



The NSW Water Industry Access Regime
Part 3 of the
Water Industry Competition Act 2006

**Application template
for coverage declaration**

Contents

A	Preamble	1
B	Complete applications and timing	2
C	Confidential information	3
D	Lodging applications	3
E	Application fee	3
1	Applicant details	1
2	Service for which access (or increased access) is sought	2
3	Infrastructure used to provide the service	5
4	The service provider	7
5	History of access negotiations	8
6	Other interested parties	9
7	Jurisdiction	10
8	Coverage declaration criteria	11
9	Criterion (a) — State significance	12
10	Criterion (b) — not economically feasible to duplicate the infrastructure	13
11	Criterion (c) — access by third parties would promote competition in an upstream or downstream market	19
12	Criterion (d) — safe use of infrastructure	27
13	Criterion (e) — public interest	29
14	Duration of coverage declaration	31
15	Object of Part 3 of the Act	32

A Preamble

This document sets out the information that should be included in an application to the Independent Pricing and Regulatory Tribunal of New South Wales (“IPART”) for coverage declaration of a water industry infrastructure service under Part 3 of the *Water Industry Competition Act 2006* (“Act”).

Coverage declaration is available under Part 3 Division 2 of the Act for parties to negotiate the use of infrastructure services that create a bottleneck to competition in upstream or downstream markets.

Parties seeking access to water industry infrastructure may do so by negotiating access with the service provider or, if access negotiations fail, by seeking coverage declaration.

Section 24 provides that an application for coverage declaration may be made by the service provider, an access seeker or the Minister in respect of an infrastructure service.

The information requested in this document is essential for IPART to consider an application and to prepare a report in accordance with its obligations under the Act. By gathering this information at the time an application is made, IPART is looking to minimise the time taken to consider such applications. IPART may reconsider the information requested in this document within one year from the commencement of the Act.

Applicants should answer all relevant questions set out in this template and should also refer to *The NSW Water Industry Access Regime: A Guide to declaration of infrastructure under the Water Industry Competition Act 2006(2008)* (“**Guide**”) that is available for download from the IPART website.

Where an applicant does not have access to the exact information sought, they should provide a best estimate, or the best publicly available information, and indicate whether the service provider or some other party is likely to have the information requested. Where applicants do not answer a question, they should explain why the question is not relevant or why the answer has been omitted.

The numbered questions below are intended to provide applicants with an application template. In addition, a brief discussion is included in each section to help applicants focus their answers on the information IPART needs. As mentioned above, applicants should refer to the Guide for a more detailed explanation of IPART’s views of access issues and the coverage declaration criteria.

This coverage application template has been based on the National Competition Council’s application template for declaration under Part IIIA of the *Trade Practices Act 1974* (Cth) and adapted for the coverage declaration regime set out in Part 3 Division 2 of the Act. Accordingly, IPART wishes to acknowledge the efforts of the National Competition Council.

B Complete applications and timing

IPART will commence consideration of an application for coverage declaration once it receives a duly completed application. If an application has not been duly completed, IPART will notify the applicant. IPART strongly encourages applicants and their advisors to discuss their applications with IPART prior to lodgement.

A complete application should answer all the relevant questions set out in this document, including delineating the water industry infrastructure service to which access is sought and providing all relevant facts and supporting information.

When answering these questions, applicants should refer to evidence to support their arguments and cite the sources of this evidence. This includes any modelling or expert evidence that the applicant wishes to use.

IPART endeavours to provide a report on the application to the Minister within four months after the date of lodgement, as specified in section 25(4) of the Act. The Minister will use his or her best endeavours to make a decision on an application within six months after the date of lodgement, as specified in s26(4) of the Act.

The key milestones within this six month period are as follows:

	Pre-application discussions with IPART
Calendar day 0	Duly completed application lodged
Calendar day 3	<ul style="list-style-type: none"> • IPART furnishes the application to and invites submissions from: <ul style="list-style-type: none"> – the service provider; and – the Minister/s administering the <i>Protection of the Environment Operations Act 1997</i>, the <i>Public Health Act 1991</i>, the <i>Water Industry Competition Act 2006</i> and the <i>Water Management Act 2000</i> • Public notification of application: <ul style="list-style-type: none"> – IPART posts the application on its website; and – IPART places a public notice in the newspaper inviting submissions from the public.
Calendar day 30	Closing of submissions in response to Application
Calendar day 80	Draft report released and submissions invited on draft report
Calendar day 100	Closing of submissions in response to draft report
By Calendar day 120	Final report provided to the Minister
By Calendar day 180	The Minister makes a decision on the application

The above timetable is indicative only. Specific milestones may also be affected by public holidays and weekends.

