Access to Water and Sewerage Infrastructure

February 2013

Government of South Australia
Department of Treasury and Finance

Department of Treasury and Finance
State Administration Centre
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Adelaide SA 5000
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Contents

1 Introduction and Overview

1.1 Introduction

This report on access to water and sewerage infrastructure services has been prepared for the Minister for Water and the River Murray to satisfy the requirements of section 26 of the *Water Industry Act 2012* (Water Industry Act). These are:

(1) The Minister must publish a report about third party access to water infrastructure and sewerage infrastructure services.

(2) The report must address-

a) Various options for third party access; and

b) The extent of coverage of a third party access regime; and

c) The procedures that should be established for seeking access and the resolution of disputes; and

d) Access pricing principles; and

e) Compliance with relevant national competition principles; and

f) The maintenance of public health, environmental and safety standards,

and may address such other matters as the Minister thinks fit.

(3) The Minister must publish the report within 1 month after the commencement of this section and cause copies of the report to be laid before both Houses of Parliament within 12 sitting days after the report is published.

(4) The Minister must use his or her best endeavours to introduce into Parliament within 9 months after the commencement of this section a Bill for an Act to provide for a third party access regime to water infrastructure and sewerage infrastructure services operated by entities licensed under this Part (after taking into account the contents of the report prepared under subsection (1) and any other relevant factor).

This report must be published by the Minister for Water and the River Murray by 1 February 2013.

This report must address compliance of the options for access with the national competition principles that were established in 1995 by the States and the Commonwealth in the Competition Principles Agreement (CPA). Clause 6 of the CPA, included in Appendix 1 of this report, outlines the principles to establish access to services provided by significant infrastructure facilities. These principles are incorporated into the national access regime under Part IIIA of the *Competition and Consumer Act 2012 (Cth)* (CCA).

The *Water Act 2007 (Cth)*, which gives the Commonwealth power to set water charge rules with respect to Murray-Darling Basin water resources, would also have implications for any access regime established in South Australia.

The proposal to develop a state-based access regime was originally identified in *Water for Good*, a plan outlining actions and water industry reforms to ensure that the State's water supplies were secure, safe and reliable. The plan included an action to:

> *Maintain government ownership of SA Water and develop a State-based third-party access regime that allows water and wastewater suppliers to access the water and wastewater infrastructure. Any such access will require licensing to ensure protection of public interest, public health and the environment.*

Water for Good proposed that the access regime would be completed by 2015.

A more urgent priority in *Water for Good* was the development of legislation that would appoint the Essential Services Commission of South Australia (ESCOSA) as the independent economic regulator of water and sewerage services in South Australia.

The Water Industry Act declares water to be a regulated industry under the *Essential Services Commission Act 2002* (ESC Act) and appoints ESCOSA as the economic regulator and licensing authority for retail water and sewerage services in South Australia. It provides all South Australian water and wastewater service providers, not just SA Water, with the necessary powers to develop infrastructure and offer retail water and sewerage services to South Australians.

The development and implementation of an access regime for water and sewerage infrastructure services is complementary to these reforms.

1.2 Overview

This report sets out for discussion a range of issues relating to amendments to the Water Industry Act to provide a right to negotiate access to water and sewerage infrastructure services.

Section 2 of this report examines the options for access regimes for water and sewerage infrastructure services under the Competition Principles Agreement. The options can be broadly described as voluntary arrangements or legislatively mandated arrangements. The section sets out a range of issues associated with each option.

Industry participants and interested citizens are invited to comment on the options for access regimes and/or address the consultation questions set out below:

- *Has the current policy framework applying to SA Water for voluntary access arrangements been successful in promoting access to water and sewerage infrastructure?*
- *Should the policy framework for access arrangements apply to other water industry participants (in addition to SA Water)?*
- *What is the impact on access seekers of the lack of certainty arising from the application of both the Water Act 2007 (Cth) and Competition and Consumer Act 2012 (Cth)?*
- *What are the costs and benefits of establishing a state-based legislative access regime?*
- *If a certified state-based legislative access regime is implemented, is it also necessary to work with the Commonwealth Government to exclude or displace the operation of the Commonwealth water charge regime under the Water Act*

2007 (Cth) from the areas of operation of the state-based legislative access regime?

Section 26(4) of the Water Industry Act anticipates that a state-based access regime will be introduced into Parliament. Section 3 of this report examines the measures that could be included in a state-based access regime to achieve compliance with the Competition Principles Agreement.

Section 3 draws heavily on South Australian experience with certified access regimes for maritime and railway services. It also discusses the relationship between an access regime and regulation for public health, environmental and safety standards. Existing public health measures that prevent the injection of recycled water into the drinking water infrastructure will be maintained.

Industry participants and interested citizens are invited to comment on the framework for a state-based access regime and/or address the consultation questions set out below:

- *What should the scope of a state-based legislative access regime be?*
- *Should the scope include bulk water transport, water distribution transport, local sewage transport and bulk sewage transport?*
- *Should ancillary services, such as water storages and treatment plants, be included within the scope of a state-based legislative access regime? If yes, on what criteria?*
- *Should ESCOSA's role as the industry regulator for water be extended to include a state-based access regime?*
- *Should the regulator be required to adopt a light handed regime (of monitoring, commercial negotiation and arbitration)? Is this sufficient? Or is a heavier handed regulatory regime required?*
- *How should the initial assessment of which specific water and sewerage infrastructure services a state-based access regime should apply to be undertaken?*
- *What criteria should be adopted for the initial assessment?*
- *Over time, how should the initial assessment of the application of the state-based access regime be reviewed?*
- *What time frame is appropriate for the periodic review of a state-based access regime?*
- *Should the review be undertaken by the regulator? If not, who should be responsible for undertaking the review?*
- *Does the Railways (Operations and Access) Act 1997 provide a good basis for the negotiation framework for a state-based access regime for water and sewerage infrastructure services?*
- *Are there other rights and/or obligations that should be included in the negotiation framework?*

- *Does the Railways (Operations and Access) Act 1997 provide a good basis for a dispute resolution framework for a state-based access regime for water and sewerage infrastructure services?*
- *Should a state-based access regime provide specific guidance to facilitate the development of new water and sewerage infrastructure?*
- *Are there other rights and/or obligations that should be included in relation to dispute resolution?*
- *What terms and conditions of access, if any, should the state-based access regime regulate?*
- *What information preparation requirements (e.g. pricing principles and accounting standards), if any, should the state-based access regime regulate?*
- *Are there any specific considerations that should be taken into account by the public health, environmental and safety standard regulators if there is a state-based access regime for water and sewerage infrastructure services?*
- *Is the requirement in section 90 of the Water Industry Act for the arbitrator to consult with public health, environmental and safety standard regulators sufficient?*
- *Are there other interstate issues in relation to the access regime for water and sewerage infrastructure services that need to be addressed?*

1.3 Next Steps

Industry participants and interested citizens are invited to comment on the report and/or address any or all of the consultation questions summarised in the previous section and set out in the text of the report.

