have an access regime certified as an 'effective access regime' for the purposes of the TPA.

4.2 Where a state or territory regime is certified, that regime will govern regulation of access to the services to which it applies and those services cannot be declared under the generic provisions of the National Access Regime in Part IIIA of the TPA or subject to an access undertaking to the Australian Competition and Consumer Commission.

4.3 To obtain certification the responsible Minister—the Premier of a state or Chief Minister of a territory—may apply, in writing, to the Council asking the Council to recommend that the Commonwealth Minister certify an access regime as effective. The requirements for application to the Council are prescribed in regulation 6B of the *Trade Practices Regulations 1974* (Cth). The Council encourages applicants to support their application with explanations and evidence demonstrating how each of the clause 6 principles is satisfied and how the regime is consistent with the objects set out in s44AA of Part IIIA of the TPA.

The Council's approach to considering an application for certification

4.4 Section 44M(4) of the TPA requires the Council, in deciding whether to recommend that a regime be certified as effective, to:

- 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 TPA (in s44AA), and
- not consider any other matters (s44M(4)).

4.5 The relevant principles are set out in clauses 6(2)–6(5) of the CPA (the clause 6 principles).[6] The Council must treat each principle as having the status of a guideline rather than a binding rule (s 44DA of the TPA).

4.6 Certification does not necessarily limit the content of an effective access regime. An effective state/territory access regime may contain additional matters as long as they are not inconsistent with the clause 6 principles (s44DA(2)). The CPA specifically recognises that there may be a range of approaches available to a state or territory government in incorporating a principle, and that where a state or territory access regime adopts a reasonable approach to the incorporation of a principle, the regime should be taken to have reasonably incorporated the principle.

4.7 While an effective access regime must satisfy each of the clause 6 principles, the CPA requires the Council to accept that a range of regulatory arrangements may be

[6] The clause 6 principles are reproduced at appendix A.

capable of delivering efficient outcomes consistent with the guiding principles. Accordingly, the process of certification does not involve assessment that the particular regime provides the most effective means of achieving efficient access outcomes. Rather it requires assessment only that the particular regime satisfactorily addresses the CPA clause 6 principles. These principles do not impose a high threshold for an access regime to be certified as effective.

Structure of this draft recommendation

4.8 In assessing the application for certification against the clause 6 principles, the Council has organised its consideration of the WICA Access Regime against the guiding clause 6 principles and the object of Part IIIA of the TPA 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), (g)-(i), (m), (n), (o)
- dispute resolution – 6(4)(a)–(c), (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 object of Part IIIA in s44AA of the TPA.

4.9 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 as the basis for assessing a regime's effectiveness. In forming its view as to the effectiveness of a regime, the Council considers each clause 6 principle relevant to each of the categories, and, as required by clause 6(3A)(a) of the CPA, only the relevant clause 6 principles.

4.10 When the Council recommends the Commonwealth Minister make a particular decision, the Council must also recommend the period for which the decision should be in force. The Council has addressed this matter in chapter 11.

5 Scope of the WICA Access Regime: CPA clauses 6(3)(a) and 6(4)(d)

5.1 CPA clause 6(3)(a) requires that for a regime to be certified as effective its coverage be limited to a narrow range of infrastructure services—those that are provided by significant infrastructure that is not economical to duplicate—and where access to the services removes barriers to competition in upstream and downstream markets. Access should be available only where any safety issues can be addressed at a reasonable cost.

5.2 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. The review provision in clause 6(4)(d) relates to the point in time of the decision to make a particular service subject to a regime. The clause could be satisfied by way of provision for the review of coverage declarations.

The WICA Access Regime

The scope of the services subject to the regime

5.3 The WICA Access Regime applies to the services provided by water industry infrastructure situated in, on or over land referred to in Schedule 1 of the Act. At present, the areas in Schedule 1 of the Act are:

- the area of operations of Sydney Water, as referred to in s10 of the *Sydney Water Act 1994* (NSW) and
- the area of operations of the Hunter Water, as referred to in s16 of the *Hunter Water Act 1991* (NSW).

5.4 Sydney Water is Australia's largest water utility and supplies water and wastewater services to over 4.3 million people in Sydney, the Illawarra and the Blue Mountains using the infrastructure described in table 5.1 below.[7] Hunter Water supplies water and wastewater services to over half a million people in the areas of Newcastle, Lake Macquarie, Maitland, Cessnock and Port Stephens, using the infrastructure described in table 5.2 below. The Council accepts these facilities are significant, having regard to their size and importance.

[7] Sydney Water also provides recycled water and stormwater management services.

Table 5.1: Sydney Water: water and wastewater infrastructure

Service	Type and size of Infrastructure
Water	21 000 km of water mains, 261 reservoirs and 156 pumping stations
Recycled water	365 km of recycled water mains
Wastewater	23 700 km sewer pipes and 669 sewage pumping stations, with 26 separate sewerage systems

Source: SWC 2008, p 8.

Table 5.2: Hunter Water: water and wastewater infrastructure

Service	Type and size of infrastructure
Water	4692 km of water mains, 76 service reservoirs and 84 pumping stations
Wastewater	4555 km sewer main systems, 17 wastewater treatment works, 380 pumping stations and over 200 000 sewer connections

Source: HWC 2008.

5.5 The Dictionary in the Act defines an infrastructure service as follows:

> **infrastructure service** means the storage, conveyance or reticulation of water or sewage by means of water industry infrastructure, and includes 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) does not include the storage of water behind a dam wall, and
>
> (b) does not include:
>
> (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.

5.6 The Dictionary in the Act defines water industry infrastructure as sewerage infrastructure and water infrastructure:

> **sewerage infrastructure** means 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.
>
> **water infrastructure** means 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 main, or (b) any pipe, fitting or apparatus that is situated upstream of a customer's connection point to a storm water drain.

5.7 Within the areas in Schedule 1 the Premier may declare certain water industry infrastructure services for coverage, in which case the services become subject to the negotiate/arbitrate access regime, which can then be used to determine access terms in the absence of commercial agreement. The process for a coverage declaration involves an application to IPART for a recommendation to the Premier and a decision by the Premier.[8] The Premier must consider the application against the declaration criteria in s23 of the Act (see [3.11]). Section 23 substantially reflects clause 6(3)(a) and adopts many of the declaration criteria that apply under Part IIIA of the TPA (s44G(2) and s44H(4)) although it introduces apparently minor wording differences. The Premier's coverage declaration is subject to judicial review but not to any form of merits review.

5.8 To date the only coverage-declared services are the sewerage services provided by Sydney Water's Bondi Reticulation Network, Malabar Reticulation Network and North Head Reticulation Network. These services were deemed to be covered on commencement of the Act (Schedule 4, Part 2). The services are within Sydney Water's area of coverage, and are the services that are declared under Part IIIA pursuant to the *Re Services Sydney* decision.[9] As noted at [1.2], if the Council recommends that the WICA Access Regime is certified, it also intends to recommend without further inquiry that the declaration of these services under Part IIIA be revoked.

5.9 The Premier may amend Schedule 1 to add more scheduled areas or to include more land in the existing scheduled areas by order published in the Gazette. The Act does not specify any process of assessment or criteria for determining potential additions to Schedule 1. Unlike for a coverage declaration, a revocation of coverage declaration, and a binding non-coverage declaration, the Act does not require a public consultation process and a recommendation by IPART prior to the Premier adding to Schedule 1.

5.10 In NSW the process for making such an order is as follows. The proposed order is published in the Gazette and tabled in the Parliament within sitting 14 days of gazettal. Either House may give a notice of disallowance of the order within 15 sitting days of tabling, in which case the matter is debated and a majority vote taken. If the order is disallowed it ceases to have effect. If there is no notice of disallowance the order is automatically made.

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8 The Premier may also revoke a coverage declaration upon application by the service provider. The process for considering and determining an application for revocation is the same as that for a coverage declaration.

9 *Re Services Sydney Pty Ltd* [2005] ACompT 7

Review of the right to negotiate access

5.11 Under the WICA Access Regime a coverage declaration must state the period for which it is to have effect. The coverage declaration may be renewed upon application by any person currently having access to the service (s24(2)). An application for renewal triggers the same procedure as that which applies to an original application for a coverage declaration, such that IPART will consider afresh whether each of the declaration criteria is satisfied in providing its recommendation to the Premier.

5.12 The WICA Access Regime also provides for a coverage declaration to be revoked upon an application for revocation by the service provider. Upon receiving the application, IPART must consider the application, invite public submissions and make a recommendation to the Premier. The Premier must revoke the coverage declaration if any of the declaration criteria are not met.

5.13 The Premier may revoke a binding non-coverage declaration at the service provider's request, or if the application for the non-coverage declaration contained false or misleading information. A binding non-coverage declaration only has effect for complying infrastructure. It does not continue to apply to infrastructure that is materially modified or expanded in such a way that, if assessed afresh, it would meet the declaration criteria.

Application and submissions

The scope of services subject to the regime

5.14 The NSW Government submitted that the declaration criteria in s23 of the Act are consistent with the CPA. It noted that to protect against inappropriate application of the WICA Access Regime, a coverage declaration requires a formal application, independent assessment by IPART and a Ministerial decision.

5.15 Ms Wendy Ambler submitted that the differences between the wording of several of the declaration criteria in s23 of the Act and the declaration criteria in Part IIIA of the TPA are significant (Ambler sub 1, at [6.17-[6.18]), and could be a barrier to competition in the NSW water sector if they have the effect of raising the bar to access (Ambler sub 1, at [6.40]). She considered that the NSW Government could clarify its drafting intent in this area.