The timeframe will not commence until a duly completed application is submitted. If an application is incomplete and significant information is omitted, IPART will notify the applicant and the applicant must resubmit the application with all deficiencies rectified.

C Confidential information

IPART uses open public processes to consider applications. IPART treats applications as public documents, unless confidentiality is agreed. It publishes applications on its website and provides them to interested parties.

Applicants wanting to submit confidential information should discuss the matter with IPART's Manager, Legal prior to making the application. Where IPART agrees to accept confidential material, applicants should provide separate copies of their application, one with the confidential information clearly marked and another for public release with the confidential information removed.

Each of these versions should be provided in electronic and hard copy form.

A request for access to confidential information will be determined in accordance with the *Freedom of Information Act 1989* and section 22A of the *Independent Pricing and Regulatory Tribunal Act 1992*.

D Lodging applications

Electronic copies of applications should be sent to by email to:

wica@ipart.nsw.gov.au

Hard copies should be sent by courier or delivered to:

Water Industry Competition Act
Access Division
Independent Pricing and Regulatory Tribunal
2-24 Rawson Place
Sydney NSW 2000

Hard copies may also be mailed to:

Water Industry Competition Act
Access Division
Independent Pricing and Regulatory
Tribunal PO Box K35
Haymarket Post Shop NSW 1240

E Application fee

Each application must be accompanied by an application fee of \$2,500.

Application Template for Coverage Declaration

1 Applicant details

1.1 Who can apply?

Applications for coverage declaration of a water industry infrastructure service declared may only be made by or on behalf of:

- the service provider for that service;
- an access seeker in relation to that service who has tried, but failed:
 - to obtain access to that service; or
 - to obtain a change to some aspect of the person's existing access to that service;
- in the case of a service provided by a public water utility, the Minister.

1.2 Who is the applicant?

Applicants should provide IPART with sufficient information to identify the company or individual making the application. Where the applicant is a subsidiary company, details of the parent company should be included.

1.3 Who is the applicant's representative?

Applicants should provide IPART with the name of the person who is its authorised representative in relation to the application. IPART will direct its communications and requests for information to this person.

1.4 Contact details

Contact details should include relevant email addresses and a physical address for the delivery of documents, including the notification of any decision of the designated Minister or IPART related to the application or the resulting report. Applicants should also provide a telephone number, email address and postal address for the representative nominated under question 1.3.

2 Service for which access (or increased access) is sought

Accurately defining the water industry infrastructure service for which access is sought is essential to an access application. An application for coverage declaration can only be made of water industry infrastructure located in the area of operations of the Sydney Water Corporation and Hunter Water Corporation. However, this may be extended in the future.

The Act defines “infrastructure service” as:

“the storage, conveyance or reticulation of water or sewage by means of water industry infrastructure, and includes the provision of connections between any such infrastructure and the infrastructure of the person for whom water or sewage is stored, conveyed or reticulated, but:

- (a) does not include the storage of water behind a dam wall, and*
- (b) does not include:*
 - (i) the filtering, treating or processing of water or sewage, or*
 - (ii) the use of a production process, or*
 - (iii) the use of intellectual property, or*
 - (iv) the supply of goods (including the supply of water or sewage),*

except to the extent to which it is a subsidiary but inseparable aspect of the storage, conveyance or reticulation of water or sewage.”

The meaning of infrastructure service is discussed in more detail in the Guide.

Applicants seeking coverage declaration of more than one service must define and discuss the coverage declaration criteria in relation to each service separately. A service can only have one service provider. If there is more than one service provider, then there is more than one service, each requiring a separate application. IPART is, however, likely to use one process to consider applications for multiple, related services. If more than one service has been identified, applicants should describe how these services are related and provide facts and evidence on the consequences of not obtaining access to all of the services. For example, if one of the services is not declared, does the applicant still seek access to the remaining services?

2.1 Describe the service to which the applicant wants to obtain access from the service provider

Coverage declaration under Part 3 of the Act provides for access to a service of water industry infrastructure (or service of a part of water industry infrastructure) rather than the infrastructure itself. Applicants should specify the service they wish to have access to in terms of what would be bought and sold, or for which there is a potential transaction.

Some examples of definition of a service are found in Box 1 below:

Box 1 - Examples of definition of a service

Sewage services:

Example 1: A service for the transportation of sewage provided by means of the North Head Reticulation Network, from a customer's boundary trap to points of interconnection.

Example 2: A service for the connection of new sewers to the North Head Reticulation Network at points of interconnection.

Water services:

Example 3: A service for the transportation of potable water by way of trunk main from Hoxton Park to Camden South

Applicants should ensure they have identified all of the services that would need to be declared for access to enhance competition in other markets.