The closing date for submissions on this report is Friday **15 March 2013**.

Submissions received will be placed on the Department of Treasury and Finance website and may be quoted.

Following receipt and consideration of submissions, the Government will prepare a draft Bill. This draft Bill will be based on this report and consideration of the submissions received. It is expected that a draft Bill will be released by mid 2013 for further public consultation.

Following consultation on the draft Bill, a revised Bill will be prepared taking account of submissions received and is expected to be introduced to Parliament in September 2013. This is compatible with the requirement in the Water Industry Act that "*the Minister must use his or her best endeavours to introduce into Parliament within 9 months after the commencement of this section a Bill for an Act to provide for a third party access regime to water infrastructure and sewerage infrastructure services operated by entities licensed under this Part.*"

If passed by Parliament, the state-based access regime commencement date would be determined based on the time required for water industry entities and the regulator to prepare.

Consultation Question

What should be the period allowed for implementation of the state-based access regime by water industry entities and the regulator?

Submissions on this report should be sent to:

e-mail regulatorypolicy@sa.gov.au

or

post Regulatory Policy
Department of Treasury and Finance
GPO Box 1045
Adelaide SA 5001

Additional copies of this report can be downloaded from http://www.treasury.sa.gov.au

2 Options for access to water and sewerage infrastructure services

2.1 Introduction

The Water Industry Act requires this report to address various options for access that are compliant with relevant national competition principles.

The national access regime, established under Part IIIA of the CCA, incorporates these national competition principles and establishes three pathways for a party to seek access to significant infrastructure services:

- By applying to the National Competition Council to have services provided by a facility declared, which provides the access seeker with a right to negotiate with the service provider.
- Under terms and conditions set out in a voluntary undertaking which has been assessed and accepted by the Australian Competition and Consumer Commission (ACCC).
- Under an existing effective access regime (i.e. a state-based access regime) which has been determined as being effective under the CCA (based on a recommendation from the National Competition Council and a decision from the relevant Commonwealth Minister).

Parties may also reach commercial agreement on access to infrastructure services outside of these formal processes, as has occurred with SA Water in the past.

The options for access can be grouped under the following categories:

- Voluntary arrangements - involves the water industry entities voluntarily making available access to the services provided by its water and sewerage infrastructure to access seekers.
- Legislatively mandated arrangements – involves the South Australian Parliament enacting legislation that mandates certain arrangements for water industry entities to make available access to the services provided by its water and sewerage infrastructure to access seekers.

These options are discussed in the following sections.

2.2 Voluntary Arrangements

2.2.1 Status Quo

All water industry retail services in South Australia are subject to a consistent regulatory framework under the Water Industry Act, whether they are South Australian Government, local government or private retailers. This regulatory framework does not include access to infrastructure services.

With regard to access, SA Water currently operates under a policy framework which allows SA Water to pursue opportunities, on appropriate commercial terms, arising from spare water transportation capacity within the State Government's water infrastructure.

This policy framework does not apply on an industry wide basis. Nor does it include transparent pricing and negotiation principles, disclosure requirements, and provisions for review and arbitration, if an agreement cannot be achieved. The main recourse for an unsuccessful access seeker is to seek declaration under Part IIIA of the CCA.

The option of retaining the status quo access arrangements is low cost to SA Water and allows negotiations for access to take place in a commercial environment. From the access seeker's perspective, the lack of transparent principles, disclosure requirements and arbitration process that is independent of Government creates uncertainty and could be a disincentive for investment in the water industry. Further, if negotiations are not satisfactory, seeking recourse through declaration under the national access regime is a costly and time consuming activity for the access seeker.

2.2.2 Direction to SA Water

The status quo option for access arrangements could be supplemented by the relevant Minister issuing a direction to SA Water under the *Public Corporations Act 1993* to provide greater structure to the framework in which access seekers and SA Water negotiate. The direction could require SA Water to:

- Publish protocols for the conduct of negotiations with access seekers.
- Comply with pricing principles.
- Establish arrangements for binding arbitration.

A direction to establish arrangements for access has a relatively low implementation cost to the Government and SA Water and will increase the transparency and consistency of negotiated agreements to access SA Water's water and sewerage infrastructure. Further, it would provide greater investment certainty for access seekers.

Nevertheless, this approach can only be applied to SA Water. Other water industry entities cannot be directed in the same manner. All water industry entities (including SA Water) would still face the possibility of declaration under Part IIIA of the CCA.

2.2.3 Voluntary undertaking under the national access regime

Under both the options for access discussed above, water industry entities could be subject to the possibility of an access seeker seeking declaration of the entity's infrastructure services under Part IIIA of the CCA.

A water industry entity may overcome this possibility by giving a voluntary undertaking under Part IIIA of the CCA. Such an undertaking would need to meet the requirements of the CCA, including the national competition principles, and must be assessed and accepted by the ACCC.

A voluntary undertaking does not require a particular access pricing approach, but the ACCC, in assessing the voluntary undertaking, would have regard to the objects clause and pricing principles of the CCA. A voluntary undertaking would establish the terms and conditions that would form the basis for access negotiations covering SA Water's infrastructure. Once the undertaking is approved, if negotiations prove unsuccessful, it provides for the ACCC, upon notification of an access dispute, to arbitrate that dispute.

A voluntary undertaking would:

- Provide access seekers with an automatic right to negotiate access with SA Water.
- Ensure that there is greater transparency regarding the potential access terms and conditions relative to a voluntary negotiation approach.
- Ensure that the terms and conditions of access (including the access price) comply with the pricing principles under the CCA, which seeks to ensure efficient price setting.

On the other hand, the voluntary undertaking approach, as with all voluntary approaches, would not be applied consistently on an industry wide basis as it would only apply to entities, such as SA Water, that make such an undertaking. It would not be possible to force other significant water industry entities to make an undertaking to the ACCC.

A key difficulty with the approach of voluntary undertakings under Part IIIA of the CCA, is that many water industry entities in South Australia, particularly SA Water, operate water service infrastructure that carries water from the Murray Darling Basin and are therefore potentially subject to the *Water Act 2007 (Cth*).

Section 92 of the *Water Act 2007 (Cth)* allows the Commonwealth Minister to make water charge rules that will apply in Basin States (including South Australia). There is scope for charges made by SA Water to be subject to the Commonwealth water charge rules, although the precise scope of the application of those rules is uncertain and not easy to determine.