5.16 Ms Ambler also noted IPART's various advisory and administrative functions under the WICA Access Regime, considering in particular that interconnection between IPART's licensing and coverage declaration roles may lead to access outcomes that constrain competition. She considered that one possibility could be that IPART would recommend against a coverage declaration application, where that application is made by a licence applicant who fails to meet the requirements of sub-section 10(4)(b) (risk to public health), on the ground that the declaration criterion in s23(d) (safe use of the infrastructure) is not met (Ambler sub 1, at [6.35]-[6.38] and [11.1]).

5.17 Submitters also raised other queries relating to the scope of the regime. The Independent Pricing and Regulatory Commission of the ACT (ICRC) and Ms Ambler questioned the process for adding to Schedule 1. The ICRC considered it to be 'unclear', and asked whether a public consultation process is intended or whether the Premier will unilaterally amend the schedule 1 (ICRC sub 1). Ms Ambler noted that whether or not the additions or inclusions 'will be subject to any degree of independent assessment is open to question' (Ambler sub 1, at [6.8]).

5.18 These two submitters also raised concerns about particular areas that might potentially be added to Schedule 1. The ICRC questioned whether the Premier can add areas within NSW designated as Commonwealth land, and if so, whether this would enable the WICA Access Regime to be used to gain access to infrastructure owned by the ACT. Ms Ambler noted the scope for the regime to be extended to include parts of the Murray Darling Basin (Ambler sub 1, at [7.2]).

5.19 Two submitters also questioned the arrangements for the review of the Premier's coverage declarations, IPART's approvals of access undertakings and arbitration determinations. AquaNet, which has an interest in the WICA Access Regime as a service provider, considered that the right to merits review should be available in relation to the Premier's coverage declarations, IPART's approvals of access undertakings and arbitration determinations. Noting that Part IIIA of the TPA provides for merits review in relation to the equivalent processes under the National Access Regime, and that the national gas and electricity regulatory regimes provide for limited merits review of key regulatory decisions, AquaNet stressed the importance of transparency and regulator accountability if the private sector is to use the WICA Access Regime with confidence (AquaNet sub 1). Ms Ambler noted a number of procedures that she considered introduce conflicts and ambiguities. She considered that the NSW Government's 'policy decision to omit a merits review process may be well worth revisiting' (Ambler sub 1, at [11.4]).

Review of the right to negotiate access

5.20 The NSW Government submitted that the WICA Access Regime satisfies clause 6(4)(d) because the regime:

- requires that a coverage declaration state the period for which it has effect and the scope for renewal of the application thereby satisfying the requirement for review
- ensures that an infrastructure service that ceases to meet the coverage declaration does not continue to be covered because the Premier has the capacity to revoke a regime, and
- satisfactorily protects against a binding non-coverage declaration continuing to apply to infrastructure that is materially modified or expanded in such a way that, if assessed afresh, it would meet the declaration criteria.

5.21 The NSW Government contended that there are unlikely to be significant changes in industry or market conditions within the 10 year maximum period of a binding non-

coverage declaration such that an infrastructure service assessed as not meeting the declaration criteria would, within that 10 year period, be assessed as meeting the criteria.

5.22 Ms Ambler noted that the WICA Access Regime contains no provision expressly preserving the terms of an existing access agreement upon the expiry of the coverage declaration that relates to that access agreement, and that only the service provider may apply for the revocation of coverage declaration (Ambler sub 1, at [6.49]).

Discussion

The scope of services subject to the regime

5.23 The Council considers that there is little argument that water and sewerage networks typically exhibit natural monopoly characteristics: including the presence of significant economies of scale and/or economies of scope in the production of the service(s) the facility provides, the existence of substantial fixed (or capital) costs and relatively low variable (or operating) costs, and large and lumpy investment costs. These features result in significant economies of scale which can act as a natural barrier to entry and hence to competition.

5.24 Where a single facility is capable of meeting likely demand for the service(s) at lower cost than two or more facilities, it will not be economically feasible to duplicate the facility and society's resources will be most efficiently used and costs minimised if additional facilities are not developed. By addressing this 'natural monopoly problem' access can promote competition in related markets.

5.25 The Council accepts that this outcome is likely to be available from the application of the coverage criteria in s23 of the Act in relation to the areas currently listed in Schedule 1. It agrees that access to the water infrastructure services that are subject to the regime will have the effect of improving the conditions for competition in upstream or downstream markets.

5.26 The Council acknowledges however that there are differences in terminology between the declaration criteria in Part IIIA of the TPA and the coverage declaration criteria in the WICA Access Regime (s23 of the Act) and that these may introduce some uncertainty in relation to the application of the coverage declaration criteria in s23, to the extent that their application relies on past interpretations and decisions pursuant to Part IIIA of the TPA.

5.27 On the information currently available, the Council is inclined to consider that the regime satisfactorily addresses the clause 6(3)(a) principles. Notwithstanding this, the Council considers that three aspects of the WICA Access Regime raise potential concerns relating to clause 6(3)(a) and therefore the regime's effectiveness. The three aspects are:

- the absence of merits review of key decisions
- prospective additions to Schedule 1 and

- the potential effects of the licensing arrangements in Part 2 of the Act.

5.28 The Council seeks further information on these three aspects of the WICA Access Regime.

Absence of merits review of key decisions

5.29 The WICA Access Regime does not provide for the merits review of the Premier's coverage declarations, revocation declarations or binding non-coverage declarations, although these may be subject to general judicial review in the NSW Supreme Court. Neither does the WICA Access Regime provide for merits review of arbitration determinations or of IPART's decisions on access undertakings or licensing.[10] Again, such matters may be subject to general judicial review.

5.30 The NSW Government explained that in developing the Act it had made a policy decision that it would not provide an avenue for merits review. The Government considered that merits review is essentially an opportunity for persons unhappy with the first decision maker's decision to get 'a second bite of the cherry'. Although the NSW Government agreed that merits review can improve decision-making processes in some circumstances, it noted that merits review can also increase the potential for regulatory gaming, reduce certainty and increase both regulatory cost and delays.

5.31 The NSW Government further argued that processes under the WICA Access Regime provide sufficient protections against decision making errors. In particular the Government noted the following:

- The process of considering applications has a high degree of transparency: IPART must undertake a public consultation process on any application for a coverage declaration, revocation of a coverage declaration, binding non-coverage declaration, or licence and provide a recommendation to the Premier (or the Minister for Water, in the case of a licence application). The Premier must consider (but is not bound to accept) IPART's recommendation.
- The Premier will, as a matter of administrative policy, provide the applicant and the service provider (if different) with a confidential copy of IPART's report regarding the application before making any final decision, and the parties will be given a final opportunity to make submissions in respect of IPART's recommendations before the Premier makes a final decision.
- The Premier 'must' make a coverage declaration if satisfied that all of the declaration criteria are met (provided the service is not the subject of an access undertaking or binding non-coverage declaration). Decisions of the Premier are subject to judicial review under common law.
- Upon the Premier making a decision, IPART must publish the Premier's decision and reasons, and its own recommendation.

[10] Arrangements for the review of arbitration determinations are discussed in chapter 8.

- The procedures to be followed by IPART, as the arbitrator under the WICA Access Regime, minimise the scope for error. IPART's policy is to ensure that any arbitration is heard by at least two tribunal members. IPART must also give the parties a draft determination prior to making a final determination, and must give them an opportunity to make submissions in relation to it. This provides the parties to an arbitration with the opportunity to raise any concerns or perceived errors before the final determination is made.
- Existing procedures for seeking judicial review of an arbitrator's determination are preserved under the regime, with arbitrations subject to the supervision of the Supreme Court of NSW.

5.32 The NSW Government noted more generally that there is reduced potential for conflicts of interest because the Premier is the responsible Minister for Part 3 of the Act (Access to Infrastructure Services) and the Minister for Water is the responsible Minister for the remainder of the Act (including the licensing requirements in Part 2).

5.33 In the Council's view, providing for appropriate review of the decisions of regulators is good regulatory practice. As envisaged by the CPA, such review does not need to allow for a second bite of the cherry and can be tailored to allow for redress of decision making errors (such as where an error of law or a finding of fact that was not open to a decision maker is established). An appropriate level of merits review does not require a general reconsideration of the initial decision or de novo redetermination. In relation to the reviewable regulatory decisions under the National Gas Law for example, applications to the Tribunal for merits review may only be made on the grounds of an error in the regulator's finding of facts, or that the exercise of the relevant regulator's discretion was incorrect or unreasonable, or that the occasion for exercising the discretion did not arise. In the Council's view this limited merits review appropriately balances the need for oversight of regulatory decision making and reduces scope for unacceptable delay.

5.34 The Council observes that provision for merits review is available in other areas involving IPART. Under both the *Electricity Supply Act 1995* (NSW) and the *Gas Supply Act 1996* (NSW), IPART makes recommendations on such matters as licensing and authorisations to a decision making Minister. IPART also makes decisions in relation to compliance with licences and authorisations. The Minister's decisions concerning licences and authorisations (on IPART's recommendations) are subject to merits review in the NSW Supreme Court and IPART's decisions on compliance matters are subject to merits review in the Administrative Decisions Tribunal.

5.35 While the Council advocates provision for appropriate review of Ministers' decisions under an access regime, it accepts that under the clause 6 principles the absence of merits review is not itself reason to find that an access regime is ineffective. The Council also accepts that the existing safeguards in the WICA Access Regime (including the exclusion of coverage declaration decision making from the responsibilities of the NSW Minister for Water) provide a level of protection against decision making errors. However in circumstances where a government has a

commercial interest in the outcome of a regulatory decision, the additional safeguard provided by a review by an independent body would have been desirable.

