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Our Ref: P05/134

Dr Michael Keating
Chair
Independent Pricing and Regulatory Tribunal
PO Box Q290
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5 October 2005

Dear Dr Keating

Re: Investigation into Water and Wastewater Service Provision In the Greater Sydney Region – Draft Report

The Public Interest Advocacy Centre (PIAC) is pleased to provide the following brief comments in respect of the Tribunal's Draft Report on its Investigation into Water and Wastewater Service Provision in the Greater Sydney Region.

PIAC's major concern with the initial stages of this Investigation was how to balance greater industry innovation with the particular consumer protection and social equity issues that arise in the provision of essential services. In particular, PIAC was concerned that retail pricing remained equitable and that any changes to the industry structure did not undermine the Government's accountability for the provision of essential services.

PIAC therefore lends its support to recommendations 6, 7, 14 and 17 which retain postage-stamp pricing, guarantee prices charged to customers are subject to regulatory oversight and impose suitable obligations on new entrants. In establishing the access framework and competitive sourcing we encourage the Government to pursue recommendation 15, which ensures that the necessary provisions are in place for price regulation to take place. We urge the Tribunal to commit to a process of consultation to determine the regulatory obligations required to protect the security of supply, water quality and access and affordability issues implicit in recommendation 17.

The recommendation for a State-based access regime (recommendation 4) is also supported on the grounds that the Tribunal has the specific expertise and knowledge of local infrastructure, as well as responsibility for pricing and service delivery. The public interest would be best served by avoiding unnecessary duplication of information and/or roles.

The Tribunal has articulated the current unsustainable use of water resources and the need to be more dynamic in the development of water services in new growth areas. This has, appropriately, driven the recommendation for competitive sourcing. However, PIAC is concerned that the Tribunal has limited the scope for innovations in recycled water use in the future by reporting that the community is unwilling to accept large-scale integrated water recycling in the potable water supply. The UMR Research referred to in the Draft Report has been heavily criticised. Subsequent research undertaken by Clean Up Australia contradicts the original research findings, suggesting, for example, that 47% of Sydney residents would be prepared to drink recycled water if it was pumped into Warragamba Dam¹. If Sydney is to get true innovation in the industry then the option for more recycling should not be eliminated at the outset of these industry reforms.

Third party access for water and wastewater infrastructure has received a measured response in the Draft Report. Given how little is known about this sort of access arrangement, both in Australia and overseas, PIAC supports the staged introduction of access initially to very large customers, rather than households.

The Tribunal has recommended a comprehensive access framework, drawing on the access principles contained in Part IIIA of the *Trade Practices Act* (TPA), as follows;

Recommendation 5

That the Government incorporates the Tribunal's framework in the access regime.

This framework comprises...

- ... (b) access to all water and wastewater infrastructure;*
- that may be specified at the inception of the access regime, or*
- that meets certain criteria (based on the current Trade Practices Act 1974 tests)*

As identified in the Draft Report, one component of assessment of access proposals under the TPA is a 'public interest' test, which specifies that a service cannot be declared unless it has been demonstrated that access to the infrastructure would not be contrary to the public interest. However, use of the TPA raises concerns about how the framework will be implemented.

As the term 'public interest' is not defined in the TPA, the National Competition Council (NCC) and the Australian Competition Tribunal have adopted a case-by-case approach to determine whether a particular access arrangement would be contrary to the public interest. The factors mentioned in clause 1.3 of the Competition Principles Agreement are tentatively relied on for guidance in relation to the public interest. Those factors are:

- a) Ecologically sustainable development;
- b) Social welfare and equity considerations, including community service obligations;
- c) Government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

¹ "Survey wars spread water confusion" *Australian Financial Review*, 15 August 2004, p3

- d) Economic and regional development, including employment and investment growth;
- e) The interests of consumers generally or a class of consumers;
- f) The competitiveness of Australian businesses; and
- g) The efficient allocation of resources.

PIAC supports the use of these principles to explore issues of public interest. Drawing on these principles, PIAC has, for example, identified a number of potential public interest concerns associated with declaration of essential wastewater networks with respect to the interests of consumers generally. This includes the loss of equity in pricing; the impact on prices for the incumbent; risk of consumers being excluded from price benefits; and the magnitude of public costs.

However, for the Tribunal's proposed approach to a State-based access regime to be effective in promoting or protecting the public interest this test must place a greater obligation on parties seeking access to demonstrate that their proposals actively address relevant public interest issues.

In its application to the Australian Competition Tribunal, Services Sydney sought to argue that the public interest was served largely on the basis of claims that their business model would generate improved environmental outcomes. Likewise, in considering the initial application by Services Sydney, the NCC appeared to rely primarily on the assertion of competition leading to environmental benefits as indicating a net public benefit from the proposal for access.² That is, both the applicant and the agency charged with assessing the application made little effort to substantiate the claimed benefits and costs to the public interests of declaration and access.

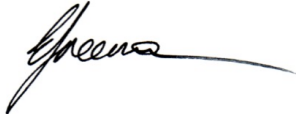
The Australian Competition Tribunal previously has observed that the public interest test should be seen as a wide one which encompasses a 'weighing up' of benefit and detriment (*Qantas Airways [2004] ACompT 9*). It also has suggested that in order to be assessed for this test an increase in competition needs to be more than trivial (*Sydney International Airport [2000] ACompT 1*). This should have led both the NCC and Services Sydney to attempt a detailed examination of the extent to which the claims of environmental improvements would surpass any possible loss of public interest arising from a declaration.

Instead, it was left to a community organisation, in this case PIAC, to assume this burden while relying on few resources and having no direct insight into the nature of the business model proposed by the applicant. PIAC made a written submission to the Australian Competition Tribunal and to the parties. In doing so, however, we were forced to rely on supposition and comparisons with retail energy markets to explore the potential for damage to the public interest.

² National Competition Council, *Services Sydney application for declaration – Final recommendation*, 2004, pp68-77

It is clear that this is far from a satisfactory approach to dealing with the public interest. Accordingly, PIAC submits that the Tribunal should seek to develop further the nature of the public interest test it will impose on parties seeking access under a State-based regime. Moreover, we believe it would be appropriate for the Tribunal to indicate how proponents of access should seek to meet the demands of the public interest test.

Yours sincerely
Public Interest Advocacy Centre Ltd

A handwritten signature in black ink, appearing to read 'Elissa Freeman', with a long horizontal flourish extending to the right.

Elissa Freeman
Policy Officer