Given that it is unclear what, if any, of SA Water's infrastructure would be covered by the *Water Act 2007 (Cth)*, it would be difficult for SA Water to give a voluntary undertaking to the ACCC under Part IIIA of the CCA. See further discussion below in section 2.3.2.

2.3 Legislatively Mandated Arrangements

The South Australian Parliament can legislate to establish an economic regulatory framework for access that applies consistently to all South Australian water industry entities. Under the 2006 Competition and Infrastructure Reform Agreement, a state-based access regime must be submitted to the National Competition Council for certification by the relevant Commonwealth Minister. Once certified, access seekers would not be able to apply to the National Competition Council for declaration, under Part IIIA of the CCA, of services to which the state-based access regime applies.

2.3.1 State-based access regime

An important distinction between a state-based access regime and voluntary access arrangements is that voluntary access arrangements are generally made by a particular water entity for specific services, whereas a state-based access regime may be much broader in scope and potentially cover a range of water and sewerage services. Moreover, a certified state-based access regime may have its own declaration and access undertaking processes that mirror those at the national level.

In considering certification, the National Competition Council must have regard to the objects in Part IIIA of the CCA and clause 6 of the CPA which sets out principles for access arrangements.

In 2010 South Australia had two state-based access regimes successfully certified by the National Competition Council, namely the South Australian ports access regime and the South Australian rail access regime. The rail access regime:

- Imposes general requirements on affected operators in relation to accounts, dealing with access seekers and access to regulated services.
- Allows ESCOSA (as regulator) to establish pricing principles for regulated services should an access dispute proceed to arbitration;
- Requires affected operators to provide pricing information brochures and any reasonably requested information about access to access seekers.
- Requires an affected operator to negotiate in good faith with an access seeker.
- Creates a process whereby ESCOSA may, on request from the access seeker, and where negotiations have broken down, attempt to settle the dispute by conciliation, or refer the dispute to independent arbitration.

2.3.2 Interaction with the Water Act 2007 (Cth)

As discussed earlier, charges made by water industry entities in South Australia, including SA Water and South Australian irrigation trusts, may be subject to Commonwealth water charge rules under the *Water Act 2007 (Cth).*

The Commonwealth water charge rules under the *Water Act 2007 (Cth)* were designed to apply price regulation to irrigation infrastructure for rural activities, rather than a negotiate/arbitrate approach to infrastructure services. The Commonwealth water charge rules adopt a tiered approach to regulation which means that an infrastructure operator is only subject to price regulation if the operator's relevant activities are over a significant size. Further, some activities related to urban water supply activities may be excluded from regulation.

The precise scope of the application of the Commonwealth regime is not easy to determine and creates the potential for significant regulatory uncertainty for the design of a state-based access regime.

The options for avoiding this regulatory uncertainty are:

- Using the provisions of Part IIA of the *Water Act 2007 (Cth)* to exclude or displace the operation of the *Water Act 2007 (Cth)*, or the Commonwealth water charge rules, from the areas of operation of a state-based access regime. Such an approach requires the cooperation of the Commonwealth.
- Design a state-based access regime so as to expressly apply only to water services not subject to the Commonwealth water charge rules (e.g. to urban water supply activities). Given the lack of clarity about what infrastructure is covered by the *Water Act 2007 (Cth),* this approach would likely only add to the regulatory uncertainty in this area.
- Designing the state-based access regime so as to mirror the regime created under the Commonwealth water charge rules under the *Water Act 2007 (Cth)*. Such an access regime is unlikely to achieve certification as an effective access regime for the purposes of Part IIIA of the CCA. Certification of an access regime

by the National Competition Council is more likely where the access regime mirrors Part IIIA of the CCA, than other Commonwealth legislation.

The first option avoids the ambiguity about what infrastructure would be covered by the *Water Act 2007 (Cth)* and what would be covered by the State legislation. The state-based access regime would be consistent with Part IIIA of the CCA and other South Australian certified access regimes and would therefore be more likely to achieve certification by the National Competition Council.

If an access regime similar to the rail access regime is enacted to apply to water and sewerage infrastructure services in South Australia, without the exclusion from the Commonwealth regime, State law may prohibit an activity (e.g. non-discrimination obligations) which is allowable under Commonwealth law. The State law may also seek to impose a more onerous regulatory regime (e.g. independent price regulation) than the Commonwealth water charge rules in relation to the same access services. These inconsistencies would potentially give rise to an inconsistency that can lead to the invalidity of a state law based on section 109 of the Australian Constitution.

Further, these inconsistencies would lead to a complex regime where some infrastructure services of SA Water (and potentially other water industry entities) would be subject to Commonwealth water charge rules, some would be subject to the state-based access regime, and some would be subject to both. As discussed, the application of the Commonwealth water charge rules would need to be determined on a case by case basis.

One exemption from a state-based access regime would be irrigation trusts. South Australian irrigation trusts are currently exempt from the South Australian Water Industry Act. Irrigation trusts are classified as *irrigation infrastructure operators* under the *Water Act 2007 (Cth)*, and all charges levied for the delivery of River Murray water to members outside of urban areas are potentially subject to Commonwealth water charge rules. It would be reasonable to exempt these from the state-based access regime and to allow them to be regulated under the Commonwealth regime.

A state-based access regime would potentially apply to all water industry entities, apart from operations of South Australian irrigation trusts. As such, a state-based regime would achieve a consistent regulatory framework across most water industry entities in South Australia, as is the case with the Water Industry Act*).* This is discussed further in section 3.1.3.

This regime would be low cost for access seekers and draws on the experience of other South Australian access regimes that are already certified.

2.4 Consultation Questions

Section 2 sets out the options available under the Competition Principles Agreement for access to water and sewerage infrastructure services. Industry participants and interested citizens are invited to comment on the options and/or address the consultation questions set out below.

Consultation Questions

Has the current policy framework applying to SA Water for voluntary access arrangements been successful in promoting access to water and sewerage infrastructure?

Should the policy framework for access arrangements apply to other water industry participants (in addition to SA Water)?

What is the impact on access seekers from the lack of certainty arising from the application of both the Water Act 2007 (Cth) and Competition and Consumer Act 2012 (Cth)?

What are the costs and benefits of establishing a state-based legislative access regime?

If a certified state-based legislative access regime is implemented, is it also necessary to work with the Commonwealth Government to exclude or displace the operation of the Commonwealth water charge regime under the Water Act 2007 (Cth) from the areas of operation of a state-based legislative access regime?

3 Implementation of a state-based access regime

Section 26(4) of the Water Industry Act anticipates that a state-based access regime will be introduced into Parliament. This section will draw heavily on South Australian experience with implementing certified state-based access regimes for railway and maritime services.