5.36 The Council considers that certification of the WICA Access Regime should occur despite the absence of merits review of the Premier's coverage declaration and similar decisions. The Council believes it should give weight to the stated objects of the WICA Access Regime and to the stated position of the NSW Government as set out at [1.3].

5.37 The Council would appreciate further views on the adequacy of judicial review proceedings as a curb on any efforts to bias decision making under the WICA Access Regime to limit competition with Sydney Water, Hunter Water or similar state interests.

Additions to Schedule 1

5.38 In the Council's view, if the WICA Access Regime is certified, then the services *subject to* the regime will be excluded from declaration under s44G/s44H of the TPA. This is because these services would then not satisfy the declaration criterion in s44G(2)(e) of the TPA.

5.39 Assuming certification of the WICA Access Regime, the services at present excluded from declaration under the general provisions of Part IIIA of the TPA are those provided by water industry infrastructure in the area of operations of Sydney Water and Hunter Water. That is, the Council considers that the exclusion from declaration under Part IIIA of the TPA is not limited to only the services both subject to and covered under the WICA Access Regime (at present the sewerage services provided by Sydney Water's Bondi Reticulation Network, Malabar Reticulation Network and North Head Reticulation Network).

5.40 On the Council's view of the interface between certified regimes and declaration criterion (e) of Part IIIA, additions to Schedule 1 would have the effect of automatically excluding additional water industry infrastructure services from the general operation of Part IIIA, unless some or all additions to Schedule 1 amounted to substantial modifications of the WICA Access Regime.

5.41 The Council is satisfied that the services that are currently subject to the regime satisfy the criteria for declaration in s23 of the Act and that s23 reflects substantially the declaration criteria in the TPA. In this sense there is currently strong convergence between the geographic scope of the regime and the services that are subject to it.

5.42 However, the addition of large geographic areas (with likely wide divergence of facilities) to Schedule 1 will broaden the type and size of facilities that provide water industry infrastructure services that are subject to the regime. This increases the prospect that services that are provided by facilities that are not economic to duplicate become subject to the regime. This means in essence that services become subject to the regime without the coverage question having been addressed.

5.43 The Council is inclined to the view that a minor addition to Schedule 1, such as a small extension in the area of operation of Sydney Water should not amount to a substantial modification of the regime. However the Council would have greater concern if there were additions to Schedule 1 that had the effect of a larger expansion of the application of the WICA Access Regime, particularly given there is no requirement for an independent and transparent process for assessing additions to the schedule and limited disallowance measures.

5.44 The process for adding geographic areas in the WICA Access Regime contrasts with arrangements for the regulation of third party access to natural gas pipeline systems. Under the National Gas Law, all pipelines were either covered upon the commencement of the law or are within the scope of the gas access regime in the statute. In this sense the scope of the regime regulating access to gas pipelines cannot be expanded independently of coverage questions being explicitly addressed.

5.45 Unlike the National Gas Law, the WICA Access Regime contains no provisions for dealing with cross-border infrastructure, for example if areas within the Murray Darling Basin (Ambler sub 1, at [7.2]), or other jurisdictions' infrastructure facilities (ICRC sub 1), are added to Schedule 1 (leaving aside the question of whether or not the Premier has the capacity to add Commonwealth-owned land located in NSW to Schedule 1). While it might be that the Premier would not contemplate adding such areas to Schedule 1 without some form of intergovernmental agreement (or at least consultation with the affected state(s) or territory), it is not clear from the NSW application and related information how the NSW Government might approach these issues.

Effect of the licensing requirements

5.46 Under Part 2 of the Act, a corporation that wishes to supply water or provide a sewerage service must obtain a licence:

- A network operator's licence is required to construct, maintain or operate water industry infrastructure.
- A retail supplier's licence is required to supply water (potable or non-potable) or to provide sewerage services.

5.47 An application for a licence is determined by the NSW Minister for Water following a public report and recommendation by IPART. The Minister must consider, but is not bound to accept, IPART's recommendation. There is no provision for merits review of the NSW Minister for Water's licensing determinations.

5.48 Section 7 of the Act provides that in considering whether or not to grant a licence and the conditions to be imposed on such a licence, the Minister must have regard to:

- protecting public health, the environment, public safety and consumers
- encouraging competition in the supply of water and the provision of sewerage services
- ensuring the sustainability of water resources, and

- promoting the production and use of recycled water.

5.49 Section 10(4) sets out the conditions on which the Minister for Water must be satisfied if he or she is to grant a licence. In particular, sub-section 10(4)(d) requires that in the case of an application for a licence for retail water supply, the Minister must be satisfied that 'sufficient quantities' of the water supplied by the licensee will be obtained otherwise than from a public water utility. One effect of this would appear to be to limit licences for water retail supply to parties that produce or gain access to sufficient quantities of water from new sources.

5.50 There is little guidance on what constitutes 'sufficient quantities' and how this provision might affect the entry of new retail water suppliers, which might then require access to water infrastructure under the WICA Access Regime. Responding to a request from the Council for elaboration on this, the NSW Government provided the following information:

- The licensing arrangements in Part 2 are independent of the access regime in Part 3, and apply irrespective of whether a party seeks access such that the licence requirement and licensing prerequisites apply to all private operators including those who do not need access to declared services.
- Prospective licence applicants can direct inquiries to IPART, whose role is to receive, consider and recommend to the Minister on licence applications.
- Sub-section 10(4)(d) recognises that publicly-owned water resources are finite and demand for them needs to be managed appropriately. New private water suppliers are permitted to enter into commercial arrangements with public water utilities to purchase water from public sources for re-supply to consumers (at unregulated prices) but that to ensure that the state's overall supply/demand balance is not adversely affected those private operators are also required to make a contribution to the supply side (for example by supplying water derived from sewer or stormwater recycling, alternative rain water capture, or desalination) (correspondence dated 17 February 2009).

5.51 While noting the NSW Government's view that the licence arrangements are separate from the access regime, the Council observes that the two are linked. It is unlikely that a potential entrant whose participation in a water retail market depended on it obtaining access would seek access if it could not also obtain a licence. In theory at least, the licensing condition in sub-section 10(4)(d) limits the range of parties that might seek access to water infrastructure services under the WICA Access Regime to only those parties that obtain most of their water from new sources (and thus are able to obtain a water retailer supplier licence). Further, it may be difficult for IPART to recommend in favour of the coverage of a water infrastructure service if the likely access seeker(s) cannot get a retail supplier licence and so cannot provide a water retail service (so cannot promote competition).

5.52 If this were the effect of the licensing arrangements in Part 2 of the Act, then opportunities to promote greater efficiency in provision of water retail or similar

services (which require access to water infrastructure but are not dependent on access to new water sources) would be frustrated. In such situations the type and level of access that might be available under Part 3 of the Act would be limited in ways that are inconsistent with the infrastructure investment efficiency and competition objectives in Part IIIA of the TPA that must be considered in determining a certification application.

5.53 However if in practice the use of the WICA Access Regime is likely largely to be by parties that obtain the bulk of their water from a new water source, then such impacts on the capacity of the regime to achieve Part IIIA's infrastructure investment efficiency and competition objectives may be more theoretical than practical.

5.54 Despite raising this potential effect of the licensing arrangements in its request to the NSW Government for elaboration (which the Council published on its website and provided to a range of potential interested parties), the Council received no evidence of concern by potential users of the WICA Access Regime. No party indicated that its capacity to use the WICA Access Regime would be diminished by the requirement to obtain water substantially from a source other than a public utility.

Reviews of the right to negotiate access

5.55 The arrangements under the WICA Access Regime provide for the review of the right to negotiate access:

- a coverage declaration must specify the period for which it is to have effect, and may be renewed upon application by any person currently having access to the service
- a coverage declaration may be revoked upon an application for revocation by the service provider, and
- a binding non-coverage declaration may be revoked upon application by the service provider or if the application for the declaration contained false or misleading information.

5.56 These processes involve consideration by IPART via a public consultation process, with a recommendation to the Premier who decides the matter.

5.57 The Council considers that the matters raised by Ms Ambler at [5.22] do not raise questions about the regime's compliance with clause 6(4)(d) of the CPA. Under the common law principles of contract law the parties can identify in the access agreement the circumstances in which the agreement terminates (which may include that the agreement does or does not terminate upon the revocation or expiry of the coverage declaration).

5.58 The Council considers that the WICA Access Regime satisfies clause 6(4)(d) of the CPA.

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

6.1 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.

Application and submissions

6.2 The NSW Government stated that clause 6(4)(p) is not applicable to considering the effectiveness of the WICA Access Regime. It did not address clause 6(2).

6.3 Two submitters noted the WICA Access Regime potentially raises questions related to its influence beyond NSW.

- The ICRC noted the potential for additions to Schedule 1 that may have the effect of the WICA Access Regime being used to gain access to the services of infrastructure owned by the ACT were it possible for the Premier to add areas Commonwealth land located within NSW.
- Ms Wendy Ambler noted the potential for additions to Schedule 1 that may have the effect of the WICA Access Regime being used to gain access to the services of infrastructure located in the Murray Darling Basin (Ambler sub 1, at [7.2]).

Discussion

6.4 At present the WICA Access Regime applies only to water industry infrastructure services situated on the land in Schedule 1 of the Act, which are the areas of operations of Sydney Water and Hunter Water. These areas are wholly within NSW. As it stands at the present time therefore, there are no interstate issues relevant to the WICA Access Regime.

