WICA ACCESS FACT SHEET NO 3

Water Industry Competition Act 2006
Dispute resolution

August 2008

The NSW Government has introduced a range of reforms to encourage private sector participation in the supply of water and provision of sewerage services in NSW. The reforms are designed to promote competition, investment and innovation in water industry infrastructure, while safeguarding public health, the environment and consumers.

The reforms have been implemented by the *Water Industry Competition Act 2006* (NSW) (WICA). Among other things, the WICA establishes:

- an access regime to permit private sector access to certain water infrastructure services and sewerage infrastructure services, allowing competition in the supply of water and provision of sewerage services;
- a licensing scheme to regulate the involvement of the private sector in the supply of these services; and
- a dispute resolution process to resolve disputes arising under the access regime and other disputes arising in connection with sewer mining.

This fact sheet explains the dispute resolution process. Information about other aspects of the WICA reforms can be found in the following fact sheets:

- WICA Access Fact Sheet No 1: The access regime - an overview.
- WICA Access Fact Sheet No 2: The access regime - coverage, revocation and binding non coverage declarations and access undertakings.

Resolution of access disputes and sewer mining disputes

Certain disputes between:

- access seekers and service providers (**access disputes**); and
- sewer miners and service providers (**sewer mining disputes**)

may be referred to IPART by either party for arbitration. The dispute will be heard by IPART or by one or more arbitrators appointed by IPART. IPART's Arbitration Registry (Registry) will be responsible for providing administrative and other support to the arbitrator and the parties. The parties will be required to use prescribed forms available from the Registry for the purposes of commencing, progressing and terminating the arbitration. These prescribed forms are set out in the Guide.

IPART has published practice directions for the arbitration of disputes under the WICA (**Practice Directions**), as well as a guide to the arbitration of these disputes. Both are available on IPART's website.

Unless the parties have already agreed (eg, under an access agreement) that a dispute will be referred to IPART, they are not bound to refer the dispute to IPART, and may choose to resolve their dispute by private arbitration or other means.

Arbitration is a dispute resolution process where an independent person or persons with expertise in the subject matter of the dispute hear the arguments of the disputing parties and make a determination (decision) resolving the dispute. An arbitration is not a trial or court proceeding, but the parties are bound by the arbitrator's determination and, if necessary, the determination can be enforced in the same way as an order or judgment of a court.

An access seeker is a person who wants access to an infrastructure service or a change to some aspect of their existing access to that service.

A sewer miner is a person who draws from the contents of a service provider's sewers or who wants to do so.

A service provider is the person who has, or is to have, control of a given water industry infrastructure by means of which the service is, or is to be, provided.

An infrastructure service is the storage, conveyance or reticulation of water or sewage by means of water industry infrastructure (see further the full definition of "infrastructure service" in the Dictionary in the WICA).

What type of disputes can be referred to IPART for arbitration?

Two types of disputes can be referred to IPART for arbitration - access disputes and sewer mining disputes.

Access disputes

An access dispute is a dispute between a service provider and an access seeker about access to the relevant service. It may be a dispute about:

- the terms on which the access seeker is to be given access (or increased access) to a service covered by a coverage declaration or access undertaking;
- any matter arising under an access agreement that provides for the dispute to be dealt with by application to IPART for arbitration; or
- any matter arising under a determination made in an earlier arbitration about an access dispute.

Sewer mining disputes

A service provider may choose to lodge a notice with IPART setting out whether, and if so on what terms, they will permit sewer miners to draw from the contents of their sewerage infrastructure, and indicating that they are willing to allow disputes about the granting or refusal of permission to be referred to IPART for arbitration.

If a service provider has lodged a notice of this kind with IPART, certain types of disputes may be referred to IPART for arbitration. Those disputes are disputes between a service provider and a sewer miner about:

- the terms of any agreement under which the sewer miner is to be permitted to draw from the contents of the service provider's sewerage infrastructure;
- any matter arising under such an agreement that provides for a dispute as to that matter to be dealt with by application to IPART for arbitration; or
- any matter arising under a determination made following an earlier arbitration about a sewer mining dispute.

Applying to IPART for arbitration

Either party to an access dispute or sewer mining dispute may apply to IPART to have the dispute arbitrated by filing an application in the Registry and giving copies to all other parties to the dispute. Upon receiving an application, IPART will confirm that the dispute is in fact an access dispute or a sewer mining dispute. The application will be refused if the dispute is not an access dispute or sewer mining dispute. IPART must also satisfy itself that the application provides a sufficient basis to support the existence of a dispute. If IPART is not satisfied of this it may, in its absolute discretion, refuse to accept the application.

In the case of an access dispute, IPART will also consider whether it is satisfied that the party

applying for arbitration has attempted to resolve the dispute by negotiating in good faith. IPART has published negotiation protocols to assist the parties to resolve, in good faith, any dispute by negotiation. A copy of these negotiation protocols is available on IPART's website. IPART may refuse to accept an application if it is not satisfied that the applicant has, in good faith, attempted to resolve the dispute by negotiation.

In some access disputes, IPART will be required to give notice of the dispute to the public and invite submissions.

Appointment of an arbitrator

IPART maintains a panel of arbitrators (**Panel**) consisting of persons approved by the Minister and other individuals that IPART considers suitably qualified to conduct arbitrations. Failing that, IPART will decide whether it will arbitrate the dispute itself or appoint one or three members from the Panel to arbitrate the dispute (references in this fact sheet to "arbitrator" include references to a tribunal of three arbitrators and references to IPART when IPART has appointed itself arbitrator). If the dispute is an access dispute, IPART must appoint either itself or a member of the Panel who has been approved by the Minister to arbitrate the dispute.