The following sections will address the implementation of a certified state-based access regime in legislation and compliance with the clause 6 principles of the CPA.

- Regulatory model.
- Legislated negotiation framework.
- Legislated dispute resolution.
- Legislated terms and conditions of access, including pricing principles.
- Treatment of interstate issues.

3.1 Regulatory model

This section sets out the basis and level of government intervention in commercial negotiations for access. Key topics covered are:

- Scope of access regime.
- Appointment of economic regulator.
- Initial assessment of application of the access regime.
- Application of the access regime.
- Periodic review of the access regime.

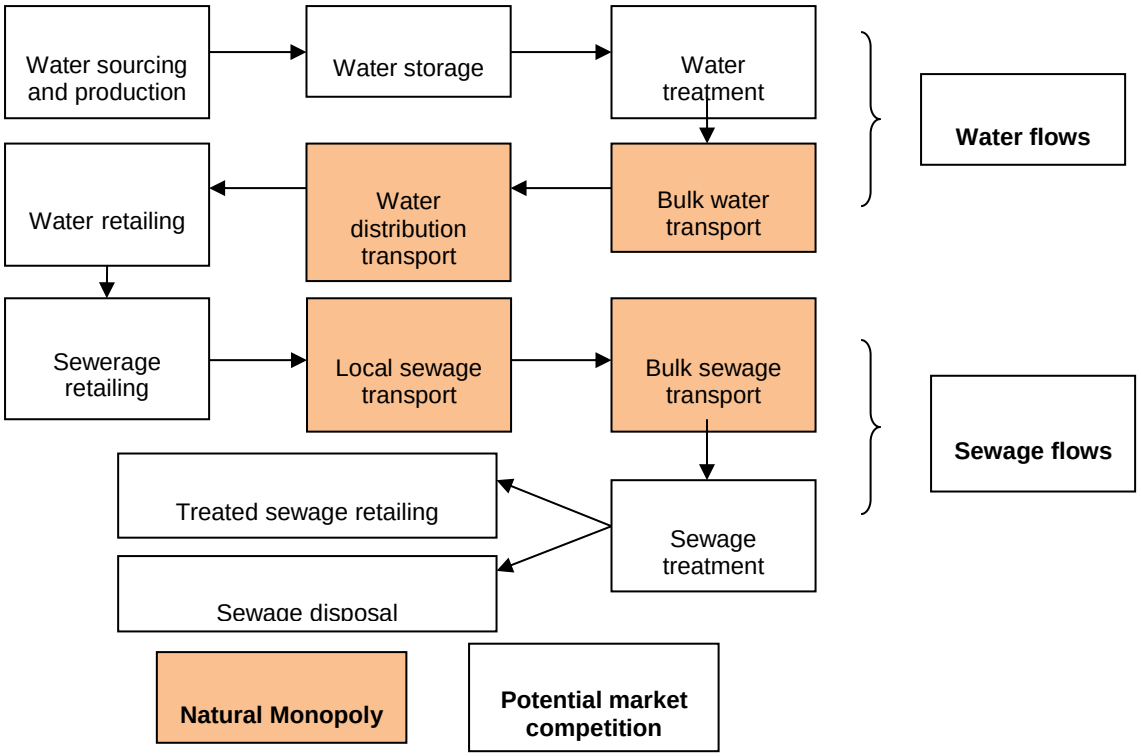
3.1.1 Scope of access regime

Guidance as to the scope of a state-based access regime is provided by Clause 6(3)(a) of the CPA. Clause 6(3)(a) states that access regimes should:

> *Apply to services provided by means of significant infrastructure facilities where:*
>
> - *it would not be economically feasible to duplicate the facility.*
> - *access to the service is necessary in order to permit effective competition in a downstream or upstream market.*
> - *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.*

Figure 1 is a conceptual schematic of the various segments of the water industry. Market analysis of these segments suggests that bulk water, water distribution, bulk sewerage and local sewerage transport infrastructure services are likely to exhibit natural monopoly characteristics because a single firm can supply the service to the entire market at lower cost. Other segments are potentially subject to competition.

Figure 1: Urban water and sewerage infrastructure – natural monopoly and potentially competitive services



Source: Based on figure 1.1 and discussion in Tasman Asia Pacific 1997, Third Party Access in the Water Industry: An assessment of the extent to which services provided by water facilities meet the criteria for declaration of access, Final report prepared for the National Competition Council, September.

Water industry entities that operate in the competitive segments of the water industry, such as the bulk water entitlements, water production and/or water retail markets, may seek access to services provided by water industry entities operating infrastructure that exhibit natural monopoly characteristics. It may be uneconomic for these access seekers to duplicate natural monopoly infrastructure and they may not have sufficient bargaining power to procure the required services. This restricts competition in other segments of the water industry.

In these cases, government intervention to implement a state-based access regime would be more efficient and would be required to promote competition in dependent markets.

The proposed scope of a state-based access regime would include all infrastructure services that comply with clause 6(3)(a)(1) and (2) of the CPA and are significant to the South Australian economy. It is anticipated that this would include services provided by the following infrastructure:

- Bulk water transport
- Water distribution transport
- Local sewage transport
- Bulk sewage transport.

A state-based access regime may apply to other services, such as water storages and treatment plants, but this should only be to the extent that they are integral to the operation of the infrastructure services for which access is being sought (e.g. the transport services cannot be provided without passing through the water treatment plant).

The national competition principles aim to ensure that a state-based access regime provides a balance between the incentive for commercial negotiations and regulatory intervention to facilitate access negotiations where an agreement is unable to be reached.

Clause 6(4)(a) of the CPA requires that a state-based access regime should incorporate the principle that: *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.* That is, to the extent possible, Government should avoid intervening in commercial negotiations between providers and access seekers.

Clause 6(4)(b) of the CPA requires that a state-based access regime should incorporate the principle that: *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.*

To achieve compliance, a state-based access regime would need to establish a right for persons to negotiate access to services provided by means of a facility in those segments of the water industry that exhibit natural monopoly characteristics.

Consultation Questions

What should the scope of a state-based legislative access regime be?

Should the scope include bulk water transport, water distribution transport, local sewage transport and bulk sewage transport?

Should ancillary services, such as water storages and treatment plants, be included within the scope of a state-based legislative access regime? If yes, on what criteria?

3.1.2 Appointment of economic regulator

The South Australian approach to economic regulation has been to establish ESCOSA to regulate across a range of industries, including energy, rail and ports. Under the Water Industry Act, ESCOSA's responsibilities have been extended recently to include the water industry.

ESCOSA could also be appointed as the regulator of a state-based access regime for water. ESCOSA has been recognised by the National Competition Council as the regulator for other certified state-based access regimes, such as railways and maritime services. ESCOSA is independent and would be sufficiently resourced.