2.2 Does the service relate to water industry infrastructure?

2.3 Describe how, and for what purpose, the applicant intends to use the service

2.4 What are the reasons for seeking access to the service?

2.5 What activities would the applicant undertake if access was provided? What products would it produce or services would it provide?

2.6 What would be the consequences for the applicant and any other interested parties if access were denied?

- 2.7 What alternative ways could the applicant produce or deliver its products or services? Or would it choose not to produce or deliver those products or services if access were not granted?**
- 2.8 If the applicant is seeking access to multiple services, describe how these services interrelate**
- 2.9 Why is access to all of these services necessary?**
- 2.10 What are the consequences of not obtaining access to each of the services?**

3 Infrastructure used to provide the service

Applicants should clearly identify the water industry infrastructure that provides the service.

The Act separates water industry infrastructure into two categories:

- “1) *water infrastructure, which means any infrastructure that is, or is to be, used for the production, treatment, filtration, storage, conveyance or reticulation of water, but does not include:*
- (a) *any pipe, fitting or apparatus that is situated downstream of a customer’s connection point to a water main, or*
 - (b) *any pipe, fitting or apparatus that is situated upstream of a customer’s connection point to a stormwater drain;*
- 2) *sewerage infrastructure, which means any infrastructure that is, or is to be, used for the treatment, storage, conveyance or reticulation of sewage, including any outfall pipe or other work that stores or conveys water leaving the infrastructure, but does not include any pipe, fitting or apparatus that is situated upstream of a customer’s connection point to a sewer main.”*

3.1 Describe the infrastructure used to provide the service

Additional detail could be provided in appendices.

3.2 Is the infrastructure located in the area of operations of the Sydney Water Corporation or Hunter Water Corporation?

An application for coverage declaration can only be made of water industry infrastructure located in the area of operations of the Sydney Water Corporation and Hunter Water Corporation. However, this may be extended in the future.

Include a map and/or diagram that shows the location of the infrastructure, the points at which it connects with other relevant pieces of infrastructure, the location of any similar infrastructure or proposed infrastructure in the same region or that supply the same markets, and the location of relevant population centres or major users.

3.3 What is the minimum bundle of assets that must be declared to provide the service?

3.4 Why do all of these assets form the minimum bundle necessary to provide the service?

3.5 How is the infrastructure used to provide the service, or how would it be used?

- 3.6 How would using the infrastructure to provide the service affect the provision of other services?**
- 3.7 Is any owner or operator of the infrastructure vertically integrated or associated with other entities operating in other parts of the distribution chain? If so, describe the nature of the relationship between operator/owner and entity.**

4 The service provider

4.1 Identify the service provider

The applicant must identify the service provider clearly, even when the applicant is itself the service provider. The Act defines the service provider as the person who has control of the water industry infrastructure that provides the service, whether or not the person is a licensed network operator. A licensed network operator is a person licensed to construct, maintain, operate infrastructure or provide services with this infrastructure under Part 2 of the Act.

4.2 Provide contact details for the service provider

4.3 Which entity is the licensed network operator of the infrastructure, if different from 4.1 above?

4.4 Which entity is the owner of the infrastructure, if different from 4.1 above?

4.5 Are any of the above entities a partnership or joint venture? If so, who are the parties to that partnership or joint venture?

4.6 Provide name and contact details, including details of the registered office for all of the entities identified above

4.7 Is the service provider a public water utility?

5 History of access negotiations

An applicant should describe any previous attempts to negotiate with the service provider for access, or increased access, to this or any similar services. Note whether the applicant was denied access, or was dissatisfied with the access terms and conditions offered by the service provider. Where possible, applicants should provide written documentation of the negotiations, including copies of correspondence.

5.1 Outline any history of previous access negotiations with the service provider

5.2 What were the services under negotiation?

5.3 When did the negotiations take place and how long did they last?

5.4 What was the response of the service provider to the applicant's attempt to negotiate access?

5.5 What were the outcomes of the negotiations for the applicant?

5.6 What matters were agreed and what matters could not be agreed?

5.7 Why did the applicant consider that the service provider's offer (if any) was unreasonable?

6 Other interested parties

6.1 Identify and provide contact details for other parties likely to be interested in the application

The applicant should provide the name and address of other parties who may wish to comment on the access application, including:

- others who may be interested in also obtaining access to the service;
- owners or operators of similar facilities in Australia;
- relevant industry bodies or associations;
- Australian, State or Territory government departments or agencies;
- other suppliers, or potential suppliers, in the markets in which it is claimed that competition would be promoted;
- significant customers in upstream or downstream markets; and
- any third party who currently has access to the service or any other service provided through the relevant infrastructure.

