IPART
New South Wales

Independent Pricing and Regulatory Tribunal

Sydney Water's third party access undertaking for water network services

Water — Preliminary View
August 2012

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Invitation for submissions

IPART invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

The submission from Sydney Water is due by 7 September 2012.

The submissions from stakeholders are due by 21 September 2012.

We would prefer to receive them electronically via our online submission form.

You can also send comments by fax to (02) 9290 2061, or by mail to:

Sydney Water's access undertaking 2012
Independent Pricing and Regulatory Tribunal
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Our normal practice is to make submissions publicly available on our website <www.ipart.nsw.gov.au>. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed on the previous page.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. IPART will then make every effort to protect that information, but it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's submission policy is available on our website.

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Executive summary

The Independent Pricing and Regulatory Tribunal of NSW (IPART) commends Sydney Water Corporation (Sydney Water) for submitting a voluntary access undertaking.[1] Under the *Water Industry Competition Act 2006* (WICA), IPART has responsibility for approving access undertakings submitted by service providers, including metropolitan water utilities.

This is the first voluntary access undertaking for a water utility submitted to an economic regulator for approval in Australia and the first water network access undertaking IPART has considered. Sydney Water does not currently provide access to any access seekers.

This report sets out our preliminary view of Sydney Water's access undertaking for its water network services. We consider the access undertaking submitted for our approval to be of high quality, however we have a number of areas of concern. A full list of our recommendations can be found in Appendix B. We expect that, if our suggested amendments are made, the undertaking is likely to be approved.

Summary of IPART's principal areas of concern

We have considered Sydney Water's access undertaking under the criteria set out in WICA.[2] These criteria are included at Box 1.1 and Box 1.2 of the report. Our main issues with the access undertaking are summarised below.

The term

The access undertaking submitted by Sydney Water is set to expire on 30 June 2016. There is no clause which requires continuity of services beyond the term of the undertaking. This is not in the interests of potential access seekers, a criterion that we must consider before approving the undertaking.

Potential retail competitors need greater certainty to enter the market. There are significant start-up costs, through negotiation of access with bulk water suppliers and water treatment operators, building retail billing systems and attracting customers. This requires certainty regarding continued access to the water network. We recommend an amendment to make the term at least 10 years. This is not inconsistent with IPART's more frequent reviews of access prices as provided for in the undertaking.

1 Access Undertaking by Sydney Water Corporation in favour of Independent Pricing and Regulatory Tribunal, 20 January 2012.

2 Sections 38 (6), 41 (2) and 41 (3) of the *Water Industry Competition Act 2006*.

The scope

The access undertaking submitted by Sydney Water only allows access to holders of a WICA retail supplier's licence. This precludes entities that wish to access the water network for the sole purpose of self-supply, and 'exempt entities' such as councils from being access holders. This limitation is a barrier to entry and not in the interests of prospective access seekers, another criteria that we must consider before approving the undertaking.

We recommend that Sydney Water allows access to entities other than holders of retail suppliers licences under WICA. These entrants are not subject to WICA's water security requirements, and as a result, Sydney Water may wish to ensure that these entrants contribute to water security costs. This is consistent with our other recommendations about the water security charge.

Principles or framework for non-standard services to guide negotiations

The access undertaking submitted by Sydney Water covers 3 services:

- water transport services
- interconnection services, and
- off-take services.

The access undertaking includes standard terms and conditions for water transport services, but does not include standard terms and conditions for interconnection and off-take services. The location, size and scope of these services would create different costs and may require different conditions.

However, we consider that the access undertaking should include either principles or a framework under which these charges would be negotiated. This would create greater transparency and give potential competitors a better understanding of the terms, conditions and charges they would face, and improve their ability to assess the viability of entering the market. Including principles or a framework is in the interests of prospective access seekers.

We recommend that the access undertaking is amended to include either principles or a framework for non-standard services to guide negotiations. We consider that any principles should be symmetric in nature.

The water security charge

The access undertaking submitted by Sydney Water includes a charge for all access holders to contribute to Sydney Water's water security projects.

The Minister, after considering our recommendation, has the discretion to include conditions in any WICA licence to compel licensees to contribute to water security costs. Furthermore, to be granted a WICA retail supplier's licence the applicant must satisfy the Minister that it is supplying a "sufficient" quantity of water from sources other than public water utilities.

We recommend that Sydney Water should not levy a water security charge on access holders for which the Minister has explicitly set a water security charge or made an explicit decision that the charge should not be levied. We recommend that all other water security charges should be negotiated, and be set at a competitively neutral level.

Water treatment services

The access undertaking submitted by Sydney Water does not cover water treatment services. Sydney Water considers that water treatment services are separable from the storage, conveyance and reticulation of water.

To meet public health drinking water requirements,[3] raw water will need some level of treatment.[4] The infrastructure required to transfer the water from the Sydney Catchment Authority's dams to Sydney Water's network goes through the existing water treatment plants. We consider that under the proposed term, and our recommended term, there may not exist sufficient long-term certainty for a private business to build a competing water treatment plant. As such, access holders will most likely need access to the existing water treatment plants to supply treated water to Sydney Water's network.

We recommend that Sydney Water should include water treatment services in the access undertaking and access agreement. This would ensure that access seekers can negotiate access to these services from Sydney Water, and the terms of that access will be transparent. Alternatively, if this is not possible, we consider that Sydney Water should undertake not to refuse any access holder access to water treatment services.

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3 National Health and Medical Research Council, *Australian Drinking Water Guidelines 2011.*

4 At this time only bulk water provided by the Sydney Desalination Plant does not require treatment, the plant has its own treatment facilities. All Sydney Catchment Authority raw water requires treatment to be used in Sydney Water's water network.

What does the rest of the report cover?

The rest of the report explains IPART's preliminary findings for this review, and the analysis that underpins them. It is structured as follows:

- Chapter 1 provides the background to the review
- Chapter 2 provides our analysis and preliminary findings about the access undertaking
- Chapter 3 provides our analysis and preliminary findings about the standard access agreement
- Chapter 4 provides our analysis and preliminary findings about the pricing method
- Chapter 5 provides our analysis and preliminary findings about water treatment services.

What happens next?

We request that Sydney Water respond to this report and submit an amended access undertaking by 7 September 2012. Other stakeholders will be allowed until 21 September 2012 to comment on our recommendations and Sydney Water's submission.

We will consider all submissions to this review before deciding whether to approve the access undertaking. We will consider further consultation if it is warranted.

1 Background

Sydney Water submitted an access undertaking which includes a standard access agreement to IPART in January 2012.[5] The access undertaking can be found on our website: www.ipart.nsw.gov.au. This is the first time we have had the opportunity to consider a voluntary access undertaking submitted under WICA. Indeed, this is the first voluntary access undertaking for water infrastructure submitted to an economic regulator for approval in Australia.