The role and responsibilities that a state-based access regime assigns to ESCOSA can range from:

- a heavily regulated approach where the detail of the access terms and conditions and associated price is subject to formal approval of ESCOSA;

to

- a light-handed regime of monitoring to ensure that commercial negotiation and arbitration occurs in a manner consistent with prescribed principles.

The light-handed regime facilitates commercial negotiation and arbitration in a low cost manner and is suited in an environment where access negotiations are likely to be infrequent and specific to the needs of the access seeker. This approach has been adopted in South Australia's certified legislative access regimes for railways (set out in the *Railways (Operations and Access) Act 1997)* and port services (set out in the *Maritime Services Act 2000).*

In an environment where access negotiations are likely to be frequent (i.e. there are potentially many access seekers and many reasons for access) and the needs of the access seekers are common, then an access regime that involves prior determination and approval of access terms and conditions and associated prices is likely to be more cost effective for facility owner and the access seekers. This approach has been adopted for industries that have been vertically separated and subject to substantial economic reform, including the gas and electricity industries, where there is full retail contestability.

Important economic reforms to the water industry have been made in South Australia through the Water Industry Act. The water industry, however, is not at the same stage of reform as the energy sector with vertical separation and full retail contestability.

Consultation Questions

Should ESCOSA's role as the industry regulator for water be extended to include a state-based access regime?

Should the regulator be required to adopt a light handed regime (of monitoring, commercial negotiation and arbitration)? Is this sufficient? Or is a heavier handed regulatory regime required?

3.1.3 Application of the access regime

Water and sewerage infrastructure owned by water industry entities regulated under the Water Industry Act range from critical pipelines serving hundreds of thousands of people to local distribution networks serving less than one hundred. It is therefore not considered to be appropriate for a state-based access regime to apply to all infrastructure services by these regulated water industry entities.

There is a clear case that a state-based access regime should be fully applied to the services provided by SA Water's bulk water transport pipelines across South Australia (See Table 1). These bulk water transport services are clearly significant. Further, the connection of the pipelines to the River Murray means that access to these services could stimulate competition in the market for River Murray water entitlements. For larger commercial, industrial and agricultural users, access to SA Water's bulk water transport services could also facilitate competition between alternative water sources.

Table 1: Water Infrastructure Services – Full Application of state-based access regime

Bulk Water Transport	Product
Murray Bridge to Onkaparinga Systems	Untreated Water
Mannum to Adelaide Pipeline	Untreated Water
Swan Reach to Paskeville Pipeline	Drinking Water
Myponga to Adelaide Pipeline	Drinking Water
Morgan to Whyalla Pipeline	Drinking Water
Tailem Bend to Keith Pipeline	Drinking Water
Eyre Peninsula Pipelines	Drinking Water
Glenelg to Adelaide Pipeline	Recycled Water

Similarly, there is a clear case that community facilities such as community waste management schemes and small water distribution systems should be exempt from a state-based access regime (See table 2). The common characteristic of these infrastructure networks is that they are relatively small in scale and are unlikely to facilitate competition in dependent markets. Thus, it is considered that they do not meet the requirement under clause 6(3A) of the CPA that the water and sewerage infrastructure be significant.

Table 2: Water infrastructure services – exempt from state-based access regime

Bulk Water Transport	Product
SA Water	
Southern Urban Reuse Scheme	Recycled Water
Mawson Lakes	Recycled Water
Adelaide Airport	Recycled Water
Barker Inlet	Recycled Water
Lochiel Park	Recycled Water
Water Distribution Transport	
Other water industry entities	
Skye	Non-Drinking Water
Roxby Downs	Drinking Water
Wallaroo	Drinking Water
Bulk Sewage and Local Sewage Transport	
Other water industry entities	
172 Community Sewerage Management Schemes	Effluent
Wallaroo	Sewage

There are a range of water and sewerage infrastructure services that do not easily fit in into either of the categories described above (full application and exempt). Over time, the significance of this infrastructure may increase and may warrant full application of a

state-based access regime. But, at this stage the cost to the infrastructure service provider of complying with a state-based access regime may not be justifiable.

One approach could be to require this intermediate class of infrastructure service providers to provide basic access information to potential access seekers and establish a process of monitoring by the regulator. Monitoring would provide the regulator with sufficient information to assess, over time, whether the access regime in relation to a specific piece of water or sewerage infrastructure should be extended.

At the commencement of a state-based access regime, an initial assessment to determine the level of application to each piece of water and sewerage infrastructure would be required. This process could involve the regulator making recommendations to a Minister.

Consultation Questions

How should the initial assessment of which specific water and sewerage infrastructure services a state-based access regime should apply to be undertaken?

What criteria should be adopted for the initial assessment?

Over time, how should the initial assessment of the application of the state-based access regime be reviewed?

3.1.4 Periodic Review

Clause 6(4)(d) of the CPA requires periodic review of the need for access regulation to apply to any infrastructure service. A state-based access regime could include a requirement for the regulator to review, on a 5 yearly basis, the access regime to ascertain whether the access regime should continue to apply to water and sewerage infrastructure services in South Australia.

Consultation Questions

What time frame is appropriate for the periodic review of a state-based access regime?

Should the review be undertaken by the regulator? If not, who should be responsible for undertaking the review?

3.2 Legislated Negotiation Framework

Section 3.1.1, concluded that to comply with the CPA, a state-based access regime would, where commercial agreement cannot be reached between the service provider and the access seeker, establish a right to negotiate for access to a service to which a state-based access regime fully applies. Further, clause 6(4)(e) of the CPA states that: *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*.

This section discusses the rights and obligations that could apply to water and sewerage infrastructure service providers for receiving, responding to and negotiating access proposals and access seekers.

In general, the certified arrangements established in the *Railways (Operations and Access) Act 1997 a*nd the *Maritime Services Act 2000* could provide the basis for these rights and obligations. The following rights and obligations could apply to providers of water and sewerage infrastructure services to which a state-based access regime applies (references are to the various sections of the *Railways (Operations and Access) Act 1997)*.

- Not unfairly discriminate or prevent or hinder access to infrastructure services (sections 23 and 24).
- Negotiate in good faith (section 32).
- Prepare an information brochure with information about terms and conditions of access and other information required by the regulator.
- Provide an information brochure to an access seeker on request within 30 days (section 28).
- Provide information about current utilisation of the infrastructure (section 29).
- Provide information about the extent to which it would be necessary to add to or extend the designated facility to meet the requirements of an access seeker (section 29).
- Advise whether or not they are, as the infrastructure owner, willing to provide access. If not, the reasons why the service cannot be provided (section 29).
- Receive and consider an access proposal within a specified timeframe (section 31).
- Notify the regulator and other parties that may be affected by an access proposal (section 31).
- An access contract would be subject to limitations on the basis of consideration of interests or objections of other affected parties (section 33).