7 Jurisdiction

Some types of water or sewage services are explicitly excluded from coverage declaration under Part 3 of the Act. Where there is potential debate about whether the service falls under an exclusion, applicants should provide evidence on why they think the service is within the scope of Part 3 of the Act.

7.1 Does the service include storage of water behind a dam wall?

7.2 Does the service include:

- the filtering, treating or processing of water or sewage;
- the supply of goods (including the supply of water or sewage);
- the use of intellectual property; or
- the use of a production process?

7.3 If you answered yes to 7.2 is this activity a subsidiary but inseparable aspect of the storage, conveyance or reticulation of water or sewage?

If the service potentially covers activities that fall within the exclusions, applicants should provide evidence on why that activity is a subsidiary but inseparable aspect of the service. In long water transportation networks, for example, additional water treatment may be required along the length of the network to ensure that any water extracted meet Health Guidelines.

8 Coverage declaration criteria

The Act provides that a Minister can only declare a service if the following criteria are satisfied:

- (a) that the infrastructure is of State significance, having regard to its nature and extent and its importance to the State economy;
- (b) that it would not be economically feasible to duplicate the infrastructure;
- (c) that access (or an increase in access) to the service by third parties is necessary to promote a material increase in competition in an upstream or downstream market;
- (d) that the safe use of the infrastructure by access seekers can be ensured at an economically feasible cost and, if there is a safety requirement, that appropriate regulatory arrangements exist; and
- (e) that access (or an increase in access) to the service would not be contrary to the public interest.

9 Criterion (a) — State significance

Criterion (a) is a test of materiality having regard to:

- (a) the nature of the infrastructure;
- (b) the extent of the infrastructure; and
- (c) the importance of the infrastructure to the State economy.

This ensures that only infrastructure that play a significant role in the State economy falls within the scope of Part 3 of the Act.

While coverage declaration is concerned with access to services rather than infrastructure, criterion (a) relates to the State significance of the infrastructure providing the service.

The factors that demonstrate the infrastructure is of State significance include, but are not limited to, its nature, extent and importance to the State economy.

- 9.1 Describe how the infrastructure is important to the State, answering any of the following questions that are relevant to its State significance**
- 9.2 What is the size of the infrastructure? What did it cost? What area or distance does it cover or serve?**
- 9.3 What is the volume or value of water, sewage or other water products going through the infrastructure?**
- 9.4 How does the infrastructure contribute to trade within the State and interstate? What is the volume or value of that trade?**
- 9.5 How does the infrastructure contribute to trade outside Australia? What is the volume or value of that trade?**
- 9.6 How important is the infrastructure in providing services in other significant markets?**
- 9.7 Are there any other characteristics of the infrastructure that make it significant to the State?**

10 Criterion (b) — not economically feasible to duplicate the infrastructure

The criteria limit coverage declaration to services provided by infrastructure that exhibit “natural monopoly characteristics”. Criterion (b) tests whether the infrastructure that provides the service is a natural monopoly. For the purpose of criterion (b), natural monopoly infrastructure exists if one piece of infrastructure can meet the entire range of relevant demand at a lower cost than two or more pieces of infrastructure.

10.1 Other infrastructure providing the service

Identify and describe any other infrastructure that could provide a substitutable service.

(a) *Is the service provided by the other infrastructure the same as that subject to the application? Describe any practical or technical differences.*

(b) *Does the other infrastructure serve the same origins and destinations as the infrastructure covered by the application?*

Infrastructure that provides the same service as that defined in the application must have the ability to serve the same origins and destinations.

(c) *Would any modifications or investment be necessary for the other infrastructure to provide the same service?*

(d) *Could the other infrastructure provide part of the service?*

(e) *If it can provide only part of the service, explain which part it could provide.*

10.2 Demand for the service

(a) *What is the current level of demand for the service:*

- by the service provider;
- by any existing access users (including the applicant); and
- by users of other infrastructure that provides the same service?

(b) *Are there existing contractual arrangements that reserve infrastructure capacity for particular parties? If so, what is the*

duration of these arrangements? Can third parties enter into commercial arrangements to use any reserved capacity?

- (c) ***If access were granted, what would be the expected level of demand over the period for which coverage declaration is sought:***
- by the service provider;
 - by the applicant;
 - by any other existing users;
 - by any other new parties taking up access; and
 - by users of other infrastructure that provides the same service?
- (d) ***If access were not granted, what would be the expected level of demand over the period for which coverage declaration is sought:***
- by the service provider;
 - by the applicant;
 - by any other existing users;
 - by any other new parties taking up access; and
 - by users of other infrastructure that provides the same service?
- (e) ***Explain how current and expected demand – with and without access – have been calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.***

The current level of demand is the use of the service which is the subject of the application provided by:

- the infrastructure identified in the application; and
- any other infrastructure providing that same service.