An access undertaking is a document prepared by a service provider. It sets out the terms and conditions for third parties to negotiate access to a service. This access undertaking relates to Sydney Water's water network services:

- water transport – the transport of treated water from existing interconnection points on the water supply transport network and the water filtration plants to customers
- interconnection – the right to connect infrastructure to the water supply transport network downstream of a water filtration plant and to use the interconnection point to inject treated water into the water supply transport network
- off-take – the right to connect infrastructure to a point on the water supply transport network to extract treated water.

Sydney Water's access undertaking is only for water network services[6] and does not apply to its sewerage network services,[7] water treatment services or bulk water supply.[8]

1.1 Assessment criteria

We have carefully considered Sydney Water's access undertaking under the criteria set out in section 38 of WICA. These criteria are shown in Box 1.1 below:

5 Access Undertaking by Sydney Water Corporation in favour of Independent Pricing and Regulatory Tribunal, 20 January 2012 (access undertaking). The standard access agreement is Schedule 3 of the access undertaking.

6 Clauses 1.1 (e) and 1.2 (a) of the access undertaking.

7 Three of Sydney Water's sewerage networks (Bondi, Malabar and North Head) are subject to a coverage declaration until 2056 under Part 3 of WICA.

8 Clause 3.2 of the access undertaking.

Box 1.1 Water Industry Competition Act 2006 – section 38 (6)

(6) In deciding whether to approve a service provider's access undertaking, IPART must have regard to the following:

(a) the legitimate business interests of the service provider

(b) the public interest, including the public interest in having competition in markets

(c) the interests of prospective access seekers

(d) any other matters that IPART considers relevant.

Note: See also section 41 in relation to the application of pricing principles and section 92 in relation to IPART's guidelines as to the exercise of its functions under this section.

We also considered the pricing principles for access agreements set out in section 41 of WICA. These principles are shown in Box 1.2 below:

Box 1.2 Water Industry Competition Act 2006 – section 41 (2) and (3)

(2) For the purposes of this section, the ***pricing principles*** in relation to any infrastructure service are as follows:

a) the price of access 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,

b) the price of access should allow multi-part pricing and price discrimination when it aids efficiency,

c) the price of access should not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent which the cost of providing access to other operators is higher,

d) the price of access should provide incentives to reduce costs or otherwise improve productivity.

(3) These principles must be implemented in a manner that is consistent with any relevant pricing determinations for the supply of water and the provision of sewerage services, including (where applicable) the maintenance of "postage stamp pricing" (that is, a system of pricing in which the same kinds of customers within the same area of operations are charged the same price for the same service).

The full text of the clauses of WICA relevant to this review are included in Appendix A.

To further inform our decision-making process, we held a public hearing on the access undertaking and considered submissions from stakeholders. We have also researched the access schemes in England, Wales and Scotland to improve our understanding of how existing access regimes work.

We commend Sydney Water for submitting the access undertaking. We are committed to encouraging competition in the NSW water market. We consider establishing an access regime for network services to be a key step in the process of creating competition for the bulk, treatment and retail water markets.

2 The access undertaking

In our view, the terms of the access undertaking are, for the most part, reasonable.

However, we have a number of areas of concern. Having considered the criteria, we suggest that there are some amendments that could be made to improve the access undertaking.

Our recommended amendments to the access undertaking are set out by topic below.

2.1 The term

The undertaking is set to expire on 30 June 2016. We consider the 4-year term of the undertaking (set to match the term of IPART's 2012 price determination)[9] is insufficient to meet 2 of the criteria in section 38 of WICA, ie, the public's interest in competition or the interests of prospective access seekers. It does not give access seekers any long term certainty, thereby creating a risky investment environment. There is no clause which requires continuity of service beyond the term of the undertaking. We recommend that the undertaking specify a longer term, in the interests of prospective access seekers.

Potential retail competitors need greater certainty to enter the market. There are significant start-up costs, through negotiation of access with bulk water suppliers and water treatment operators, building retail billing systems and attracting customers. This requires certainty regarding continued access to the water network. We recommend an amendment to make the term at least 10 years.

We note that a fundamental change to Sydney Water's pricing method could create opportunities for access holders to cherry pick certain customers. However, the terms of access allow Sydney Water to apply to IPART for a variation in the access undertaking.[10] We consider that under such situations, we may agree to bring forward the end date or change the pricing method of the undertaking.

Recommendation

1 Amend the access undertaking to specify a longer term of at least 10 years.

9 Clause 2.2 of the access undertaking.

10 Clause 2.3 of the access undertaking allows Sydney Water to apply to vary it if Sydney Water is of the opinion that it is no longer commercially viable or if it becomes inconsistent with the objectives outlined in clause 1.2.

2.2 The scope

We consider that allowing only WICA retail suppliers access to Sydney Water's water network services[11] is not in the interests of all prospective access seekers, a criterion we must consider. The restriction is a barrier to entry.

Large customers may wish to seek access for the purpose of self-supply and councils may wish to supply some water services to their residents or businesses. Neither of these entities would require a WICA retail supplier's licence. Under the proposed undertaking, it is a precondition that any access seeker hold a WICA licence (even though such a requirement is not imposed on 'self-suppliers' and councils under WICA). We consider that any legal entity should be allowed to seek to negotiate access to Sydney Water's water network services regardless of whether or not they hold a WICA retail licence.

We consider that potentially a number of self-supply customers and councils could benefit from access to water network services.

Recommendation

2 Amend the scope of the access undertaking to allow any legal entity to seek access to Sydney Water's water network.

2.3 Principles or a framework for non-standard services

The current access undertaking does not include standard terms or conditions for interconnection and off-take services, rather it allows the applicant to negotiate them separately.[12] We understand that these have not been included as both of these services would incur different costs and conditions depending on size, scope and location. Sydney Water also states that it does not expect any interconnection or off-take services will be required before 30 June 2016.[13] We consider this approach pragmatic.

We consider that the terms of the access undertaking would create a barrier to entry, as access seekers would have no indication of the costs or basis of Sydney Water's charges for these services. However, in the interests of prospective access seekers, we consider that the access undertaking should include either principles or a framework under which these charges would be determined.

Further, any principles should be applied symmetrically. The principles should not advantage Sydney Water, unless in the reverse situation the access seeker will be advantaged. For example, if Sydney Water determines that the access seeker should pay for all additional costs of an off-take or an interconnection, then an access seeker that generates savings should be allowed to keep those savings.

11 Clauses 1.1 (e) and 5.3 (b) (ii) of the access undertaking.
12 Clause 4.3 of the access undertaking.
13 Clauses 4.1 (b) and (c) of the access undertaking.

Recommendation

3 Amend the access undertaking to include a standard set of principles or a framework from which off-take and interconnection access and charges will be negotiated and calculated.