The provider of services to which a state-based access regime applies would incur costs negotiating with access seekers. The state-based access regime could allow facility owners to recover reasonable costs from the access seeker.

Consultation Questions

Does the Railways (Operations and Access) Act 1997 provide a good basis for the negotiation framework for a state-based access regime?

Are there other rights and/or obligations that should be included in the negotiation framework?

3.3 Legislated Dispute Resolution

In establishing a right to negotiate, supported by provisions to enforce those rights, the legislation should set out the roles and responsibilities of a Government instrumentality taking on that enforcement role. Clause 6(4)(c) of the CPA states that: *any right to negotiate access should provide for an enforcement process*. Clause 6(4)(g) of the CPA states that: *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.*

A state-based access regime could include dispute resolution arrangements based on the *Railways (Operations and Access) Act 1997.* These dispute resolution arrangements form part of the South Australian railways access regime that has been certified by the National Competition Council.

Key aspects of dispute resolution are discussed under the following headings:

- Triggering arbitration
- Binding decisions
- Guidance to the arbitrator
- Extension of facility
- Variation and revocation
- Powers and procedures
- Consultation questions.

3.3.1 Triggering Arbitration

A state-based access regime for water could set out the criteria enabling an access seeker's rights for arbitration. Criteria that trigger an access dispute and the access seeker's right for arbitration could include:

- A provider or respondent failing to respond to the access proposal of the access seeker within required period.
- A provider or respondent failing to negotiate in good faith with the access seeker.
- The access seeker failing to obtain an agreement on the access proposal or modification of the access proposal after making reasonable attempts to reach an agreement.
- A formal objection is made by a respondent.

A state-based access regime could require that an access seeker must notify the regulator of the request for arbitration. The regulator would be required, in the first instance, to attempt to settle the dispute by conciliation. While conciliation is not explicitly required under the CPA, this approach allows for simpler disputes to be resolved in a more cost effective manner. Ultimately, if the regulator is not able to achieve conciliation the regulator must appoint an arbitrator.

3.3.2 Binding Decisions

Clause 6(4)(h) of the CPA states that: *decisions of the dispute resolution body should bind the parties; however rights of appeal under existing legislative provisions should be preserved.*

A state-based access regime could provide for the enforcement by the Supreme Court of the arbitrator's decisions.

Further, appeal rights against a decision of the arbitrator could be limited to an appeal on a question of law. This is consistent with existing legislative provisions in the *Commercial*

Arbitration and Industrial Referral Agreements Act 1986 that would have otherwise applied to arbitration if a state-based access regime was not in place.

3.3.3 Guidance to the Arbitrator

Clause 6(4)(i) of the CPA describes the matters that the arbitrator should take into account when deciding on the terms and conditions for access. The matters are:

- The owner's legitimate business interest and investment in the facility.
- The costs to the owner of providing access, including any costs of extending the facility but not associated with losses from increased competition in upstream or downstream markets.
- The economic value to the owner of any additional investment that the person seeking access agreed to undertake.
- The interest of all persons holding contracts for use of the infrastructure.
- Firm and binding contractual obligations of the owner or other persons (or both) already using the infrastructure.
- The operational and technical requirements necessary for the safe and reliable operation of the infrastructure.
- The economically efficient operation of the infrastructure.
- The benefit to the public from having competitive markets.

A state-based access regime could explicitly require the arbitrator to take into account:

- The matters outlined in clause 6(4)(i) of the CPA.
- Objects of the Water Industry Act.
- Pricing principles for reference tariffs set by ESOCSA that must have regard to clause 6(5)(b) of the CPA.
- Principles of non-discrimination as outlined in section 23 of the *Railways (Operations and Access Act) 1997*.

Clause 6(4)(l) of the CPA states that: *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.*

Consistent with the *Railways (Operations and Access Act) 1997,* a state-based access regime could provide explicit guidance to the arbitrator that a decision cannot prejudice the existing right a person has to use the infrastructure. It is not appropriate for an arbitrator to consider changes to existing arrangements for access to the infrastructure on the basis of a request for arbitration by a new access seeker.

Further, that the Supreme Court should have the power to order compensation of persons who have suffered loss or damage as a result of a contravention against a state-based legislative regime.

3.3.4 Extension of Infrastructure

The Water Industry Act provides all South Australian water and wastewater service providers, not just SA Water, with the necessary powers to develop infrastructure and offer retail water and sewerage services to South Australians. Developers are no longer limited to connecting to SA Water for developments in South Australia.

Developments that are not self-sufficient in terms of drinking water supplies or the treatment of sewerage, will benefit from the establishment of a state-based access regime. The interconnection of these developments may require the water or sewerage infrastructure provider to extend their existing infrastructure to meet the needs of the access seeker, in this case the water and sewerage services retailer for the new development.

A state-based access regime could enable the arbitrator to make binding determinations in relation to extension of infrastructure. Clause 6(4)(j) of the CPA states that: *the owner may be required to extend, or permit extension of, the facility that is used to provide a service if necessary.*

Clause 6(4)(j) sets out some matters that the arbitrator must take account of in relation to an extension of infrastructure. The matters are:

- Such extension being technically and economically feasible and consistent with the safe and reliable operation of the infrastructure.
- The owner's legitimate business interests in the infrastructure being protected.
- The terms of access for the party taking into account the costs borne by the parties for extension and the economic benefits to the parties resulting from the extension.

A state-based access regime could provide explicit guidance to the arbitrator that the decision of the arbitrator cannot have the effect of requiring the owner of the water or sewerage infrastructure to bear any of the capital cost of any addition or extension to the infrastructure unless the infrastructure owner agrees.

3.3.5 Variation and Revocation

Clause 6(4)(k) of the CPA states that: *if there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access agreement which was made at the conclusion of the dispute resolution process.*

A state-based access regime for water and sewerage infrastructure could adopt the provisions for variation and revocation set out in the *Railways (Operations and Access) Act 1997.* The regulator would be able to vary or revoke an access arrangement if all parties agree, or refer the matter to arbitration. In making the decision to refer a matter to arbitration, the regulator would be required to have regard to:

- Whether there has been a material change in circumstances since the award was made or last varied.
- The nature of the matters in dispute.
- The time that has elapsed since the award was made or last varied.

- Other matters that the regulator considers relevant.