6.5 As noted at [5.45], the WICA Access Regime contains no provisions for dealing with cross-border infrastructure. While it might be that the Premier would not contemplate adding areas in which there is such infrastructure to Schedule 1 without some form of intergovernmental agreement (or at least consultation with the affected state(s) or territory), the NSW application and related information does not explain how the NSW Government might approach these issues. The Council has no information however to suggest that NSW is or might be contemplating additions to Schedule 1 that raise questions about the regime's capacity to satisfy clause 6(2) and 6(4)(p). While it recognises that the NSW Premier is not prevented from adding areas such that the WICA Access Regime may conceivably have effect beyond the boundary of NSW, such a course is probably unlikely. In particular, the Murray Darling Basin is subject to a range of legislation and intergovernmental agreements that would

suggest the addition to Schedule 1 of areas within the basin without agreement between affected governments might be counterproductive, and therefore unlikely.

6.6 The Council accepts that the WICA Access Regime satisfies clauses 6(2) and 6(4)(p).

7 The negotiation framework: CPA clauses 6(4)(a) – (c), (e), (f), (g), (h), (i), (m), (n), (o)

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

7.1 Clauses 6(4)(a)–(c) seek to ensure that an access regime provides an appropriate balance between commercial negotiation and regulatory intervention to facilitate 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 and also provide a means for dealing with situations where access providers and access seekers are unable to reach agreement.

7.2 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 WICA Access Regime

7.3 If a water industry infrastructure service is the subject of either a coverage declaration or an access undertaking approved by IPART, then an access seeker has the right to negotiate access to the services. The terms on which a service provider will provide access to an infrastructure service the subject of a coverage declaration or an access undertaking must be set out in an agreement between the parties or if no agreement can be reached, in an access determination.

7.4 The procedures for negotiating an access agreement are set out in Regulation 8 of the Regulation and in IPART's negotiation protocols. The negotiation protocols include the requirements that the parties must:

- agree a timeframe for negotiations, which must not exceed 90 days
- endeavour to accommodate each others' reasonable requirements during the negotiations, and
- meet and negotiate in good faith with a view to reaching agreement on the terms and conditions, including price, on which the service provider makes the requested infrastructure service available to the access seeker (IPART 2008e).

7.5 If the negotiation is successful and the parties reach an agreement, the agreement is recorded in writing and must comply with s39 of the Act.

7.6 If the parties cannot reach agreement as to the terms and conditions of access, or if a dispute arises under an access agreement, then either party may apply to IPART for the dispute to be determined by arbitration (s40). The process for resolving a dispute is considered in the following chapter.

Application and submissions

7.7 The NSW Government submitted that clauses 6(4)(a)-(c) are satisfied by s39 and s40 of the Act.

Discussion

7.8 The WICA Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access. The role of IPART (or an alternative private arbitrator) in arbitrating access disputes means that commercial negotiations are supported by credible enforcement mechanisms.

7.9 IPART's negotiation protocols set minimum requirements for service providers and access seekers. They meet the requirements for effectiveness by requiring the parties to negotiate in good faith and the service provider to use every endeavour to meet the access seeker's requirements. If a dispute is referred for arbitration then IPART will consider whether the referring party has complied with the protocols. The parties may agree to depart from the negotiation protocols but must notify IPART if they do this.

7.10 The Council considers that Regulation and the negotiation protocols should enable an appropriate balance between the interests of service providers and access seekers.

7.11 In the case of voluntary access undertakings, IPART's process of public consultation when determining whether to approve an undertaking aims to ensure that approved access undertakings contain appropriate terms and conditions of access. The requirement for 'upfront' approval of an access undertaking by IPART is intended to give parties some level of certainty about the likely terms and conditions of access and to reduce the frequency of disputes.

7.12 The WICA Access Regime satisfies the principles in clauses 6(4)(a)-(c).

Clause 6(4)(e): reasonable endeavours

7.13 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) explicitly, or through general provisions that have the same effect.

The WICA Access Regime

7.14 The WICA Access Regime expressly incorporates the clause 6(4)(e) principle. Regulation 8(3)(b) provides that the negotiation protocols must include an obligation

on the service provider to use all reasonable endeavours to accommodate the access seeker's requirements. The negotiation protocols provide:

> The Service Provider and Access Seeker must endeavour to accommodate each other's reasonable requirements in the course of negotiations. The Service Provider and Access Seeker must meet and negotiate in good faith with a view to reaching agreement on the terms and conditions, including price, on which the Service Provider must make the requested infrastructure service...available to the Access Seeker (clause 5.4 of schedule 2 of the negotiation protocols).

7.15 In addition, Regulation 8(2) and the negotiation protocols require a service provider to give an access seeker an information pack and respond to requests within certain timeframes.

7.16 IPART may refuse to accept an application for a dispute to be resolved by arbitration if it is not satisfied that the applicant has made a good faith attempt to resolve the dispute by negotiation. When determining whether the parties have attempted to resolve the dispute by good faith negotiations, IPART must have regard to the provisions in Regulation 8. These include matters such as the provision of information by the service provider and whether the service provider has used reasonable endeavours to accommodate the access seeker's requirements.

Application and submissions

7.17 The NSW Government submitted in its application that clause 6(4)(e) of the CPA is addressed, stating that 'the availability of legally binding arbitration (section 40) creates an incentive for service providers to accommodate reasonable endeavours of access seekers'. The Government further submitted that Regulation 8(3) and the negotiation protocols encompass the obligation in clause 6(4)(e), and that IPART may refuse an application for arbitration if the party applying for arbitration has not made a good faith attempt to negotiate.

7.18 Ms Ambler queried whether the negotiation framework genuinely enables effective negotiations. She noted that the 'reasonable endeavours to accommodate' requirement in clause 6(4)(e) of the CPA is not incorporated in the Act, but rather is included via the Regulation and negotiation protocols (Ambler sub 1, at [8.9]).

Discussion

7.19 The Regulation and the negotiation protocols incorporate the requirement in clause 6(4)(e) of the CPA that a service provider must use 'reasonable endeavours' (which includes the proper disclosure of information) to accommodate an access seeker's needs. While acknowledging that the Act itself does not incorporate this principle, in the Council's view it is sufficient that the Regulation and negotiation protocols do.

7.20 The WICA Regime satisfies clause 6(4)(e).

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

7.21 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.

The WICA Access Regime

7.22 Section 39(2) of the Act provides that in relation to a service which is the subject of a coverage declaration or access undertaking, a provision of an access agreement is void to the extent that it purports to:

- prohibit a service provider from providing the service to any person, whether or not the person is a party to the agreement
- prohibit a service provider from providing the service to some persons on more advantageous terms than those on which it provides the same service to other persons or
- restrict any person from giving information to IPART or the Minister pursuant to any legislative requirements, or from creating documents for the purpose of recording information for that purpose.

7.23 Section 41(1) of the Act provides that:

- IPART must have regarding to the pricing principles when deciding whether or not to approve an access undertaking for an infrastructure service and
- an arbitrator must have regard to the pricing principles when determining a dispute in relation to the pricing of access to an infrastructure service the subject of a coverage declaration.

7.24 The 'pricing principles' require that the price of access should allow multi-part pricing and price discrimination when it aids efficiency, but should not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher (s41(2)).

Application and submissions

7.25 The NSW Government submitted that the WICA Access Regime contains no provision requiring access to a service for different access seekers to be on the same terms and conditions. The Government referred to the provisions of s39(2) and to the requirement that an arbitrator must have regard to the 'pricing principles' in s41 when determining a dispute in relation to price.

Discussion

7.26 The negotiation framework in the WICA Access Regime gives parties the flexibility to negotiate terms and conditions of access to suit their particular circumstances.

Section 39(2) indicates that a service provider may give access to a service to access seekers on different terms and conditions.

7.27 The WICA Regime satisfies clause 6(4)(f).

Clauses 6(4)(g), (h), (i): dispute resolution

7.28 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 must bind the parties and be enforceable.

7.29 The Council has considered the regime's procedures for independent dispute resolution in chapter 8. In summary, the Council's view is that the dispute resolution procedures and enforcement mechanisms contained in the WICA Access Regime adequately support the regime's negotiation framework. The WICA Access Regime satisfies clauses 6(4)(g), (h) and (i).

Clause 6(4)(m): hindering access

7.30 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 WICA Access Regime

7.31 Section 43 of the Act provides that the provider or user of a service (the subject of a coverage declaration or access undertaking), or a related body corporate of a provider or user, must not engage in conduct for the purpose of preventing or hindering any other person from obtaining or exercising rights of access to the service. The prescribed maximum penalty is 500 penalty units (for a corporation) and 50 penalty units (in any other case).[11]

Application and submissions

7.32 The NSW Government referred to s43 of the Act, noting that it is an offence to engage in conduct for the purpose of preventing or hindering any person from obtaining or exercising rights of access.

Discussion

7.33 The WICA Access Regime explicitly prohibits conduct for the purpose of hindering access and imposes a financial penalty for contravention. The prescribed maximum penalty for a corporation is $55 000 (500 penalty units x $110).

7.34 The WICA Access Regime satisfies clause 6(4)(m).

[11] According to s17 of the *Crimes (Sentencing Procedure) Act 1999* one penalty unit equals $110.

Clause 6(4)(n): separate accounting

7.35 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 make available 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.

7.36 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 WICA Access Regime

7.37 Section 42 of the Act provides that within 3 months after an infrastructure service becomes the subject of a coverage declaration, the service provider must keep separate accounts for its services which are the subject of the declaration. They must also submit a cost allocation manual to IPART in relation to that infrastructure, setting out the basis on which the service provider proposes to establish and maintain accounts for those infrastructure services. The Minister may also establish rules for the preparation of cost allocation manuals.