2.4 Dispute resolution

In the access undertaking it is unclear whether IPART is always given the first option to arbitrate should there be a referral to arbitration, or if the parties may agree to refer a dispute to private arbitration without involving IPART.[14] We consider that arbitration should be available and that, consistent with Sydney Water's submission[15] we could be given the first option to arbitrate.

In the access undertaking, the dispute resolution clause only applies to disputes in relation to:

- negotiating terms of access in new access agreements
- negotiating additional terms to an existing access agreement
- a decision by Sydney Water to vary the prices at which network services are provided under an existing access agreement.[16]

The dispute resolution clauses appear to apply to the negotiation of access in access agreements for both standard and non-standard services.[17]

We consider that the dispute resolution clauses should be extended to cover a wider range of disputes. We consider it may be appropriate for referral to IPART for arbitration to be allowed for all disputes arising under access agreements once in existence (see Recommendation 23).

Clause 6.4(a) of the proposed access undertaking provides that either party may refer a dispute to arbitration. However, clause 6.5(a) of the proposed access undertaking provides that the parties may agree to resolve the dispute by private arbitration or through arbitration conducted by IPART. This implies that both parties must agree to have a dispute referred to IPART to be determined by arbitration. We recommend that clause 6.5(a) is clarified so that it is clear that either party may refer a dispute to arbitration by IPART. This is consistent with section 40 (1) of WICA.

We consider these amendments would be in the interests of both Sydney Water and prospective access seekers, as arbitration can be quicker and less expensive than referring disputes to court.

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14 Clauses 6.4 (a), 6.5 (a) and (c) of the access undertaking. Sydney Water's supporting submission indicates that IPART is intended to always be given the first option to arbitrate (p 9).

15 Sydney Water, *Water network access undertaking*, Supporting submission, January 2012, p 9.

16 Clauses 6.1 (a) (i) to (iii) of the access undertaking.

17 Access agreement means an agreement between an access holder and Sydney Water for the provision of Water Network Services, clause 9.1 of the access undertaking.

Recommendation

4 Amend the access undertaking to clarify the arbitration clauses and ensure that arbitration by IPART or another party is available to any dispute arising under either the access undertaking or standard access agreement.

5 Amend the access undertaking to expand the scope of the dispute resolution clauses, in particular to allow the parties to apply to refer a dispute under an existing access agreement to IPART for arbitration.

6 Amend the access undertaking to clarify that either party may refer a dispute to arbitration by IPART.

2.5 Definitions

The definitions of the services and responsibilities of each party are not sufficiently robust. We consider that it is not clear what role the access seeker would be performing, and what services Sydney Water would provide to customers that are not Sydney Water's retail customers.[18]

In Scotland, this was addressed through a series of agreements and codes setting out each party's roles and responsibilities.[19] We recommend that a code of operations is developed to define roles and responsibilities for access holders and access providers.

We note that the current definition of 'water transport service' only applies to transport from existing interconnection points.[20] We recommend that it is extended to cover all interconnection points. Any differences in water transport costs from new interconnection points can be recovered by the charges for interconnection services.

Recommendation

7 Develop a code of operations to define the services, operations and responsibilities of each party subject to the access undertaking and access agreements, and to define the interactions between the parties.

8 Amend the definition of 'water transport service' to include treated water inputted into any interconnection point.

18 Clause 9.1 of the access undertaking.

19 Water Industry Commission for Scotland, *Water and sewerage retail competition in Scotland*, February 2012.

20 Clause 1 of Schedule 1 of the access undertaking.

2.6 Drafting errors

We note that:

- there appear to be words missing from clause 6.4 (d) of the access undertaking
- there are inconsistencies between clause 4.8 and clause 7.1 of the access undertaking (the 2 clauses relate to the disclosure provisions of ring-fenced information, however they allow disclosure under different circumstances)
- clauses 6.3 (b) and 6.5 (f) of the access undertaking refer to the President of the NSW Chapter of IAMA; this should be the Chair of the NSW Chapter of IAMA.

Recommendation

9 Clarify clause 6.4 (d) of the access undertaking.

10 Amend clause 4.8 and/or clause 7.1 of the access undertaking to remove inconsistencies.

11 Amend clauses 6.3 (b) and 6.5 (f) of the access undertaking to refer to the Chair of the NSW Chapter of IAMA.

2.7 Other issues

We consider that the access undertaking could be improved by including further clauses to ensure that there is no discrimination against access holders.[21] In particular, discrimination against access holders for the benefit of Sydney Water's retail operations, or other access holders, should not be allowed under any circumstances. This is in the interests of prospective access seekers.

We have some concern that the time frames allowed in some of the clauses may be insufficient. We recommend that all time frames are specific (not, for example, that Sydney Water will 'promptly' provide reasons when it ceases to negotiate).[22] We consider also that we should be allowed 20 business days (rather than 5) to respond to a request for arbitration.[23] The longer timeframes are in the interests of prospective access seekers. We note that in England and Wales, Ofwat have allowed longer time frames than those proposed by Sydney Water.[24]

We are concerned that large customers of access holders would need to maintain relationships with both the retailer and the network operator. We consider that it may be preferable for the retailer to be responsible for informing Sydney Water of any information that is material for the network management needs of its customers. We are seeking comment from prospective access seekers and other interested stakeholders as to whether this is desirable.

21 Clause 4.6 of the access undertaking.
22 Clause 5.3 (b) (iv) of the access undertaking.
23 Clause 6.5 (c) of the access undertaking.
24 Ofwat, *Access codes guidance,* September 2011.

Recommendation

12 Amend the access undertaking and the access agreement to ensure that no access holder is discriminated against in favour of another access holder or Sydney Water's retail business.

13 Amend the access undertaking to ensure that the terms, conditions and charges offered by Sydney Water to an access seeker remain valid for a defined period of time.

14 Amend the access undertaking to extend the timeframe for IPART to respond to requests for arbitration, and to define Sydney Water's time frame to inform access seekers why it has ceased to negotiate.

IPART seeks comments from stakeholders on the following:

1 Is it desirable for access holders to have responsibility for informing Sydney Water of issues relevant to network management, or should the access holder's customer provide this information directly to Sydney Water?

3 The standard access agreement

In general, we are satisfied with the standard access agreement as proposed.

However, we have a number of areas of concern. We suggest that there are some amendments that could be made to improve the standard access agreement and better address the criteria that IPART must consider when deciding to approve the agreement.

Our recommended amendments to the standard access agreement are set out by topic below.

3.1 The term

Under the standard access agreement, the agreement ends at the expiry of the undertaking or its earlier termination.[25] We consider this creates a barrier to entry. There is no requirement for Sydney Water to submit a new access undertaking at the expiry of an existing undertaking. This creates uncertainty for all access holders, but is of particular concern to access seekers that intend to enter into an agreement towards the end of the undertaking term.