3.3.6 Powers and Procedures

A state-based access regime for water could have similar powers and procedures in relation to the arbitrator as set out in the *Railways (Operations and Access) Act 1997.* Key powers and procedures include:

- The arbitrator must be a person who is properly qualified. ESCOSA must consult with all parties to the dispute and must attempt to make an appointment acceptable to all parties.
- A party to the dispute may be represented in arbitration proceedings by a lawyer or, by leave of the arbitrator, another representative.
- The Minister for Water and the River Murray has the right to participate in arbitration proceedings.
- The arbitrator must act expeditiously and conduct arbitration proceedings in private.
- The arbitrator is not bound by technicalities, legal forms or rules of evidence.
- The arbitrator will have the power to give procedural directions and to obtain information and documents
- The arbitrator may refer a matter to an expert for report.
- A person may request that information given to the arbitrator be treated as confidential, and the arbitrator may impose conditions on the access to and disclosure of information.
- The arbitrator and the access seeker can terminate arbitration under certain circumstances.
- The standard period of arbitration is up to 6 months.
- The arbitrator must make a draft decision to the parties and the Minister for Water and the River Murray and give opportunities for representations to be received and considered.
- The arbitrator must, within seven days of making a decision, notify ESCOSA, the Minister for Water and the River Murray and the parties.
- The access seeker may within seven days of the decision elect to withdraw. The decision is rescinded and the access seeker will, for a specified period of time, be prevented from making further access proposals.
- Costs of arbitration are to be borne by the parties in proportions decided by the arbitrator. If the access seeker terminates arbitration or elects to withdraw, then the access seekers must bear the costs in their entirety.

The powers and procedures described above are sufficient to meet the requirements of clause 6(4)(o) of the CPA which states that: *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*.

3.3.7 Consultation Questions

Section 3.3 sets out a dispute resolution framework that is consistent with the CPA and based in large part on the approach adopted in the *Railways (Operations and Access) Act 1997.* Industry participants and interested citizens are invited to comment on the dispute resolution framework and/or address the consultation questions set out below.

Questions

Does the Railways (Operations and Access) Act 1997 provide a good basis for a dispute resolution framework for a state-based access regime for water and sewerage infrastructure services?

Should a state-based access regime provide specific guidance to facilitate the development of new water and sewerage infrastructure?

Are there other rights and/or obligations that should be included in relation to dispute resolution?

3.4 Legislated Terms and Conditions

Clause 6(4)(f) of the CPA states that: *access to a service for persons seeking access need not be on exactly the same terms and conditions.*

A state-based access regime should not limit access seekers and the infrastructure owner from negotiating commercial agreements outside of the provisions of the access regime. A state-based access regime should, as a safety net, confer rights on the access seeker in relation to negotiating access and imposing obligations on the infrastructure owner when the access seeker exercises those rights.

A state-based access regime can provide guidance to the infrastructure owner about the terms and conditions of access, including price.

While light handed models of access regulation generally do not impose on the infrastructure owners or an arbitrator binding guidance on terms and conditions of access, some measures could be included in such a state-based access regime for water and sewerage infrastructure to ensure that sufficient information is made available to the access seeker and arbitrator to assist in negotiation and arbitration.

These measures are:

- For the regulator to have the power to establish pricing principles for setting reference prices for water services to which a state-based access regime applies.
- Consistent with clause 6(4)(n) of the CPA, a requirement on the infrastructure owner to have separate accounting arrangements for the elements of a business which are covered by the access regime.

The regulator in establishing pricing principles should be required to adopt the requirements set out in clause 6(5)(b) of the CPA, which states that*: 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.*

Consultation Questions

What terms and conditions of access, if any, should the state-based access regime regulate?

What information preparation requirements (e.g. pricing principles and accounting standards), if any, should the state-based access regime regulate?

3.5 Public health, environmental and safety standards

It is appropriate for the Government to regulate public health, environmental and safety standards. Similarly, clause 6(3)(a)(iii) of the CPA states that: *access should be provided where "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.*

South Australia is well placed in relation to its regulation of public health, environmental and safety standards. The state-based access regime would not seek to alter the regulation of public health, environmental and safety frameworks. For example, existing public health measures that prevent the injection of recycled water into the drinking water infrastructure will be maintained.

Key topics are discussed under the following headings:

- Public health
- Environmental standards
- Safety standards
- Arrangements between regulators and the arbitrator
- Consultation questions.

3.5.1 Public Health

Public health in relation to drinking water is regulated through the *Safe Drinking Water Act 2011.* The Act is based on implementation of the Australian

Drinking Water Guidelines (ADWG) with key components being consistent with interstate and international legislation. The main provisions of the Act are:

- Registration of drinking water providers.
- Implementation of risk management plans as described in the ADWG including:.
    - Approved monitoring programs and incident notification protocols.
    - Regular audits and inspections.
    - Reporting of results to the Department of Health and Ageing.
    - Provision of results to consumers.

Public Health aspects of non-potable water and treatment of sewage are regulated through the *Public and Environmental Health Act 1987* and the *Public and Environmental Health (Waste Control) Regulations 2010*, which include:

- Provisions for shutting down or upgrading a recycled water supply system if it poses a health risk.
- Installation approval requirements for waste control systems (including community wastewater management systems).
- Requirements for the approval of recycled water systems.
- Requirements for the approval of sewage products.

The *Australian Guidelines for Water Recycling: Managing Health and Environmental Risks (Phase 1)* provide guidance for the safe provision of recycled water and are recognised as the authoritative reference by South Australian agencies.

The health regulation of recycled stormwater and other non-potable water does not require a formal approval. The Department of Health and Ageing recommends that proponents discuss their proposals with them, to reduce the risk of needing to shut down or modify the system under the *Public and Environmental Health Act 1987* due to a health risk.

3.5.2 Environmental Standards

The *Environment Protection Act 1993* regulates environmental impacts from the operation of water services. This includes licensing of sewage treatment works, community wastewater management schemes, aquifer storage and recovery in specified areas and discharge of sewage to marine or inland waters.

The *Environment Protection (Water Quality) Policy 2003* also specifies obligations on water entities, for example:

- The *Code of Practice for Aquifer Storage and Recovery 2004* applies to aquifer storage and recovery schemes.
- The *South Australian Reclaimed Water Guidelines 1999* prepared by the Department of Human Services and the Environment Protection Agency apply to a person that reuses, or supplies for reuse, sewage collected by a community wastewater management scheme or a sewage treatment system.

The *Murray-Darling Basin Agreement* (Schedule 1 of the Commonwealth *Water Act 2007*) includes water-sharing arrangements for sharing of water from the River Murray. South Australia's entitlement to River Murray water is specified in the Murray-Darling Basin Agreement. The State water law that supports the Commonwealth *Water Act 2007* is the *Natural Resources Management Act 2004*.