The expected level of demand estimates the extent to which future use of that service is likely to rise or fall, with and without access.

Applicants should provide disaggregated information in the form of the following table. If more than one piece of infrastructure provides the same service, the information on each other piece of infrastructure should be provided separately. If demand is uncertain, applicants should provide a range that includes the maximum likely demand as its upper limit.

Table 1

	Use of the service by the service provider	Use of the service by the applicant	Use of the service by existing access users	Estimated use of the service by new parties taking up access	Use of the service in other infrastructure that provides the same service	Total
Current demand						
Future demand in X¹ years <u>with access</u>						
Future demand in X years <u>without access</u>						

The applicant must provide information on how the estimates in this table were calculated.

10.3 Current and future capacity of the infrastructure

Explain whether the infrastructure in its current form has the capacity to meet reasonably foreseeable demand. Provide evidence on the expected excess capacity or the expansion in capacity needed to meet future demand with and without access.

In some cases, spare capacity is necessary to provide a safety margin in the operation of the infrastructure. In other cases, capacity may be needed to provide other services. Applicants should estimate the amount of capacity (if any) that would be needed for other purposes.

- (a) *What is the total current capacity of the infrastructure?*

- (b) *Is some of the current capacity of the infrastructure required for provision of services other than those for which coverage declaration is sought or for other purposes?*

- (c) *Does available capacity vary between peak and off peak, seasonally or based on any similar factors? If so, how does available capacity vary?*

¹ X should relate to the period for which access is sought.

(d) *Are there any proposals or plans for alterations to the capacity of the infrastructure? What changes in capacity are needed to meet expected demand?*

(e) *Explain how capacity was calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.*

The applicant should provide disaggregated information in the form of the following table. If actual or projected capacity is difficult to ascertain precisely, the applicant should estimate a range that includes the maximum and minimum likely capacity. All information on how the estimates were calculated must be provided.

Table 2

	Total capacity of the infrastructure	Use of the infrastructure (Totals from Table 1)	Projected changes in usage	Other uses	Excess or shortfall is capacity for high and low periods of usage
Current capacity					
Future capacity in X ² years <u>with access</u>					
Future capacity in X years <u>without access</u>					

10.4 Estimate any expected increase in capital or operating costs if access were provided to the existing infrastructure

Providing access may require an expansion of the existing infrastructure or change its operating costs. Applicants should explain how they reached their estimates and provide evidence to support those estimates.

(a) *Would it be necessary to expand the existing infrastructure to meet reasonably foreseeable demand?*

(b) *Could the capacity of the existing infrastructure be expanded to meet reasonably foreseeable demand? If so, how would it be expanded and at what cost?*

² X should relate to the period for which access is sought.

- (c) *Would access affect the cost of operating the existing infrastructure? If so, how would it affect operating costs and what would be the size of the cost change?*

- (d) *Explain how the expected increase in capital and operating costs was calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.*

10.5 Estimate the capital and operating costs of developing new infrastructure to provide the service subject to the application

Estimate the cost of the best alternative infrastructure capable of providing the service. The alternative should reflect the most cost effective technology and route/location available.

- (a) *What are the costs of building and operating new infrastructure to provide the service?*

- (b) *What would be the capacity and route/location of the new infrastructure?*

- (c) *How would the capital costs of building new infrastructure compare with the cost of expanding the existing infrastructure?*

- (d) *How would the operating costs of the new infrastructure compare with the operating costs of the existing infrastructure with access?*

- (e) *Explain how the expected capital and operating costs were calculated and the assumptions made in those calculations. Provide evidence to support the estimates and the sources of that evidence.*

10.6 Identify environmental, planning or other regulations that significantly affect construction of new infrastructure

These regulations may exist at Australian, State or local government level.

- (a) *Name the regulation and describe its operation.*

- (b) *How does the regulation affect construction of new infrastructure?*

10.7 Identify whether the service provider has natural, economic or technical advantages because it was first to set up infrastructure of its kind

Describe any incumbency advantages that confer a monopoly on the service provider. An incumbency advantage is a natural, economic or technological advantage associated with the initial establishment of infrastructure. These advantages could mean that new businesses are unable to gain the same advantages as the incumbent.