Towards the end of the undertaking term, the period to expiry would be insufficient for prospective access seekers to commit to any investments or seek new customers. In their interests, it would be preferable to allow for access agreements to continue beyond the expiry of the access undertaking.[26]

25 Clause 2.1 of the standard access agreement.
26 This is in addition to Recommendation 1.

Recommendation

15 Amend the standard access agreement to allow for access agreements to continue beyond the expiration of the access undertaking.

3.2 The scope

We have recommended that the access undertaking is amended to allow self-supply customers and councils to be included within the scope of the access undertaking.[27] In contrast to conditions imposed on WICA licensees, we are aware that there is no mechanism to ensure that self-supply customers and councils contribute to the costs of water security infrastructure, for example the Sydney Desalination Plant.

We consider that the standard access agreement for such access holders should ensure that all access holders contribute to water security projects, on a competitively neutral basis, except for those access holders on which the Minister has explicitly imposed a requirement to pay, or not to pay, a water security charge. This approach is in the legitimate business interest of Sydney Water, by ensuring that access holders will not be advantaged by not having to contribute to water security projects.

Recommendation

16 Amend the access agreement, for access holders that do not hold a WICA retail licence, to ensure that these access holders are contributing to the costs of water security projects, on a competitively neutral basis.

3.3 Customer complaints

In the public workshop, Sydney Water committed to consult with the Energy and Water Ombudsman NSW to ensure that the customer complaint processes of the 2 organisations will be aligned.[28] Aligning these processes is in the public interest.

Recommendation

17 Amend the standard access agreement to ensure consistency of its customer complaint processes with those of the Energy and Water Ombudsman NSW.

27 Recommendation 2.

28 The Public Workshop was held on 2 April 2012.

3.4 Information requirements and ring-fencing

In the standard access agreement there is a requirement for access holders to provide Sydney Water with forecasts of the number of customers, the volume of water to be transported and other matters.[29] However, the agreement does not specify how frequently the information must be provided and whether it is ring-fenced.[30] These matters should be more clearly defined in the interests of access seekers.

We also note that Sydney Water indicates it may disclose the information provided by access seekers on an aggregated basis.[31] Should there only be 1 access holder, the information cannot be aggregated. We are concerned that disclosure of an access holder's customer numbers, volume of water and other matters may not be in the access holder's interest.

We also note that Sydney Water is requiring full disclosure of the full terms of insurance policies.[32] Based on our experience in the administration of WICA licensees, we are aware that this will be an issue for insurers and will be, in effect, a barrier to entry. The standard access agreement also requires access holders to irrevocably appoint Sydney Water as its attorney of power to ensure that the access holder complies with the requirements under the agreement to hold certain insurance policies.[33] The Minister does not require power of attorney for WICA licence holders, only that they maintain appropriate insurance arrangements. This agreement's terms appear to be a disproportionate way of protecting Sydney Water's interests.

The language regarding ring-fenced and competitively sensitive information appears to only protect information received in the negotiation process.[34] We consider that it is appropriate that other information provided at other times by access holders, such as the regular forecasts and competitively sensitive information, should also be considered ring-fenced and protected.

Recommendation

18 Amend the standard access agreement to clarify the frequency, ring-fencing and disclosure of forecasts provided by access holders.

19 Amend the standard access agreement to ensure that the terms and conditions relating to insurance policies are not unreasonable.

29 Clause 4 of the standard access agreement.
30 Sydney Water's submission indicates that the information is required on a quarterly basis (p 11), but this is not included in the standard access agreement.
31 Clause 4.3 (b) of the standard access agreement.
32 Clause 17.4 (c) of the standard access agreement.
33 Clause 17.4 (e) of the standard access agreement.
34 'Ring-fenced' is defined in clause 1.1 of the standard access agreement and clause 9.1 of the access undertaking.

20 Amend the access undertaking and the standard access agreement's definitions of ring-fenced and competitively sensitive information to extend the same protection to information required to be provided at all times by access holders to Sydney Water rather than limit these protections to information provided during the negotiation process.

3.5 Reciprocity of requirements

We note that the liability, indemnity and material change provisions are not reciprocal.[35] That is, the access agreement's liability, indemnity and material change provisions only apply to the access holder, and not to Sydney Water. We consider that in the interests of prospective access seekers, they should be reciprocal.

Sydney Water is not obliged, under the standard access agreement, to provide reasonable notice and assistance in circumstances that may adversely affect an access holder. This could include the notice of planned service interruptions, minimising service interruptions and providing prompt and reasonable assistance when requested in the management of incidents in Sydney Water's network.[36] Not providing reasonable notice or assistance is not in the public's interest.

Recommendation

21 Amend the standard access agreement to ensure that the liability, indemnity and material change provisions are reciprocal.

22 Amend the standard access agreement to oblige Sydney Water to provide notice and assistance in circumstances that may affect an access holder's customers.

3.6 Dispute resolution

The standard access agreement provides for resolution of (non-billing) disputes by negotiation, mediation and litigation.[37] We consider that the standard access agreement should also provide that a dispute in relation to any matter arising under an access agreement may be referred to IPART for arbitration. This is because arbitration can be quicker and less expensive than court proceedings and offers confidentiality to the parties. This is consistent with Recommendation 4.

We consider that 10 business days is not sufficient time following the appointment of a mediator to allow for the prospect of mediation to be conducted successfully.[38] We consider that 20 business days would be more appropriate.

35 Clauses 16 and 21 of the standard access agreement.
36 Clause 13.1 of the standard access agreement.
37 Clause 23.1 (c) (iii) of the standard access agreement.
38 Clause 23 (f) of the standard access agreement.

Recommendation

23 Amend the standard access agreement to allow the parties to refer a dispute under the standard access agreement to IPART for arbitration.

24 Amend the standard access agreement to allow 20 business days for mediation before either party can refer the dispute to arbitration or commence court proceedings.

3.7 Drafting errors

We note that there are words missing from clause 1.1 of the standard access agreement's definition of "Access Holder Customer".

Recommendation

25 Clarify the definition of "Access Holder Customer" in clause 1.1 of the standard access agreement.

3.8 Change of customers

The standard access agreement requires access holders to list each of their connection points within the access agreement.[39] If an access holder were to gain a new customer (or if Sydney Water's retail business were to acquire the business of an existing access holder's customer) it appears that the access holder would be required to reach a new access agreement or apply to vary the existing access agreement. We consider that this would be a disproportionately expensive task for customers to "switch" between access providers. This would not be in the interests of Sydney Water or the prospective access seekers, or the public's interest in competition.