The taking of water from a water course, lake, well or surface water is subject to the provisions of the *Natural Resources Management Act 2004.* For the River Murray area, water rights and approvals were unbundled from a single licence and managed as four new and separated instruments:

- Water Access Entitlement - this is the ongoing right to a specified share of the water resource and is an asset that can be sold or transferred.
- Water Allocation - this is the right to take a specific volume of water for a given period of time, not exceeding 12 months, based on the volume of water available in that period. This is also an asset that can be sold or transferred.
- Water Resource Works Approval - this is a permission to take water, from a prescribed resource, at a particular point, in a particular manner.
- Site Use Approval - this is a permission to use water, taken from a prescribed resource, at a particular site in a particular manner.

All of these instruments are required before a person may take water from the River Murray. Other water courses in South Australia are subject to similar requirements, depending on whether the water course, lake, well or surface water has been prescribed and whether the water rights and approvals have been unbundled.

3.5.3 Safety Standards

The technical regulation of on-property plumbing where the property is connected to SA Water's water and sewerage infrastructure is currently performed by SA Water. For properties in areas not serviced by SA Water this function is managed by the Department of Health and Ageing.

The Water Industry Act transferred the technical regulation function performed by SA Water to the Office of the Technical Regulator (OTR) in the Department for Manufacturing, Innovation, Trade, Resources and Energy. In due course the technical regulation of plumbing function performed by the Department of Health and Ageing will also transition to the OTR. The occupational licensing of plumbers will continue to be performed by Consumer and Business Services Division of the Attorney-General's Department.

The legislation requires the Technical Regulator to develop, monitor and regulate technical standards in connection with the water industry. This will cover on-property plumbing as currently performed.

Technical standards and guidelines that may apply to access seekers include:

- Plumbing Code (AS/NZS 3500).
- National codes for water infrastructure developed by the Water Services Association of Australia, many of which have been developed into Australian Standards.
- Dam design guidelines developed by the Australian National Committee on Large Dams Incorporated, which includes South Australian and interstate water corporations, and implements dam safety guidelines.

3.5.4 Arrangements between regulators and the arbitrator

A facility owner may need to establish specific terms and conditions in the access agreement that impose obligations on the access seeker in order for the facility owner to comply with public health, environmental and safety standards. A state-based access regime should empower the regulator and arbitrator to consult with the relevant regulatory body and ascertain whether the proposed terms and conditions are appropriate to ensure compliance by the facility owner with the public health, environmental and safety regulatory frameworks.

This issue has already been addressed by section 90 of the Water Industry Act which requires relevant Government agencies to consult with each other in connection with the operation and administration of the Water Industry Act. It would be appropriate to extend section 90 to include an arbitrator appointed by the regulator.

3.5.5 Consultation Questions

Section 3.5 sets out the existing measures for public health, environmental and safety standards that currently apply and would continue to apply when a state-based legislative access regime is established. Industry participants and interested citizens are invited to comment on the public health, environmental and safety standard regulatory framework and/or address the consultation questions set out below.

Consultation Questions

Are there any specific considerations that should be taken into account by the public health, environmental and safety standard regulators if there is a state-based access regime for water and sewerage infrastructure services?

Is the requirement in section 90 of the Water Industry Act for the arbitrator to consult with public health, environmental and safety standard regulators sufficient?

3.6 Interstate Issues

Clause 6(4)(p) of the CPA states that, where more than one State or Territory regime applies to the service, those regimes should be consistent and, by means of vested jurisdiction to 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 of enforcement of access arrangements.

For example, the South Australian rail access regime only covers railway infrastructure services that are located within South Australia. The *Australasia Railway (Third Party Access Act 1999 (SA and NT)* provides for access to the Tarcoola-Darwin railway.

A state-based access regime for water and sewerage infrastructure services would only apply to infrastructure located within South Australia. As discussed earlier, this would include water industry entities that use Murray Darling Basin water sources.

Nevertheless, as discussed earlier, irrigation infrastructure operators under the *Water Act 2007 (Cth)*, such as South Australian irrigation trusts that operate their infrastructure for the purpose of delivering water for the primary purpose of irrigation, would be excluded from a

state-based access regime. These services would be covered generally by the water charge rules established under the *Water Act 2007 (Cth).*

Consultation Question

Are there other interstate issues in relation to the access regime for water and sewerage infrastructure services that need to be addressed?

4 Conclusion and Next Steps

4.1 Conclusion

This report on access to water and sewerage infrastructure services satisfies the requirements of section 26 of the Water Industry Act.

The report has considered various options for third party access given the State and Commonwealth regulatory environment. A state-based access regime would, subject to certification by the National Competition Council and approval by the Commonwealth Government, provide for a single framework for access for water industry entities under the Water Industry Act.

The report discussed the possible implementation of a state-based access regime that has been adapted to address the wide range of water industry entities that offer water infrastructure services and offers a flexible and adaptive framework for access that is regulated by an independent regulator.

The possible rights and obligations of access seekers and providers of water services infrastructure and the functions and powers of the regulator and arbitrator under a state-based access regime were also discussed.

4.2 Next Steps

Industry participants and interested citizens are invited to comment on the report and/or address any or all of the consultation questions summarised in the previous section and set out in the text of the report.

The closing date for submissions on this report is Friday **15 March 2013**.

Submissions received will be placed on the Department of Treasury and Finance website and may be quoted.

Following receipt and consideration of submissions, the Government will prepare a draft Bill. This draft Bill will be based on this report and consideration of the submissions received. It is expected that a draft Bill will be released by mid 2013 for further public consultation.

Following consultation on the draft Bill, a revised Bill will be prepared taking account of submissions received and is expected to be introduced to Parliament in September 2013. This is compatible with the requirement in the Water Industry Act that "*the Minister must use his or her best endeavours to introduce into Parliament within 9 months after the commencement of this section a Bill for an Act to provide for a third party access regime to water infrastructure and sewerage infrastructure services operated by entities licensed under this Part.*"

If passed by Parliament, the state-based access regime commencement date would be determined based on the time required for water industry entities and the regulator to prepare.

Consultation Question

What should be the period allowed for implementation of the state-based access regime by water industry entities and the regulator?

Submissions on this report should be sent to:

e-mail regulatorypolicy@sa.gov.au

or

post Regulatory Policy
Department of Treasury and Finance
GPO Box 1045
Adelaide SA 5001

Additional copies of this report can be downloaded from http://www.treasury.sa.gov.au

Appendix 1

Competition Principles relating to access arrangements as updated by the Competition and Infrastructure Reform Agreement

Access to Services Provided by Means of Significant Infrastructure Facilities

6.(1) Subject to subclause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:

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

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

(c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and

(d) 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.

(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.

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

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

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

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

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

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except) for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5). There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

(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 the access regime; and

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

(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 access 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.

(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.