7.38 IPART may approve the cost allocation manual as submitted or require the service provider to amend it. A cost allocation manual may only be varied with IPART's consent. Once IPART has approved the manual, the service provider must, on and from the expiry of 3 months after IPART's approval, ensure that costs are allocated between each of those services, and between those services and its other activities, in accord with the manual. The service provider must make its cost allocation manual available for public inspection. There is a financial penalty for non-compliance with s42.

7.39 IPART has published a draft cost allocation guide to assist service providers with preparing cost allocation manuals in the future. The Council understands that IPART proposes to finalise the draft guide, pending consideration of comments from stakeholders and comments on Sydney Water's proposed cost allocation manual.

Application and submissions

7.40 The NSW Government referred to the provisions of s42 of the Act, noting that the statutory requirement that separate accounting arrangements apply in respect of a

service that is the subject of a declaration is not explicitly applied in the case of infrastructure services that are subject to an access undertaking. The Government stated however that all access undertakings must be approved by IPART, and that it expected that IPART will require similar separation of accounts as a condition of approval of any access undertaking.

Discussion

7.41 The requirements in s42 apply explicitly only to services the subject of a coverage declaration. They are not explicitly applied where a service is the subject of an access undertaking. While it would be preferable if this obligation were explicit, the Council notes the NSW Government's expectation that IPART will require separation of accounts as a condition of approval of any access undertaking.

7.42 The Council considers that the WICA Access Regime satisfies clause 6(4)(n).

8 The dispute resolution procedure: CPA clauses 6(4)(a) – (c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c))

Clauses 6(4)(a)–(c): dispute resolution

8.1 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 and that an effective access regime should establish an independent and credible dispute resolution procedure.

8.2 In this way, 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), (o) and 6(5)(c) of the CPA.

The WICA Access Regime

8.3 Section 40 of the Act provides that if the parties cannot reach agreement as to the terms and conditions of access, or if a dispute arises under an access agreement, either party may apply to IPART for the dispute to be determined by arbitration. Pursuant to the *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act), the arbitrator may be IPART or some other person appointed by IPART.

Discussion

8.4 The WICA Access Regime establishes the right for parties to negotiate access for services the subject of a coverage declaration or access undertaking, with binding arbitration available where agreement cannot be reached.

8.5 The WICA Access Regime satisfies clauses 6(4)(a)-(c).

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

8.6 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 so promoting confidence among the parties.

8.7 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.

8.8 The Council's past work in certification has raised the question of the balance between possible compromise of an arbitrator's independence if it also acts as the access regime regulator on the one hand, and the value in an arbitrator being able to draw on past experience in relation to an access dispute, on the other. The Council is not opposed in principle to the same body having both roles, though it recognises the potential for issues of conflict to arise and the need for governments to consider the inclusion of safeguards.

8.9 The Council has previously considered that it is likely to be in the public interest if arbitration determinations on access disputes are published (with appropriate treatment of confidential material), so that greater certainty may be given about the arbitrator's likely approach to resolving disputes. In turn this may encourage parties to resolve disputes themselves without arbitration.

The WICA Access Regime

8.10 Section s40(1) of the Act provides that if a dispute exists between a service provider and an access seeker as to:

- the terms on which the access seeker is to be given access (or an increase in access) to a service the subject of a coverage declaration or access undertaking
- any matter arising under an access agreement that provides for a dispute as to that matter to be dealt with in accordance with s40 or
- any matter arising under a determination under s40

then either party to the dispute may apply to IPART for the dispute to be determined by arbitration. IPART may refuse to accept an application for arbitration if it is not satisfied that the applicant has, in good faith, attempted to resolve the dispute by negotiation (s40(2)).

8.11 Arbitration is a formal dispute resolution process governed by the *Commercial Arbitration Act 1984 (NSW)* (CAA) in which two or more parties refer their dispute to an independent third person (the arbitrator) for determination. Unless the parties had already agreed (for example, under an access agreement) that their disputes be resolved by IPART, they are not bound to use IPART.[12] They may elect to resolve their dispute by private arbitration or other means.

8.12 The outcome of an arbitration (called an award) is enforceable in the same manner as a Court judgment or order. One of the advantages of arbitration is that it allows parties to appoint an arbitrator who has specialist technical expertise and experience in the subject matter of the dispute. Thus an arbitration process can provide a specialist tribunal so facilitating more efficient and effective dispute resolution.

8.13 The CAA applies to arbitrations under s40, and to any determination arising from such arbitration, as if a reference in the CAA to an award were a reference to a

[12] Under an access undertaking disputes must be referred to IPART.

determination under s40 of the Act. Further, ss24B–24E (except for s24B(2) and (3)(b)(c)) of the IPART Act apply to arbitrations under s40 in the same way as they apply to arbitrations under s24A of the IPART Act (ss40(4) and 40(5) of the Act).

8.14 IPART has published practice directions for the arbitration of disputes under the WICA Access Regime as well as a guide to arbitration. Section 24B of the IPART Act and Part C of the practice directions deal with the appointment of the arbitrator, the arbitrator's decisions, and the powers of the arbitrator.

8.15 IPART will appoint only itself or a person(s) on the Premier's approved panel as an arbitrator. A party who is unhappy with IPART's choice of arbitrator may object to the appointment, in which case IPART may appoint an alternative arbitrator, although it is not required to do so. In some circumstances a party may apply to the NSW Supreme Court for the arbitrator to be removed.

8.16 The arbitrator must use his or her best endeavours to determine a dispute within 6 months. In considering the terms of a proposed determination, the arbitrator must have regard to:

- the matters prescribed by the regulations (refer s40(6) of the Act and Regulation 10)
- the pricing principles in s41 of the Act
- the matters set out in clauses 6(4)(i), (j) and (l) of the CPA (refer s24B of the IPART Act) and
- any other matters that the arbitrator considers relevant.

8.17 In making a determination, the arbitrator must give effect to any access undertaking which the service is subject to, and must not require a service provider to do (or not do) anything that would put it in breach of its obligations under any existing access determination or under any law (s40(10)). The arbitrator may deal with any matter relating to access by the access seeker, including matters that were not the basis for notification of the dispute. The determination does not have to require the service provider to provide access to the access seeker (s24C of the IPART Act).

8.18 The arbitrator can make any direction as to who should pay the costs of the arbitration, having regard to the factors outlined in s34 of the CAA and s18 of IPART's guide to arbitration (IPART 2008c).

8.19 IPART must publish a summary of the arbitrator's determination on its website (Regulation 10(11)–(12)). According to s16 of the IPART guide to arbitration, it is unlikely that the notice of determination (and the material published on IPART's website) will contain confidential information, but if a party has concerns about confidentially it may raise them with the arbitrator.

8.20 There is no provision for merits review in relation to an arbitration determination or IPART's decisions on access undertakings, although such matters may be subject to judicial review. A party may appeal an arbitration determination on a question of law arising out of the award (s38 CAA). This is not dissimilar to the avenues of appeal

from a Court judgment/order, in the sense that appeals from a court judgment/order usually only have some prospect of success if the appeal is based on an error of law, rather than on a finding of fact. In other words, to the extent that grounds for appeal may only be based on an error(s) of law, it is unlikely that a party aggrieved by an arbitrator's determination would be at a material disadvantage were the determination instead made by a trial judge in Court.

Application and submissions

8.21 The NSW Government referred to s40 of the Act, Regulation 11, clause 7 of the *Independent Pricing and Regulatory Tribunal Regulation 2007* (NSW), and s34 of the CAA noting that the application of these provisions satisfied the relevant clause 6 principles.

8.22 Ms Ambler acknowledged that the WICA Access Regime creates a right to negotiate access to a service with recourse to arbitration if negotiations fail and that Regulation 8 intends that negotiations occur in an atmosphere of openness and transparency following procedures set out in the negotiation protocols. She submitted however that the Act provides no right for a party to make submissions to IPART in respect of a negotiation, or to challenge a decision of IPART not to accept an application to arbitrate (Ambler sub 1, at [8.7]). Moreover, noting the requirement that IPART give effect to any government policy communicated to it (in s24FB of the IPART Act), Ms Ambler considered there may be an issue regarding the independence of the arbitration function, including arbitrators appointed by IPART from the Premier's approved panel (Ambler sub 1, at [9.7]-[9.10]).

Discussion

8.23 The WICA Access Regime provides for the arbitration of disputes about access to a service by an independent body (either IPART or an alternative such as private arbitration) where the parties have attempted in good faith, but failed, to resolve their disputes by negotiation.[13] A party unhappy with IPART's choice of arbitrator may object to the appointment, and in some circumstances may apply to the NSW Supreme Court for the arbitrator to be removed.

8.24 The Council considers that this process has a number of positive aspects as follows:

- Where the parties refer a dispute to IPART, the CAA applies to the arbitration (s40(4)). The arbitrator's determination is final and binding (unless the parties agree otherwise (s28 CAA)).
- The requirement that IPART publish on its website a summary of the arbitrator's determination provides transparency. There is protection of

[13] Disputes may be about the terms on which an access seeker is to be given access, any matter arising under an access agreement (that provides for IPART to deal with the dispute by arbitration) or any matter arising under a determination made in an earlier arbitration.

confidential information: unless there are public interest issues favouring disclosure, material used in the arbitration must be kept confidential.