- (a) *What are these advantages and how significant are they?*

- (b) *How do these advantages benefit the owner of the existing infrastructure over new entrants? For example, the incumbent may benefit from access to the only feasible location, strong brand loyalty, benefits from owning an established network, or costs to customers of switching between suppliers.*

- (c) *Could these advantages be overcome by a new entrant or are they permanent? What would a new entrant need to do to overcome any incumbency advantages?*

- (d) *How would access overcome these advantages?*

10.8 Outline any economies of joint production between the service and other services provided by the infrastructure

If there are overwhelming economies of joint production between the service and other services provided by the infrastructure, it would not be economically feasible to duplicate the infrastructure to separately provide the service. Describe any significant economies of joint production and their implications for developing new infrastructure.

- (a) *What other services have economies of joint production with the service subject to the application?*

- (b) *Why cannot the provision of these services be separated?*

- (c) *What would be the cost of separating these services?*

11 Criterion (c) — access by third parties would promote competition in an upstream or downstream market

Criterion (c) addresses whether infrastructure that exhibits natural monopoly characteristics (thus satisfying criterion (b)) is also bottleneck infrastructure. This aims to limit coverage declaration to infrastructure that occupies a strategic position in the service delivery chain, where it is likely to enhance the environment for competition in related markets that are upstream or downstream from the infrastructure

Whether competition would be enhanced depends on the service provider having market power and the ability and incentive to use that power to adversely affect competition in a dependent market. In assessing criterion (c), IPART:

- defines any dependent market in which competition may be promoted, and verifies that each market is separate from the market for the service to which access is sought;
- determines whether access (or increased access), facilitated by coverage declaration, would promote a more competitive environment in each dependent market, which requires assessing:
 - whether the incumbent has the ability and incentive to exercise market power to adversely affect competition in each dependent market; and
 - whether the structure of each dependent market is such that using coverage declaration to constrain the service provider from exercising market power would promote competition;
- examines barriers to entry and competitive conditions in each dependent market. Coverage declaration may not promote competition in a market that has a high barrier to entry that is unrelated to the bottleneck infrastructure, or that is already strongly competitive; and
- assesses whether the effects of coverage declaration are large enough to have a material impact on the competitive environment in each dependent market.

Applicants should define any upstream or downstream markets (“dependent markets”) where competition would be promoted by access to the service. They should describe the scope of each market, including each product and service and the region or regions covered by the market, giving reasons for their claims about the boundaries of the relevant market.

Each market in which competition is promoted must be functionally separate from the market for the service. Demonstrating these markets are separate requires identification of the different vertical stages in the production and or distribution chain. Evidence on the following is needed:

- facts demonstrating that the costs of separating the service in the dependent market from the service to which access is sought are not so high that these functions must be undertaken together; and
- facts demonstrating that each layer uses assets sufficiently specific and distinct to that layer such that the assets cannot readily produce the output of the other layer (ie that they are economically distinct).

11.1 Describe the demand and supply chain upstream and downstream from, or otherwise linked to, the service for which access is sought

Applicants should describe the demand and supply for products and services that are upstream and downstream from the service to which access is sought.

- (a) *What products or services are or could be provided at the various upstream and downstream points in the demand and supply chain?*
- (b) *From the analysis in question 11.1 identify any dependent markets in which competition is likely to be promoted as a result of access to the service.*
- (c) *Define the product, geographical and functional dimensions of each dependent market.*
- (d) *What are the products or services that compete in each dependent market? If there are products or services that are potentially substitutable for those identified in the dependent market(s), explain why they are not considered to be part of that market.*
- (e) *Are there suppliers of other products or services that could change their production to supply products or services into the dependent market(s)? If so, who are these suppliers, what are they currently producing and how would they need to change their activities? How quickly might they make such changes and at what cost?*

- (f) *Is there potential for suppliers or customers to move between products or services purchased in or from different regions? If so, what would suppliers and consumers need to do to move between regions, how quickly can this occur and how does it affect competition?*
- (g) *Are any factors changing demand and supply over time, for example new technology, changing market conditions or market growth? If so, what are these changes? How quickly are they occurring? How are they affecting competition in each dependent market?*
- (h) *Describe the assets used to produce the products or services in each dependent market.*
- (i) *Could the assets used in each dependent market also be used to produce products or services at the next layer in the production or distribution chain? Is it possible to separate these assets from assets at other levels in the production or distribution chain? The answer to this question should focus on the separability of assets in the dependent market(s) and assets used to produce the service to which access is sought.*

11.2 Describe the businesses that supply or could supply products or services in each dependent market?

- (a) *How many businesses are there?*
- (b) *Are the businesses large or small?*
- (c) *If there are only a few actual or potential suppliers, name them.*

11.3 Describe the customers that purchase or could purchase products or services in the dependent market(s)?

- (a) *How many actual or potential customers are there?*
- (b) *Are they industrial consumers, domestic consumers or other end users?*

(c) *If there are only a few actual or potential customers, name them.*

11.4 What is the size of each dependent market in volume and dollar terms?

Explain how the estimates of the size of each dependent market was calculated and the assumptions made in that calculation. Provide evidence to support the estimates and the sources of that evidence.