We consider that Sydney Water should amend the standard access agreement to allow for an easier mechanism for additional customers to "switch" service provider once an access agreement is in place. We are aware of the potential impacts of this proposed change, and should Sydney Water decide not to implement this recommendation, we ask that it provides us with the estimated costs of designing such a mechanism and a clear statement of reasons for not accepting our proposal.

Recommendation

26 Amend the standard access agreement to allow a streamlined process for an access holder to vary the terms and conditions, in particular their connection points.

39 Schedule 1 of the standard access agreement.

3.9 Other issues

We have identified a series of other issues with the standard access agreement. They relate to:

- material referenced but not provided
- termination of the access agreement
- the change of control provisions, and
- wording and referencing of clauses.

Material referenced but not provided

The proposed standard access agreement references a Water Treatment Services Agreement between Sydney Water and the access seeker.[40] The Water Treatment Services Agreement is a precondition of the access seeker being supplied water transport services. We would need to consider the standard terms and conditions of the Water Treatment Services Agreement to be able to approve the standard access agreement. IPART has written to Sydney Water about this. Sydney Water has undertaken to provide information about this agreement in its response to this preliminary view.[41]

Termination of the access agreement

Under the current standard access agreement, Sydney Water may terminate the access agreement should an access holder fail to supply its own customers for a certain period (as specified in the agreement).[42] This right arises regardless of whether or not the customer is connected to Sydney Water's infrastructure. Some customers may be connected to a private network beyond an off-take point, or have agreed with the access holder for intermittent service. In the context of the criteria we must consider under WICA, we consider that this right could exceed Sydney Water's legitimate business interest.

The standard access agreement may be terminated immediately if a retailer of last resort is declared in relation to the access holder's customers.[43] However, we note that a retailer of last resort can be declared at any time regardless of whether or not a supply failure has occurred, and that the retailer of last resort has no additional responsibilities until a declaration of supply failure is made. We consider it inappropriate for Sydney Water to gain the right to terminate an access agreement when a retailer of last resort is declared. Alternatively, Sydney Water may wish to consider whether the access agreement should provide that Sydney Water may

40 Clauses 3.2 (d), 8.1 and 19.3 (b) of the standard access agreement.
41 Letter from Sydney Water to IPART, Re: Sydney Water access regime and Water Filtration Plant Contracts, 19 July 2012.
42 Clause 19.2 (a) (i) of the standard access agreement.
43 Clause 19.3 (a) (iv) of the standard access agreement.

terminate the agreement in the event that the Minister declares supply failure in relation to the access holder.

Change of control provisions

The clauses of the current standard access agreement relating to change of control or assignment of the agreement give Sydney Water a considerable amount of discretion in approving an assignment or change in control. Sydney Water's criteria for change of control appear to be more robust than its criteria for assessing prospective access seekers under the access undertaking. Consent for change of ownership may be withheld where Sydney Water forms the view that the proposed access holder is not a reputable corporation and is not of sufficiently high financial and commercial standing.[44] We consider that differences in the standard of assessment could be used as a potential barrier to change of ownership, mergers and acquisitions. We consider this situation to be inappropriate and, in the context of our criteria under WICA, we are of the view that this could exceed Sydney Water's legitimate business interest.

Wording and referencing of clauses

The standard access agreement includes clauses that appear to remove Sydney Water's obligation to provide any of the water network services or make treated water available.[45] We recognise that the intent of this clause is to ensure Sydney Water will not be obliged to deliver a grossly increased forecast quantity of water to an access holder's customers. However, we consider the clause to be excessive and Sydney Water should not be released of an obligation to use all reasonable steps to operate its infrastructure services so as to meet an increased forecast quantity of water to be transported, subject to costs.

The standard access agreement references 2 licence conditions from the WICA Retail Supplier's Licence.[46] This document is subject to change, and we recommend that the agreement is amended to remove referencing detail and numbering of this licence.

Recommendation

27 Sydney Water provide IPART with the standard terms and conditions of a Water Treatment Services Agreement prior to our final consideration of the access undertaking.

28 Amend the standard access agreement to remove the clause allowing Sydney Water to terminate the agreement if the access holder fails to supply its own customers, particularly those not connected to Sydney Water's network.

44 Clause 20 of the standard access agreement.
45 Clause 4.3 (c) (ii) (A) and (B) of the standard access agreement.
46 Clauses 17.1 (a) (i) and (ii) of the standard access agreement.

29 Amend the standard access agreement to remove the clause that allows termination of the agreement if a retailer of last resort is declared.

30 Amend the standard access agreement aligning Sydney Water's assessment of changes of control/assignment to be consistent with its assessment of access seekers under the access undertaking.

31 Amend the standard access agreement to oblige Sydney Water to take all reasonable steps to operate its infrastructure services so as to meet an increased forecast in water demand, subject to costs.

32 Amend the standard access agreement to remove referencing of detail and numbering of the WICA Retailer Supplier's Licence.

4 The charging method

In general, we consider that the charging method under the access undertaking[47] is consistent with the pricing principles in WICA.[48] However, we have a number of areas of concern. We suggest there are some amendments that could be made to improve the charging method.

Our recommended changes to the charging method are set out by topic below.

4.1 Water security charge

The water security charge is designed to support water security projects, although the definition, in the access undertaking, is vague.[49] This creates a level of uncertainty for prospective access seekers. In our discussions with Sydney Water,[50] it appears that this charge is designed to cover the costs of projects the Government has directed Sydney Water to carry out under the *State Owned Corporations Act 1989*.

We have been assured by Sydney Water that the costs of the Sydney Desalination Plant are not included in this charge. However, we are not convinced that the language used to define the water security charge and water security projects excludes the Sydney Desalination Plant or provides sufficient clarity for informed negotiations.[51] We consider that in the interests of prospective access seekers, this definition should more clearly indicate which projects, or types of projects, the charge is designed to cover.

47 Schedule 2 of the access undertaking.
48 Section 41 of WICA.
49 Clause 4.4 of Schedule 2 and clause 9.1 of the access undertaking.
50 Public workshop, 2 April 2012.
51 Clause 9.1 of the access undertaking.

The Minister will only grant a WICA retail supplier's licence if he or she is satisfied that the applicant is supplying a "sufficient" amount of water from a source other than a public water utility.[52] Furthermore, the Minister has the discretion to insert conditions into any licence to compel licensees to contribute to the costs of water security and/or purchase water from specified water industry infrastructure, for example, the Sydney Desalination Plant.[53] The Minister exercises these functions on our recommendation.

Where the Minister has explicitly set a water security charge or made an explicit decision that no charge should be levied, we do not consider it appropriate for Sydney Water to levy a water security charge on that access holder. This would ensure that access holders would not be paying twice for water security projects, which would be contrary to their interests. It would also ensure that the Minister's decisions are not circumvented, which would be contrary to the public interest.