- The arbitrator's discretion to award costs (or not) can provide incentives for the parties to engage in proper conduct during the arbitration and to make genuine attempts to resolve disputes. Costs under the WICA Access Regime appear to be at a level that is unlikely to deter parties from seeking access.
- IPART's practice directions for the arbitration of disputes under the WICA Access Regime and IPART's guide to arbitration offer guidance on procedures and set out requirements on participants' behaviour.
- The dispute is likely to be resolved relatively quickly. The arbitrator must use his or her best endeavours to determine the dispute within 6 months (s40((8) of the Act).
- The procedure for judicial review of arbitration awards under the CAA protects against erroneous decisions by an arbitrator. Further, an arbitrator must give a copy of the proposed determination to the parties and must give them an opportunity to make submissions on that determination. This offers an additional check against decision-making error.

8.25 The Council accepts that IPART is established and resourced in ways which should enable it to maintain independence between its functions as regulator and arbitrator. This independence is likely to be assisted by the availability of a panel of qualified arbitrators approved by the Premier, who IPART can appoint to arbitrate access disputes.

8.26 The Council considers that the WICA Access Regime satisfies clause 6(4)(g).

Clause 6(4)(h): binding decisions

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

8.28 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 appeals body must also bind the parties.

8.29 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 appeals provisions.

The WICA Access Regime

8.30 Under the WICA Access regime, the parties to a dispute must give effect to the arbitrator's determination and must not engage in conduct for the purposes of obstructing the implementation of the determination (s24D of the IPART Act). Section 28 of the CAA provides that an award made by an arbitrator is final and binding on

the parties, while s33 of the CAA provides that the determination may be enforced in the same manner as a judgment or court order. Existing rights of judicial appeal under the CAA and at common law are preserved (s38 of the CAA).

8.31 In accordance with the CAA, the arbitration is subject to the supervisory control of the NSW Supreme Court. In practice, this means that while the arbitrator is responsible for the conduct of the arbitration, a party may seek the Court's assistance in certain circumstances including:

- where an arbitrator needs to be removed[14]
- where production of documents is required from third parties
- review of a determination for an error of law and
- enforcement of a determination.

8.32 A party has the right to appeal to the NSW Supreme Court on any question of law arising out an arbitrator's determination (s38 of the CAA). An appeal may only be brought with the consent of all the other parties or with the leave of the Supreme Court. The Supreme Court may only grant leave if it considers that there is a manifest error of law on the face of the award, or strong evidence that the arbitrator made an error of law.

8.33 If an appeal from an arbitrator's determination is brought to the Supreme Court, the Court may:

- confirm the determination
- vary the determination
- set aside the determination or
- send the determination back to the arbitrator (together with the Court's opinion) for reconsideration, in which case the arbitrator must make the determination within 3 months of the date of the Court's order.

8.34 The ultimate decision of the NSW Supreme Court binds the parties.

Application and submissions

8.35 The NSW Government referred to s40(4) and (5) of the Act, to s24D of the IPART Act, and to s28, s33 and s38 of the CAA, noting that the effect of these provisions satisfied the relevant clause 6 principles.

Discussion

8.36 Under the WICA Access Regime, determinations by an arbitrator are final and binding on the parties and may be enforced in the same manner as a judgment or court

[14] Section 44 of the CAA provides that the Supreme Court may remove an arbitrator if the arbitrator has engaged in misconduct, has been subject to undue influence, or is otherwise incompetent or unsuitable to determine the dispute.

order. Existing rights of appeal, in the nature of judicial review in the NSW Supreme Court, are preserved. The WICA Access regime satisfies clause 6(4)(h).

8.37 A party does not have the right to seek merits review of an arbitrator's determination. This matter is discussed at [8.67]-[8.73].

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

8.38 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 would also need to take account of the clause 6(5)(b) principles in considering access prices.

The WICA Access Regime

8.39 Sections 24B-24E of the IPART Act apply to arbitrations under the WICA Access Regime (s40(5)). Section 24B(3)(a) of the IPART Act provides explicitly that in the arbitration of a dispute, the arbitrator must take into account the matters set out in clauses 6(4)(i), (j) and (l) of the CPA.

8.40 In addition, an arbitrator must have regard to the 'pricing principles' when determining a dispute in relation to the pricing of access to an infrastructure service which is the subject of a coverage declaration (s41).

Application and submissions

8.41 The NSW Government referred to s40(5) of the Act, which applies relevant sections of the IPART Act to arbitrations, and to s24B(3)(a) of the IPART Act. The Government considered that these provisions meant that the relevant clause 6 principles are satisfied.

Discussion

8.42 Notwithstanding an omission in the NSW Government's application identified by Ms Wendy Ambler,[15] the Council considers that the WICA Access Regime satisfactorily incorporates the principles in clause 6(4)(i) because it requires IPART/the arbitrator to take into account the matters in clauses 6(4)(i) of the CPA. The WICA Access Regime also requires IPART/the arbitrator to have regard to the 'pricing principles', which reflect the principles in clause 6(5)(b) of the CPA. (See also chapter 9.)

8.43 The WICA Access Regime satisfies clause 6(4)(i).

[15] Ms Ambler noted that the NSW Government's application for certification had omitted to consider the compliance of the WICA Access Regime against clause 6(4)(i)(v) (Ambler sub 1 at [5.1 and 5.2]). This clause is relevant to the matters that a disputes resolution body should take into account in deciding the terms and conditions of access.

Clause 6(4)(j): facility extension

8.44 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 WICA Access Regime

8.45 Section 24B(3)(a) of the IPART Act provides explicitly that in the arbitration of a dispute, the arbitrator must take into account the matters set out in clause 6(4)(i), (j) and (l) of the CPA. Further, s24C(2)(d) of the IPART Act provides that a determination by an arbitrator may require the service provider to extend the infrastructure facility.

Application and submissions

8.46 The NSW Government considered that s40(5) of the Act, which applies relevant sections of the IPART Act to arbitrations, and s24B(3)(a) of the IPART Act, mean that clause 6(4)(j) is satisfied.

Discussion

8.47 The WICA Access Regime satisfies clause 6(4)(j).

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

8.48 Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. The Council considers that this clause should not be interpreted in a way that would compromise the certainty of contractual arrangements. Once a contract is signed—whether through commercial negotiation or following arbitration—it should govern the relationship between the parties. An appropriate way in which to address a material change of circumstances might be for the parties to identify in the contract any factors that would warrant the contract being reopened in the future.

8.49 To satisfy this clause, an access regime could provide for parties to use an arbitrator to resolve disputes over what constitutes a material change in circumstances. This provision would allow for circumstances where commercial negotiations fail to achieve agreement.

The WICA Access Regime

8.50 Section 40 of the Act provides that if a dispute exists between a service provider and an access seeker (including as to any matter arising under an existing access agreement or determination) either party may apply to IPART for the dispute to be determined by arbitration.

Application and submissions

8.51 The NSW Government referred to s40 of the Act noting that this provision meant that the clause 6(4)(k) is satisfied.

Discussion

8.52 Under the WICA Access Regime, it is open to a service provider and an access seeker to identify in an access agreement any factors that would justify the contract being reopened in the future. In addition, if the parties are in dispute regarding any matter arising under an existing access agreement or determination, they may apply to IPART to have the dispute determined by arbitration.

8.53 The WICA Regime satisfies clause 6(4)(k).

Clause 6(4)(l): compensation

8.54 Clause 6(4)(l) provides that a dispute resolution body should impede a person's existing right to use a facility only 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 WICA Access Regime

8.55 Section 24B(3)(a) of the IPART Act provides that in the arbitration of a dispute, the arbitrator must take into account the matters set out in clauses 6(4)(i), (j) and (l) of the CPA.

8.56 Section 40(10)(b) of the Act provides that an arbitrator in making a determination must not include in the determination any provision that requires a service provider to do (or not do) anything that would put it in breach of its obligations under any existing access determination, under the WICA Access Regime, or under any other legislation.

Application and submissions

8.57 The NSW Government referred to s40(5) of the Act, which applies relevant sections of the IPART Act to arbitrations, and to s24B(3)(a) of the IPART Act. The Government considered that these provisions meant that the relevant clause 6 principles are satisfied.

Discussion

8.58 Having regard to the prohibition in s40(10)(b), the situation where an arbitrator makes a determination that impedes existing rights such that compensation is necessary may be unlikely to arise. However, in circumstances where a determination impedes existing rights without contravening s40(10)(b) (for example, if a service

provider is required to extend a facility, and the extension encroaches on or otherwise affects the property rights of a neighbouring third party landowner), then the arbitrator must take into account the matters in clause 6(4)(l).

8.59 The WICA Access Regime satisfies clause 6(4)(l).

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

8.60 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the 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 WICA Access Regime

8.61 Section 42 of the Act provides that within 3 months after an infrastructure service becomes the subject of a coverage declaration, the service provider must keep separate accounts for its services which are the subject of the declaration and must submit a cost allocation manual to IPART. The cost allocation manual is made publicly available on IPART's website.

8.62 Section 40(5) of the Act applies certain sections of the IPART Act to arbitrations under the WICA Access Regime. Sections 22 and 24B(4) of the IPART Act give an arbitrator the power to compel a person to send information or documents, or to attend a hearing to give evidence, for the purposes of an arbitration. This includes financial and accounting information pertaining to a service.

8.63 The Act also applies the CAA to arbitrations under s40 of the Act. Section 18 of the CAA provides for court enforcement of requests to attend arbitration or produce documents. Section s37 of the CAA requires a party to an arbitration to do all things which the arbitrator requires to enable a just award to be made and prohibits actions to delay or prevent an award being made.