11.5 What are the current barriers to competition or entry in the dependent market(s)?

11.6 Describe the current level of competition in the dependent market(s).

If a dependent market is already effectively competitive, with products or services supplied from a range of sources, then access is less likely to promote competition.

(a) *Is each dependent market competitive?*

(b) *Are there other sellers and buyers competing in the dependent market(s) that are not reliant on the service subject to the application?*

(c) *Is there the potential for other suppliers or buyers to enter the dependent market(s) that are not reliant on the service subject to the application?*

11.7 Why is access necessary to promote competition in the dependent market(s)?

Describe how access would affect the dependent market(s) where it is claimed that competition would be promoted. Discuss how access affects competition and whether some sectors of any of the markets would be affected more than others.

(a) *Explain how access to the service for which coverage declaration is sought would affect competition in the dependent market(s).*

(b) *How would the size of each dependent market be affected by access? Estimate the size of the dependent market(s) if access were available.*

- (c) *Would access affect some types of customers or suppliers more than others?*
- (d) *What effect would access have on barriers to competition or entry in the dependent market(s)?*
- (e) *How would access affect innovation and the operation of niche suppliers in the dependent market(s)?*

11.8 Is there any evidence that the service provider is exercising its market power?

The application should establish that the service provider has the ability and incentive to exercise market power in a way that limits competition in a dependent market. The Guide discusses factors that affect a service provider's ability and incentive to exercise market power.

Even if the service provider theoretically has market power it may not have the incentive to use that power in a way that reduces competition in a dependent market. These incentives may be weak if a dependent market is already competitive, there is other infrastructure that provides a similar service, or regulation or other commercial imperatives mean that exercising market power would not benefit the infrastructure owner.

Evidence of actual exercise of market power by a service provider would demonstrate the ability and incentive to exercise market power.

- (a) *Has access been denied?*
- (b) *Is the service provider charging prices that exceed the competitive level for the service?*
- (c) *For a vertically integrated service provider, is it engaging in behaviour to leverage its monopoly power into the dependent market? How is the service provider using its vertical integration in ways that disadvantage potential competitors? How is the service provider benefiting from these actions and how is it affecting competitors?*
- (d) *Explain the evidence to support any claims that the service provider is exploiting its market power and the source of that evidence.*

11.9 Do the service provider's customers or suppliers have countervailing market power?

The service provider may not have the ability to exploit its market power if its customers are able to choose alternative services and therefore are not locked in, or heavily reliant, on the service provider's service.

- (a) *How reliant are the customers on the service provided by the service provider? Do the customers have access to alternatives to the service provider's service?*

- (b) *Does countervailing power vary between customers or customer groups? If so, how does it vary and what groups are affected?*

11.10 Is there any other infrastructure that provides similar or competing services to the service for which access is sought?

The existence of other infrastructure that provides similar services could limit the service provider's ability to exercise market power. This depends on whether those similar services can, or could potentially, feed into a dependent market and whether the costs, available capacity and services offered by the competing infrastructure make it a viable alternative. Applicants should discuss whether other infrastructure that provides similar services constrains the market power of the service provider.

- (a) *Describe any infrastructure not described in question 10.1(a).*

- (b) *Describe the service the other infrastructure provides and the extent to which it differs from the service to which access is sought.*

- (c) *Does or could this infrastructure provide services in a dependent market?*

- (d) *Has the access seeker sought to use this infrastructure instead of the one to which access is sought? If so, what was the outcome of those discussions? If not, why not?*

- (e) *How would the cost of using the other infrastructure compare with the cost of using the infrastructure under the application?*

- (f) *Does the other infrastructure constrain the service provider's ability to exploit its market power?*

11.11 Are there any government policies or commercial imperatives that limit the service provider's ability to use market power?

In some industries there are commercial imperatives or government policies or regulations that mean it is not in the service provider's interest to exploit its market power, even if it had such power.

- (a) *Identify any such policies or incentives.*

- (b) *How do they affect the service provider's ability to use its market power and what scope, if any, remains for it to continue to use its market power?*

11.12 Other factors that might limit the service provider's ability and incentive to exercise market power

Describe the effects of any other relevant factors. on the service provider's ability to exercise market power.

- (a) *Are there such factors?*

- (b) *If so, what are these factors and what are their effects?*

11.13 Establish that there are no other barriers to competition in each of the dependent markets that would prevent access from having a material impact on competition

Applicants should establish why they believe the potential barriers would not pose a significant barrier to competition.