We consider that where the Minister has not explicitly declared a water security charge to apply to a WICA licensee, or where the Minister has no power to compel the access holder to contribute to water security under WICA (such as a self-supply customer or a council), that the water security charge should be negotiated on a competitively neutral basis.

We also note that Sydney Water has indicated that some of the projects that the water security charge would be used to contribute towards are the Rosehill (Camellia) recycled water project and the Western Sydney recycled water initiative replacement flows project. The portfolio Minister has previously issued directions under section 16A of the IPART Act under which we are required to include the efficient costs of complying with a specified requirement imposed on Sydney Water in our determined prices for Sydney Water's monopoly services.[54] We have considered this issue and reached the view that recovering these costs through access prices is inconsistent with the current Ministerial directions.

However, we note that these s16A directions were made before access was considered likely. It may be in Sydney Water's legitimate business interest to request that the s16A directions be amended.

52 Section 10 (4) (d) of WICA.

53 Sections 13 (2) (c) (i) and (ii) of WICA.

54 Letter, The Hon Nathan Rees MP, Minister for Water Utilities to Dr Michael Keating AC, Chairman, Independent Pricing and Regulatory Tribunal, 12 March 2008 and Letter, The Hon Nathan Rees MP, Minister for Water Utilities to Dr Michael Keating AC, Chairman, Independent Pricing and Regulatory Tribunal, 17 August 2007.

Recommendation

33 Amend the access undertaking to clarify the projects, or types of projects, to which the water security charge would apply.

34 Amend the access undertaking to remove the water security charge for all customers with a WICA licence for which the Minister has explicitly set a water security charge or has made an explicit decision that the charge should not be levied.

35 Amend the access undertaking to ensure that the water security charge is negotiated on a competitively neutral basis for all access seekers to which it applies.

36 Amend the access undertaking to ensure water security projects that are subject to a s16A direction to be recovered from regulated monopoly prices are not included in the access undertaking's water security charge.

4.2 Gross up factor

The gross up factor to account for lost water[55] is a reasonable component of Sydney Water's access pricing method. We consider that it is well within Sydney Water's legitimate business interests.

However, we have some concerns about its calculation in the access undertaking. We consider that the incentive to reduce lost water should lie with the network operator (in this case Sydney Water's network business) rather than the retail supplier (in this case access holders and Sydney Water's retail business). We consider that the proportion should be set to a fixed level with reference to an economic level of non-revenue water. We consider that using actual levels by allocating the costs of any inefficiencies in its operations as network operator to access holders may exceed Sydney Water's legitimate business interests, as it reduces its incentive to operate efficiently.

We are also concerned by the level of uncertainty the current method creates. To manage bulk water purchases an access holder would have to forecast not only the amount of water it needs to service its customers, but also the amount of lost water over the entire system. This is not in the interests of prospective access seekers. Both of these issues, the incentives to minimise non-revenue water and the need to estimate levels of non-revenue water, are solved by setting the gross up factor at a fixed proportion of water sold.

55 Clause 4.3 of Schedule 2 of the access undertaking.

We note that the current gross up factor relates to "non-revenue water", which we understand is defined by the Water Services Association of Australia.[56] The definition includes potable water top-up to recycled water systems. We consider it inappropriate for an access holder to pay for water that will be sold to Sydney Water's recycled water customers. In the context of applying the pricing principles for access agreements contained in WICA,[57] we consider this could be an example of a vertically integrated service provider setting terms that discriminate in favour of its downstream operations. Access holders would be required to contribute to the costs of water Sydney Water will sell to its own customers if they were required to contribute to the costs topping up recycled water schemes with potable water. Such a charge should not be required by the access undertaking.

Recommendation

37 Amend the gross up factor to set it at a fixed proportion, to reflect the economic level of the lost water.

38 Amend the gross up factor, or the definition of non-revenue water, to exclude potable water top-up to recycled water systems.

4.3 Published charges

Sydney Water has indicated that from time to time it will provide a sample of access charges on its website. We consider that it may be beneficial to all parties if Sydney Water created a 'rate card'. This would ensure the prices are fixed for a period of time.

One example of where a rate card is required is the Foxtel Special Access Undertaking (SAU) for Digital Set Top Unit Services. The Foxtel SAU and Digital Access Agreement provides that:

- At least annually Foxtel must calculate and produce an access seeker rate card which specifies the access charges payable by access seekers. Those charges are based on a specified methodology, and
- Foxtel must arrange for an independent review of the calculations used to prepare the rate card, and it must provide a copy to the Australian Competition and Consumer Commission. This must occur after the first 12 months and thereafter every 3 years.[58]

56 National Water Commission, *2011-12 National Performance Framework*, June 2012, pp 37-38.
57 Section 41 (2) of WICA.
58 Australian Consumer and Competition Commission, Foxtel Special Access Undertaking, 1 December 2006.

Sydney Water's rate card could be subject to a confidentiality agreement should Sydney Water not wish to advertise its water transport charges. We consider that, to create certainty for access holders, it would also be prudent to limit the frequency with which this rate card can be changed. We consider that it would be inappropriate for this to be changed more frequently than once every 3 months.

Recommendation

39 Amend the access undertaking to calculate the costs over a specific time frame, of at least 3 months, and make this available on a rate card.

4.4 Water treatment services

Sydney Water has indicated that it will charge access holders for 'unavoidable costs' it incurs, should an access holder purchase water treatment from a private water filtration plant that charges less than the average cost of water filtration.[59] However, Sydney Water does not commit to compensate access holders that have purchased water treatment services from a private water filtration plant that charges more than the average cost of water filtration. We consider that the principle should be applied symmetrically.

Recommendation

40 Amend the 'unavoidable costs' charge so that it is applied symmetrically for both savings and costs.

5 Water treatment services

Sydney Water has indicated that it considers that water treatment services are separable from water network services (interconnection, transport and off-take).[60] As a result, water treatment services are not included in the access undertaking.

In this regard, we note that under WICA, an access undertaking may only relate to the treatment of water to the extent it is a subsidiary but inseparable aspect of the storage, conveyance or reticulation of water.[61]

We are not convinced that water treatment services have been treated symmetrically in the proposed access undertaking.

59 Clauses 3.2 and 4.5 of Schedule 2 of the access undertaking.
60 Sydney Water's supporting submission, p 8.
61 Section 38 (1) of WICA, and see definition of "infrastructure service", WICA Dictionary.

5.1 Separation of water treatment services from water network services

We understand Sydney Water considers water treatment to be separable from the storage, conveyance and reticulation of water. It is certainly possible for an access holder to supply water to the water network without purchasing water treatment from a water filtration plant owned by, or that holds a contract with, Sydney Water. The Sydney Desalination Plant, for example, is a separate business from Sydney Water which provides treated water to Sydney Water's network, and clearly it does not require water treatment services.