Application and submissions

8.64 The NSW Government referred to s42 and s40(5) of the Act, to ss22 and 24B(4) of the IPART Act and to s37 of the CAA. The Government considered that these provisions meant that the relevant clause 6 principles are satisfied.

Discussion

8.65 The provisions of the CAA and IPART Act give IPART and arbitrators adequate access to the financial information they require to conduct their roles in dispute resolution and to properly assess the issues relating to third party access.

8.66 The WICA Access Regime satisfies clause 6(4)(o).

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

8.67 Clause 6(5)(c) recognises that an important element of an access regime is the independent review of any access decisions. Clause 6(5)(c) provides that where merits review is provided, then the review should be limited to information submitted to the original decision-maker.

The WICA Access Regime

8.68 Aggrieved parties may seek judicial review in the NSW Supreme Court of arbitration determinations on various grounds including: a breach of the rules of natural justice; that the required procedures were not observed; that the decision maker did not have jurisdiction; that the decision was not authorised by the relevant Act or was an improper exercise of the power; that the decision involved an error of law; that the decision was affected by fraud or was otherwise contrary to the law; and that there was no evidence to justify the making of the decision.

8.69 The WICA Access Regime does not provide for merits review of arbitration determinations.

Application and submissions

8.70 The NSW Government's application stated that clause 6(5)(c) is not applicable as the regime does not provide for merits review.

8.71 As noted at [5.19], AquaNet advocated the right to merits review in relation to the Premier's coverage decisions, IPART's access undertaking approvals and arbitration determinations while Ms Wendy Ambler saw value in the NSW Government revisiting its policy decision to omit a merits review process (Ambler sub 1, at [11.4]). AquaNet argued, among other things, that the 'very broad discretion' available to IPART in relation to undertakings approvals and arbitration determinations and 'the limited nature of the consultation associated with arbitration' increased the importance of the availability of merits review (AquaNet sub 1).

Discussion

8.72 The WICA Access Regime does not provide for merits review of arbitration determinations. The Council has therefore not considered the regime's mechanisms for dispute resolution against clause 6(5)(c), which deals with the form of any merits review arrangement. It appears to the Council that, despite the wording of the clause 6 principles recognising that a procedure for independent review of decisions is desirable, the wording of clause 6(5)(c) contemplates that access regimes may not provide for merits review.

8.73 Unlike coverage, revocation of coverage and non-coverage declarations by the Premier (which involve a decision by the Premier based on assessment of the facts of an application against the declaration criteria in s23 of the Act), arbitrations will generally focus on resolving a particular matter(s) in an access agreement that is a

source of disagreement between the parties. Given the nature of the decision in an arbitration determination and the procedures and protections available under the WICA Access Regime (including the reliance on the CAA), the Council's view is that the benefit in providing for the merits review of arbitration determinations (in addition to the available safeguards) is not clearly established.

9 Efficiency promoting terms and conditions of access

9.1 An effective access regime must enable outcomes that achieve the objective of efficient use of and investment in significant bottleneck infrastructure, so promoting competition. An effective regime needs to:

- incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets (clause 6(5)(a))
- provide a robust framework for negotiating agreements and resolving disputes: a right to negotiate access supported by binding dispute resolution (clauses 6(4)(a)-(c), (g) and (h)), an obligation on the service provider to negotiate in good faith (6(4)(e)), and availability of required information (6(4)(n) and (o))
- provide an entitlement to revoke or modify an access arrangement where there has been a material change in circumstances (6(4)(k))
- enable efficient access terms and conditions (clauses 6(4)(f) and 6(4)(i) specify the considerations/factors that a disputes resolution body should take into account when determining access terms and the pricing principles in clause 6(5)(b)) while providing considerable discretion and flexibility in setting prices, and
- require that regulated access prices be set to cover costs and provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or otherwise improve productivity.

The WICA Access Regime

9.2 The WICA Access Regime provides a framework for parties to reach commercial agreement on access terms and conditions, with provision for binding arbitration where agreement cannot be reached (see chapters 7 and 8).

9.3 Section 21 of the Act provides that the object of the regime is 'to establish a scheme to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream or downstream markets'.

9.4 IPART when deciding whether or not to approve an access undertaking and an arbitrator when determining a dispute on the price of access must have regard to the pricing principles in s41(2) of the Act. These principles stipulate that the access price should:

- generate expected revenue for the service that is at least sufficient to meet the efficient costs of providing access to the service, and include a return on investment commensurate with the regulatory and commercial risks involved

- allow multi-part pricing and price discrimination when it aids efficiency
- not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent to which the cost of providing access to other operators is higher and
- provide incentives to reduce costs or otherwise improve productivity.

9.5 Section 41(3) provides that these principles be implemented in a manner that is consistent with any relevant pricing determinations for the supply of water and the provision of sewerage service including where applicable the maintenance of postage stamp pricing.[16] In elaborating on the application of s41(3), the NSW Government submitted that the requirement is 'only that, of the many different approaches that can legitimately may be taken under those pricing principles, one which is consistent with 'postage stamp' pricing (if it applies) should be preferred'. The NSW Government stated that s41(3) 'is necessary because some (but not all) of the pricing methodologies that might be consistent with the CPA pricing principles would be inconsistent with the maintenance of postage stamp pricing. For example, under some pricing methodologies access seekers may be able to 'cherry pick' customers in such a way as to undermine the cross-subsidies inherent in the system of postage stamp pricing.'

9.6 The NSW Government emphasised the independence of IPART, stating that it is a matter for IPART to apply the principles in accord with the Act. The Government stated that it cannot direct IPART in relation to the application of the pricing principles to particular cases, and nor would it be appropriate to attempt to do so.

Discussion

9.7 The negotiation and disputes settlement framework in the WICA Access Regime satisfactorily addresses the requirements for certification (see chapters 7 and 8).

9.8 Section 21 of the Act mirrors the wording in clause 6(5)(a) and makes clear that the object of the WICA Access Regime is to promote efficiency thereby promoting competition in related markets. This addresses the certification requirement in clause 6(5)(a) that the regime include an appropriate objects clause.

9.9 The access pricing principles in s41(2) are identical to the principles in clause 6(5)(b) of the CPA and so address this certification requirement.

9.10 The Council acknowledges that the NSW Government's decision to apply postage stamp pricing for certain public utility water and wastewater services need not be inconsistent with efficient access pricing outcomes. Where the costs associated with postage stamp pricing are funded directly from the budget, then potential adverse resource allocation effects in the high margin sectors of the water and wastewater

[16] Postage stamp pricing is a system of pricing under which the same types of customers within a certain area are charged the same price for the same service. The NSW Government advised that its policy is that postage stamp pricing is to apply in respect of certain water and waste-water services provided by public water utilities.

services markets (and the need for barriers to entry) are avoided. In such circumstances there would be no reason for access prices not to be set in accord with the pricing principles in clause 6(5)(b).

9.11 The Council acknowledges the NSW Government's view that the Act requires IPART to apply the pricing principles in accordance with the Act.

9.12 Further the Council acknowledges that IPART is an independent body with expertise and experience in relation to pricing. However, it would concern the Council (in relation to the effectiveness of the WICA Access Regime) were it in the future to receive evidence that IPART, in applying the requirement to have regard to the maintenance of any applicable postage stamp pricing, had departed from the pricing principles in s41(2) of the Act. No party provided evidence that this outcome may arise.

10 The TPA Part IIIA objective (s 44AA)

10.1 The *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) inserted an objects clause into Part IIIA. Section 44AA provides 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.

10.2 The Council in recommending on 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 TPA).

The WICA Access Regime

10.3 Section 21 of the Act provides that the object of the WICA Access Regime is:

> to establish a scheme to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream or downstream markets.

Application and submissions

10.4 The NSW Government confirmed that its objective in introducing third party access is to promote greater efficiency in the water industry through facilitating competitive service provision. The Government argued that the regime would promote competition especially by way of encouraging the development of new water supply. The Government stated:

> Principally the NSW Government's objective in introducing the WIC Access regime is to promote greater efficiency in the water industry through facilitating competitive service provision. Efficiency in this regard includes especially dynamic efficiency (innovation), such as in the development of new water sources, particularly recycling.
>
> The NSW Government supports appropriate access arrangements as a means of achieving these objectives (correspondence dated 17 February 2009).

10.5 The NSW Government's 2006 *Metropolitan Water Plan* encourages the private sector to implement innovative solutions to the water supply and demand balance, particularly with regard to recycling. The stated objective of these reforms is the promotion of competition in the water and wastewater industries and the encouragement of new investment and innovation in the metropolitan water industry (DWE 2006).

10.6 The NSW Government stated that it has always fully endorsed the principles of the CPA, which it believes are reflected in the WICA Access Regime.

10.7 The NSW Government explained that its earlier opposition (before the commencement of the WICA Access Regime) to the decision in *Re Services Sydney* is consistent with its support for its objective in implementing the WICA Access Regime. The Government advised that it had not supported the decision because it was committed to developing a state-based effective water and waste-water access regime, and that the proposed state-based access regime would be superior to declaration under Part IIIA because it would be tailored specifically for the NSW water and waste-water industry and would allow a more integrated approach including a single regulator for retail and access prices and service standards. The NSW Government did not consider it to be in the public interest for its proposed State regime to be duplicated at the Commonwealth level. Further, the Government submitted that there were concerns at the time about allowing third party access in advance of the development of an appropriate regulatory regime for the protection of public health, the environment and consumers (correspondence dated 17 February 2009).