- (a) *Are there significant barriers to competition that would remain even if access was introduced?*

- (b) *Are existing customers locked into long-term contracts?*

11.14 Show that the effects of coverage declaration would be large enough to have a material impact on the dependent market(s)

Even if coverage declaration would, in theory, improve the environment for competition, it is necessary to show that its impact in dependent markets would be material.

- (a) *How important is the service to which access is sought in meeting customer demands in the dependent market(s)?*

- (b) *How large a part of the total cost of supplying the dependent market(s) is the cost of the service to which access is sought?*

- (c) *How large an effect is access likely to have on the costs of the declared service, taking into account the constraints discussed previously?*

- (d) *How large an effect is access likely to have on the quality of the declared services? Are the quality characteristics important in any of the dependent markets? If so, why are they important?*

12 Criterion (d) — safe use of infrastructure

Criterion (d) provides that coverage declaration should only occur where access or increased access to the service can be facilitated with economically feasible safety requirements and, if there is a safety requirement, that appropriate regulatory arrangements exist, such as codes of conduct and operational guidelines. For a service to be declared, access must be possible without compromising system and operational integrity or safe scheduling and timetabling.

Safety requirements must not place undue economic burden on either the service provider or access seeker.

The applicant should establish that it is possible to provide access safely. It is not necessary for procedures to be in place, as long as it would be possible to establish them when negotiating or setting the terms and conditions of access.

12.1 Can access be provided without putting human health and safety at risk?

12.2 Is access currently provided in a safe manner?

12.3 Provide details of any regulations that deal with safety issues

12.4 Does other infrastructure providing a similar service provide this service safely?

12.5 How would the provision of access affect safety?

12.6 Could requirements be established to deal with safety issues?

12.7 Describe the costs involved in providing access that is safe and complies with any safety requirements

12.8 How would these requirements be regulated?

12.9 Are there any other factors that indicate safety might be a problem?

13 Criterion (e) — public interest

Criterion (e) does not address the concerns of criteria (a)-(d). Criterion (e) requires consideration of whether access, or an increase in access, would not be contrary to the public interest. This involves a balancing exercise. If criteria (a) to (d) are met, then these may be public interest factors that favour of granting a declaration. These, and any other positive public interest factors that favour declaration, must be weighed against any detriments that may arise as a result of declaration.

The Act does not define “public interest”, and the term is difficult to define with any specificity. Relevant public interest considerations vary among applications.

A key public interest consideration is the impact of coverage declaration on economic efficiency. Another issue that frequently arises is the costs of regulation. That is, the costs and inefficiencies associated with coverage declaration.

Direct regulatory costs include the costs of negotiating access with third parties or arbitrating an access dispute.

In determining whether the benefits of coverage declaration are likely to outweigh the costs, it may help to compare the direct costs of coverage declaration with the potential reductions in the price of the service (this is relevant where there is evidence of monopoly pricing by the service provider).

In applying the public interest test, IPART considers whether, for the community as a whole, the costs of coverage declaration outweigh the benefits. This analysis may include consideration of costs and benefits that are not able to be quantified in financial terms.

13.1 Outline issues that should be considered in determining whether access is contrary to the public interest. Where relevant discuss the impact of access on:

- the development of alternative access regimes and arrangements;
- consistency across access regimes or arrangements;
- the direct regulatory and compliance costs associated with access;
- incentives to invest;
- any other costs associated with access;
- the achievement of other government policy objectives;
- ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;

- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

14 Duration of coverage declaration

Every coverage declaration must include an expiry date. The appropriate period of coverage declaration varies according the circumstances of each application.

Applicants should specify their preferred period of coverage declaration and give reasons for their preference. The factors considered in establishing a period could include:

- the importance of long term certainty for businesses;
- the need for coverage declaration to apply for a period sufficient to influence the pattern of competition in any upstream or downstream market;
- allowing time for access dispute resolution; and
- the desirability of periodically reviewing of the need for coverage declaration.

Applicants must recognise that a coverage declaration does not take effect while the infrastructure service concerned is the subject of an access undertaking approved under section 38 of the Act or subject to a binding non coverage declaration under section 34 of the Act.

14.1 Specify the preferred period of coverage declaration

14.2 Why is this period preferred?

14.3 What would be the consequences of a longer or shorter period?

15 Object of Part 3 of the Act

The object of Part 3 of the Act is contained in section 21 of the Act. This object is to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream and downstream markets.

15.1 Is there anything further the applicant considers IPART should take into account in respect of the application and the object of Part 3 of the Act?