However, the bulk of the water in Sydney Water's network, not provided by Sydney Desalination Plant, must be transported from the Sydney Catchment Authority's dams to the network. The infrastructure for transporting water from the dams to the water network goes through Sydney Water's water filtration plants.

For any access holder to purchase its supply of raw water from the Sydney Catchment Authority and not use Sydney Water's existing water filtration plants a significant investment in pipelines and treatment plants would be required. We consider that such an investment would not be viable given the current term of the access undertaking. We understand that Sydney Water's Build Own Operate Transfer contracts can be for periods of 25 years.[62] We consider this to be an indication of the likely breakeven investment period of a water filtration plant.

The need to purchase bulk water, that requires treatment, would suggest that in the short run, such as the 4-year term of the proposed undertaking, access seekers are likely to use existing water treatment plants to supply water.[63] The access undertaking does not guarantee access to water treatment services. Should Sydney Water decide not to provide water treatment services to an access holder, this is potentially a barrier to entry.

It should be considered whether, in the timeframe of the access undertaking, it is possible for access holders to supply water at a competitive price without using the existing treatment plants, and whether, within the timeframe, water treatment services are separable from the storage, conveyance and reticulation of water.

As discussed in section 3.9, we have sought information about the Water Treatment Services agreement. We would prefer that the Water Treatment Services Agreement be included in the access agreement, and that water treatment services be covered by the access undertaking. Alternatively, if this is not possible, we consider that Sydney Water should undertake not to refuse any access holder access to treatment services.

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62 Degrémont, Prospect Water Filtration Plant, website accessed on 13 July 2012, http://www.degremont.com.au/index.php?page=prospect_water_filtration_plant.

63 That is, water not purchased from the Sydney Desalination Plant or another treated source.

Recommendation

41 Amend the access undertaking and the access agreement to include water treatment services. Alternatively, if this is not possible, Sydney Water should undertake not to refuse any access holder access to water treatment services.

5.2 Reasonableness of charges for water treatment

We expect that any large scale access holder is likely to purchase some of its water from the Sydney Catchment Authority. In this situation, unless the access holder builds its own water filtration plant and pipelines, the access holder would have to purchase water treatment services from either a private water filtration plant or Sydney Water.

At this stage, Sydney Water has not confirmed whether access holders would be able to purchase water treatment services from private water filtration plants holding existing contracts with Sydney Water. Sydney Water has undertaken to provide further information in its response to this report. If an access holder does purchase water treatment services from a private water filtration plant, Sydney Water will recover 'unavoidable costs' of treatment. The 'unavoidable costs' charge is designed to recover some of Sydney Water's availability charges and to facilitate cross subsidisation of water filtration costs within Sydney Water's area of operations.[64]

We consider that the 'unavoidable costs' charge should be set at a competitively neutral price.

If an access holder purchases water treatment services from Sydney Water, Sydney Water will set the costs of treatment. However, as a 'separable part' of the water network, water treatment services are excluded from the access undertaking. Accordingly, there is no mechanism to set the price. Subject to our review of the foreshadowed Water Treatment Services Agreement, we consider that the charges Sydney Water determines for water treatment services should be set at a competitively neutral price.

Under the access undertaking, should an access holder not require water treatment services it does not incur this charge.[65] If an access holder builds its own water filtration plant, with lower water treatment costs than Sydney Water's average water treatment cost, it would hold a competitive advantage in water costs. However, this would also require interconnection service, to connect the new water filtration plant to Sydney Water's network. We consider that Sydney Water should clarify whether it will be seeking to recover the differences between the access holder's water treatment costs and its average water treatment costs through the interconnection service charges.

64 Sydney Water's supporting submission, p 25.
65 Clause 3.3 of Schedule 2 of the access undertaking.

Recommendation

42 Amend the water treatment service costs (to the extent possible for an excluded service) to ensure that charges levied by Sydney Water are competitively neutral.

43 Sydney Water should clarify whether it intends to recover differences in water treatment costs through the interconnection service charges.

Appendices

A Matters to be considered by IPART under WICA

Division 5 Access undertakings

38 Access undertakings

(1) A service provider may give IPART an access undertaking with respect to any one or more of its infrastructure services (whether or not it has begun providing them and whether or not they are the subject of coverage declarations).

(2) An access undertaking is to be in the form of a document that sets out the service provider's arrangements for the provision of access to its infrastructure services.

(3) Those arrangements must provide for any disputes concerning the provision of access to its infrastructure services to be referred to IPART for resolution in accordance with section 40.

(4) An access undertaking does not have effect until it has been approved by IPART.

(5) On receiving an application for approval of an access undertaking, IPART must invite public submissions on the application.

(6) In deciding whether to approve a service provider's access undertaking, IPART must have regard to the following:

(a) the legitimate business interests of the service provider,

(b) the public interest, including the public interest in having competition in markets,

(c) the interests of prospective access seekers,

(d) any other matters that IPART considers relevant.

Note. See also section 41 in relation to the application of pricing principles and section 92 in relation to IPART's guidelines as to the exercise of its functions under this section.

(7) An access undertaking has effect for the period specified in the undertaking in that regard, and may only be varied during that period with the consent of IPART.

(8) A service provider must keep its access undertakings available for inspection by members of the public, free of charge, during normal office hours.

(9) It is sufficient compliance with subsection (8) if copies of the access undertakings are made available to the public on the service provider's internet website.

(10) Copies of an access undertaking are to be made available to members of the public, at cost, during normal office hours.

Division 6 Access agreements and access determinations

39 Access agreements

(1) The terms on which a service provider is to provide access to an infrastructure service the subject of a coverage declaration or an access undertaking are to be set out:

(a) in an agreement between the service provider and the access seeker, or

(b) if no such agreement can be reached, in an access determination.

(2) A provision of an access agreement is void to the extent to which it purports:

(a) to prohibit a service provider from providing a service the subject of a coverage declaration or an access undertaking to any person, whether or not the person is a party to the agreement, or

(b) to prohibit a service provider from providing a service the subject of a coverage declaration or an access undertaking to some persons on more advantageous terms than those on which it provides the same service to other persons, or

(c) to prohibit or restrict any person from giving information to IPART or the Minister pursuant to any requirement under this or any other Act, or from creating documents for the purpose of recording information for that purpose.

40 Access determinations

(1) If a dispute exists between a service provider and an access seeker:

(a) 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 an access undertaking, or

(b) as to any matter arising under an access agreement that provides for a dispute as to that matter to be dealt with in accordance with this section, or

(c) as to any matter arising under a determination under this section,

either party to the dispute may apply to IPART for the dispute to be determined by arbitration.

Note. Pursuant to section 24B of the *Independent Pricing and Regulatory Tribunal Act 1992* (as applied by subsection (5)), the arbitrator for such a dispute may be IPART or some other person appointed by IPART to arbitrate the dispute.