10.8 The Water Services Association of Australia (WSAA) supported the certification of the WICA Access Regime. It considered that the regime provides 'a clear framework for a potential entrant to seek access to urban water and sewerage infrastructure with a greater degree of certainty regarding outcomes than Part IIIA of the Trade Practices Act' (WSAA sub 1). The WSAA went on to say that it could not identify any inconsistency with the provisions of the TPA and the Act. Noting the declaration in *Re Services Sydney* (which provides an access pathway for certain Sydney Water sewerage infrastructure services), the WSAA stated that it is preferable not to encourage forum shopping by access seekers as this would result in greater uncertainty for all parties.

10.9 Sydney Water also endorsed the certification of the WICA Access Regime, stating that certification would simplify the regulatory arrangements governing access to the services provided by water industry infrastructure in NSW, and that it 'welcomes competition' (Sydney Water sub 1).

10.10 By contrast Ms Wendy Ambler's view is that 'there seems to be little indication that the objective of promoting effective competition has been achieved in practice either by declaration under the TPA or deemed declaration under the WICA or by the existence of the WICA access regime'. While she acknowledged that it could be argued that a number of the certification criteria are reasonably incorporated into the WICA Access Regime, Ms Ambler considered several aspects of the regime militate against certification and there would be value in creating a clearer precedent for other states and territories so promoting consistency across jurisdictions (Ambler sub 1, at [11.1] and [11.4]).

Discussion

10.11 The Council acknowledges that the stated object of Part 3 of the Act (s21) substantially reflects the object of Part IIIA of the TPA.

10.12 Having regard to the objects of Part IIIA, the Council draws attention to its questions about the impact of particular aspects of the WICA Access Regime:

- the effectiveness of the safeguards in the regime (such as the processes for decision making and arrangements for reviewing decisions) regarding coverage, revocation of coverage and binding non-coverage declarations, given the broad discretions given to IPART and decision makers and the involvement of the NSW Government in the NSW water sector through ownership of Sydney Water Corporation (Sydney Water) and Hunter Water Corporation (Hunter Water)(see [5.29]-[5.37])
- the implications of the ability for the Premier to add geographic areas to Schedule 1, so having the effect of expanding the services that are subject to the WICA Access Regime (see [5.38]-[5.45]), and
- the impact of the requirements for water licences, and in particular whether the requirement that parties seeking a licence for retail water supply obtain sufficient quantities of water from non public utility sources (sub-section 10(4)(d)) would have the effect of unduly limiting the use that might be made of the WICA Access Regime (see [5.46]-[5.54]).

11 The duration of certification

11.1 When recommending to the Commonwealth Minister on the certification of an access regime, the Council must also recommend on the period that any certification should remain in force (s44(M)(5) of the TPA).

11.2 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 no mechanism in the TPA for revocation or early termination of a certification.

11.3 Where an access regime has been certified as an effective access regime, in considering any application for declaration of a service to which the regime applies the Council is bound to follow that certification and must not recommend declaration, unless it believes there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified (s 44G(4)). Similarly a decision making Minister may not declare a service that is subject to a certified state or territory regime unless he or she considers there have been substantial modifications to the access regime or the clause 6 principles since the regime was certified (s 44H(6)).

Application and submissions

11.4 The NSW Government did not address the appropriate duration of any certification in its application. Following a request from the Council, the NSW Government advised that it considered the duration of certification should be at least 25 years and up to 50 years. In support of this view, the NSW Government considered that the investment horizon for new infrastructure in the water industry is long, and that it is important investors (and financiers) have regulatory certainty. The NSW Government submitted that the WICA Access Regime had been developed as a principles-based regime to ensure that it has flexibility to adapt to changes in the market environment. The Government also stated that it is relevant that the Tribunal in *Re Services Sydney* considered 50 years to be an appropriate time to declare services in this industry. This was also the duration proposed by the Council in its recommendation to the NSW Premier in relation to that application for declaration.

Discussion

11.5 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 mechanism in the TPA for revocation or early termination of a certification,[17] on the other. Where relevant, the Council also considers other factors such as whether a regime is

[17] Unless the Council believes there have been substantial modifications to the access regime or the clause 6 principles in the CPA since the regime was certified (s 44G(4) of the TPA).

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.

11.6 In the Council's view, the Tribunal's decision in *Re Services Sydney* to declare the Sydney Water's sewerage transport and interconnection services for a period of 50 years is not relevant to considering the duration of any certification of the WICA Access Regime.

11.7 Long term certainty for business is a valid consideration in relation to infrastructure access, thus is primarily (appropriately) a consideration in determining the period for which a coverage declaration (or a binding non-coverage declaration) will have effect. It is not an issue when considering the duration of a certification, and there is nothing to prevent a coverage declaration and indeed an access agreement extending beyond the period of any certification. Under the WICA Access Regime, the importance of long term certainty for business is a factor that IPART may consider when recommending to the Premier on the period of a coverage declaration.

11.8 Under the regime, the period of a binding non-coverage declaration must not exceed 10 years. The NSW Government noted in its application for certification that this (maximum) period 'allows for service providers to obtain certainty, before investing in new infrastructure, as to whether the declaration criteria apply'.

11.9 On balance, the Council considers that 10 years is an appropriate duration for the certification of the WICA Access Regime for the following reasons:

- Access regulation in the water industry is at an embryonic stage. NSW is the first jurisdiction to develop a regime for regulating access to water infrastructure services. Other jurisdictions are only now beginning to explore the application of access regulation to water infrastructure services, and their investigations may provide some useful insights that the NSW Government may wish to consider for its own regime.
- IPART in recommending the period of a coverage declaration, and the Premier in deciding the period, may conclude that it is appropriate for the period of coverage to extend beyond 10 years. Further, it is possible for a coverage declaration to be renewed.
- The TPA provides a mechanism to extend the period that a certification decision is in force.
- The WICA Access Regime is in many respects only a skeletal principles-based framework which leaves a significant level of discretion to IPART, the Premier and the Minister for Water.
- The uncertainty created by some of the shortcomings of the WICA Access Regime, including the absence of merits review of coverage declaration decisions, the licensing requirement in s10(4)(d), and the relative ease with which the Premier can add more land to the areas in Schedule 1 of the Act.

12 References

HWC (Hunter Water Corporation) 2008, *Hunter Water Corporation 2007/08 Annual Report*, Newcastle.

DWE (Department of Water and Energy NSW) 2006, *2006 Metropolitan Water Plan*, Sydney.

IPART (Independent Pricing and Regulatory Tribunal) 2008a, *Arbitration of disputes under the Water Industry Competition Act 2006 practice directions,* Sydney.

—— 2008b, *Draft cost allocation guide Water Industry Competition Act 2006*, Sydney.

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—— 2008d, *A guide to declaration of infrastructure under the Water Industry Competition Act 2006*, Sydney.

—— 2008e, *Negotiation protocols, Water Industry Competition (Access to Infrastructure Services) Regulation 2007*, Sydney.

NSW Government 2006, *Water for Life, Consultation paper: Creating a dynamic and competitive metropolitan water industry*, Sydney.

SWC (Sydney Water Corporation) 2008, *Sydney Water Annual Report Summary 2008*, Sydney.

Tribunal decisions

Re Services Sydney Pty Ltd [2005] ACompT 7

Acts and other instruments

Commercial Arbitration Act 1984 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)

Electricity Supply Act 1995 (NSW)

Gas Supply Act 1996 (NSW)

Independent Pricing and Regulatory Tribunal Act 1992 (NSW)

Independent Pricing and Regulatory Tribunal Regulation 2007 (NSW)

Interpretation Act 1987 (NSW)

Schedule to the *National Gas (South Australia) Act 2008* which is applied as law in the following jurisdictions: *National Gas (New South Wales) Act 2008, National Gas (ACT) Act 2008, National Gas (Tasmania) Act 2008, National Gas (Queensland) Act 2008, National Gas (Victoria) Act 2008* and *National Gas (Northern Territory) Act 2008*

Trade Practices Act 1974 (Cth)

Trade Practices Amendment (National Access Regime) Act 2006 (Cth)

Water Industry Competition Act 2006 (NSW)

Water Industry Competition (Access to Infrastructure Services) Regulation 2007 (NSW)

Water Industry Competition (General) Regulation 2008 (NSW)

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).

(a) 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).

(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 ss44DA(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 – Index of application and submissions

Application

Letter from the NSW Government dated 17 December 2008
Schedule setting out information required by Reg 6B of the *Trade Practices Regulations 1974 (Cth)*
Attachment – Assessment of the NSW Water Industry Access Regime against the Competition Principles Agreement principles
Letter from the NSW Government dated 17 February 2009 providing further elaboration

Submissions on the application

WSAA sub 1	Water Services Association of Australia submission dated 20 January 2009
ICRC sub 1	Independent Competition and Regulatory Commission (ACT) submission dated 23 February 2009
Ambler sub 1	Ms Wendy Ambler submission dated 3 March 2009
AquaNet sub 1	AquaNet Sydney Pty Ltd submission dated 4 March 2009 (received 5 March)
Sydney Water sub 1	Sydney Water Corporation submission dated 2 March 2009 (received 6 March)

Appendix C – Chronology

Date	Event
19 December 2008	Application received by the Council
13 January 2009	The Council requested further elaboration from the NSW Government
15 January 2009	The Council wrote to likely interested parties to provide notice of the application
2 February 2009	Notice of the application published in *The Australian* and on the Council's website, inviting submissions in response to the application
17 February 2009	Further elaboration received from the NSW Government
4 March 2009	Closing date for submissions on the application
2 April 2009	Draft recommendation released
4 May 2009	Closing date for submissions on the draft recommendation