(2) IPART may refuse to accept such an application if it is not satisfied that the applicant has, in good faith, attempted to resolve the dispute by negotiation.

(3) At any time after commencement of proceedings on an application under this section, the arbitrator may require the service provider to cause notice of the proceedings to be given to all other persons to which the service provider provides access to the service concerned.

(4) Subject to this section and the regulations, the *Commercial Arbitration Act 2010* applies to an arbitration under this section, and to any determination arising from an arbitration under this section, as if a reference in that Act to an award were a reference to a determination under this section.

(5) Sections 24B-24E of the *Independent Pricing and Regulatory Tribunal Act 1992* apply to an arbitration under this section in the same way as they apply to an arbitration under section 24A of that Act, and so apply as if:

(a) a reference in those sections to a government agency were a reference to a service provider, and

(b) section 24B (2) and (3) (b) and (c) of that Act were omitted,

except that section 15 of that Act does not apply in relation to any determination arising from an arbitration under this section.

(6) In considering the terms of a proposed determination, the arbitrator must have regard to such matters as are prescribed by the regulations.
Note. See also section 41 in relation to the application of pricing principles.

(7) Before making a determination, the arbitrator:

(a) must cause copies of the proposed determination to be given to each of the parties to the dispute, and

(b) must give each of the parties an opportunity to make submissions to the arbitrator in relation to the proposed determination.

(8) Subject to subsection (9), the arbitrator must use his or her best endeavours to determine the dispute within 6 months after the application for the dispute to be determined was made to IPART.

(9) If the access seeker seeks access in relation to any activity for which it would require, but does not yet hold, a licence under Part 2:

(a) the arbitrator may adjourn proceedings for such time as the arbitrator considers reasonable for the purpose of enabling the access seeker to obtain such a licence, and

(b) if the access seeker fails to obtain such a licence within that time, may make a determination refusing the access sought.

(10) In making a determination under this section:

(a) the arbitrator must give effect to any access undertaking to which the service concerned is subject, and

(b) the arbitrator must not include in the determination any provision that requires a service provider to do, or not to do, anything that would put it in breach of its obligations under any existing access determination or under this or any other Act or law.

(11) On making a determination under this section, the arbitrator must cause a notice of the making of the determination (which notice must include a summary of the determination) to be given to IPART.

(12) On receiving such a notice, IPART must cause the information contained in the notice to be made available to the public on IPART's internet website.

Division 7 Administration of access regime

41 Pricing principles

(1) For the purposes of this Part:

(a) IPART must have regard to the pricing principles when deciding whether or not to approve an access undertaking for an infrastructure service, and

(b) 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.

(2) For the purposes of this section, the "pricing principles" in relation to any infrastructure service are as follows:

(a) the price of access 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,

(b) the price of access should allow multi-part pricing and price discrimination when it aids efficiency,

(c) the price of access should not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent to which the cost of providing access to other operators is higher,

(d) the price of access should provide incentives to reduce costs or otherwise improve productivity.

(3) These principles must be implemented in a manner that is consistent with any relevant pricing determinations for the supply of water and the provision of sewerage services, including (where applicable) the maintenance of "postage stamp pricing" (that is, a system of pricing in which the same kinds of customers within the same area of operations are charged the same price for the same service).

42 Service providers to have approved cost allocation manuals

(1) Within 3 months after an infrastructure service becomes the subject of a coverage declaration, the service provider:

(a) must keep separate accounts for such of its infrastructure services as are the subject of the declaration, and

(b) must submit a cost allocation manual to IPART in relation to that infrastructure.

(2) A cost allocation manual must be in the form of a document that, in accordance with any rules under subsection (3), sets out the basis on which the service provider proposes to establish and maintain accounts for those of its infrastructure services as are the subject of a coverage declaration.

(3) The Minister may from time to time, by order published in the Gazette, establish rules for the preparation of cost allocation manuals.

(4) IPART may approve a service provider's cost allocation manual as submitted, or may require the service provider to amend it and resubmit it for approval.

(5) On and from the expiry of 3 months from the date on which IPART approves a service provider's cost allocation manual in relation to infrastructure services the subject of a coverage declaration, the service provider must ensure that costs are allocated between each of those services, and between those services and its other activities, in accordance with the manual.

(6) A cost allocation manual may only be varied with the consent of IPART.

(7) A service provider must keep its cost allocation manual available for inspection by members of the public, free of charge, during normal office hours.

(8) It is sufficient compliance with subsection (7) if a copy of the cost allocation manual is made available to the public on the service provider's internet website.

(9) Copies of the cost allocation manual are to be made available to members of the public, at cost, during normal office hours.

(10) A service provider must not fail to comply with the requirements of this section.

Maximum penalty: 500 penalty units (in the case of a corporation) and 50 penalty units (in any other case).

43 Hindering access to certain services

(1) The provider or a user of a service the subject of a coverage declaration or an access undertaking, or a body corporate related to the provider or a user of the service, 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.

Maximum penalty: 500 penalty units (in the case of a corporation) and 50 penalty units (in any other case).

(2) A person may be taken to have engaged in conduct for the purpose referred to in subsection (1) even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the person or from other relevant circumstances.

(3) Subsection (2) does not limit the manner in which the purpose of a person may be established for the purposes of subsection (1).

(4) In this section, a "user" of a service includes a person who has a right to use the service.

44 Register of infrastructure services

(1) IPART is to maintain a register of:

(a) infrastructure services the subject of coverage declarations, and

(b) infrastructure services the subject of binding non-coverage declarations, and

(c) infrastructure services the subject of access undertakings.

(2) The regulations may make provision with respect to the manner and form in which the register is to be kept and the nature of the information to be included in the register.

(3) IPART must keep the register available for inspection by members of the public, free of charge, during normal office hours.

(4) It is sufficient compliance with subsection (3) if a copy of the register is made available to the public on IPART's internet website.

(5) Copies of entries in the register are to be made available to members of the public, at cost, during normal office hours.

Table A.1 Consideration of areas IPART must have regard to under WICA

Matters for consideration	Amendments
The legitimate business interests of the service provider	4, 5, 6, 7, 9 ,10, 16, 22, 23, 24, 25 and 26
The public interest, including the public interest in having competition in markets	17, 25, 27, 31, 34, 35, 36, 41, 42 and 43
The interests of prospective access seekers	1, 2, 3, 4, 5, 6, 7, 8, 11, 12 13, 14, 15, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42 and 43
Any other matters that IPART considers relevant	4, 11, 14, 22, 26, 32, 36 and 38

B List of recommended amendments

We commend Sydney Water's submission of the access undertaking. However, we have a number of areas of concern. Our recommended amendments to Sydney Water's access undertaking are included below. We consider that if our suggested amendments are made, we expect that the undertaking will likely be approved.