If any party is unhappy with the arbitrator appointed by IPART, they may object to the appointment in writing to IPART. IPART may make an alternative appointment but is not required to do so.

In certain limited circumstances, a party can challenge the appointment of an arbitrator in court.

Legal representation

Generally speaking, parties will not be permitted to have legal representation in the arbitration. However, a party may seek leave to have legal representation (by an Australian legal practitioner). The arbitrator will only grant leave if they are of the opinion that legal representation is likely to shorten the hearing or reduce the costs of the dispute or that the party would be unfairly disadvantaged if they were not legally represented.

Preparation for the hearing

Once appointed, the arbitrator will take various steps to prepare for the hearing. These include:

- in access disputes, requiring the service provider to give notice of the proceedings to all other persons to whom the service provider provides access to the relevant service;
- in sewer mining disputes, requiring the service provider to give notice of the proceedings to other persons permitted to draw from the contents of the service provider's sewerage infrastructure;
- organising a preliminary meeting of the parties;
- setting a timetable for the completion of preparatory steps before the hearing of the dispute;
- requiring the parties to prepare position statements and to attempt to agree on some of the matters in those statements;
- determining whether any other persons should become party to the arbitration and whether anyone else (including the public) should be notified of the dispute and invited to make submissions in relation to it;
- sending the parties a schedule of issues setting out the matters that the arbitrator proposes to deal with at the preliminary meeting;
- holding the preliminary meeting to discuss the scope of the dispute, set a timetable and deal with other matters in connection with the arbitration; and
- holding any other preliminary meetings that might be required, as well as a pre-hearing conference.

In preparing for the hearing, the parties should attempt to prepare a statement of agreed facts to assist the arbitrator and the parties to identify and focus on those matters which are in dispute.

The hearing

The arbitrator may conduct the hearing in any way they consider appropriate, having regard to the need for the dispute to be resolved in a fair, efficient and timely manner. The arbitrator will not be bound by the rules of evidence. The applicant will present its case first, followed by the other parties.

In most cases, evidence will be given by written witness statements. These must be provided to the arbitrator and the other parties before the hearing. Some examination of witnesses by other parties will be allowed in a manner directed by the arbitrator, but witnesses will ordinarily not be permitted to supplement their statements with oral evidence.

Expert witnesses (eg, accountants or academics) may be permitted in accordance with any directions made by the arbitrator. The arbitrator may require expert witnesses for each party to confer and to prepare a joint report.

The parties will be required to provide copies of any documents that they wish to rely on to the arbitrator and the other parties before the hearing. Depending on the circumstances, the parties may also be required to prepare written submissions setting out their arguments. This may be required if, for instance, the dispute involves a disagreement about a legal issue.

For the purpose of determining an access dispute in connection with an infrastructure service the subject of a coverage declaration or access undertaking, the arbitrator may assume, in the absence of evidence to the contrary, that the service provider is able to provide the access seeker with such access to the service as is sought by the access seeker.

Confidentiality and procedural fairness

Material used in the arbitration will generally be of a commercially sensitive nature. As a result, ordinarily hearings and all meetings and conferences will be held in private, but public interest issues must also be taken into account in the resolution of disputes. Where public interest issues are relevant, these may weigh against considerations of privacy and confidentiality.

IPART will ensure that anyone whose interests must be taken into account is notified of the dispute and the issues involved in the dispute, and given an opportunity to present a submission to the arbitrator, but any submissions received will be provided to the parties to allow them to respond. The arbitrator may direct in writing that certain persons may be present at the hearing, but before doing so they must have regard to the parties' wishes and the need to maintain the confidentiality of any commercially sensitive information.

Ordinarily, all evidence, submissions and other material involved in the arbitration will be confidential, and parties will be required to give a written undertaking that they will maintain the confidentiality of the material and will not disclose the material or information in it to anyone who is not a party or the arbitrator. However, documents will not be confidential in circumstances where they are required to be disclosed as a matter of law or where their production is compelled as part of other litigation.

The determination

After the hearing, the Arbitrator will:

- prepare a draft determination;
- make the draft determination available to the parties and give them an opportunity to make submissions about it; and
- make a final determination.

Before determining a dispute, the arbitrator must give written notice to the parties:

- of any assumptions that the arbitrator proposes to make for the purposes of their determination, and
- of each party's right to make submissions to the arbitrator with respect to any of those assumptions and the date by which any such

submissions should be lodged with the arbitrator.

In making their determination, the arbitrator must have regard to a range of matters, including:

In the case of an access dispute:

- any access undertaking to which the service is subject;
- where the dispute concerns a coverage declaration (see WICA Access Fact Sheet No 1), the pricing principles (see WICA Access Fact Sheet No 2);
- clauses 6(4)(i), (j) and (l) of the Competition Principles Agreement between the Commonwealth and the States; and
- any other matters which the arbitrator considers relevant.

In the case of a sewer mining dispute:

- the service provider's policy with respect to the granting of permission to draw from the contents of its sewerage infrastructure; and
- any matters prescribed in the regulations (at present, no such matters have been prescribed).

In the case of an access dispute, the arbitrator may, in their determination, deal with any matter relating to access by the access seeker, including matters that were not the basis for notification of the dispute. The determination does not have to require the service provider to provide access to the access seeker.

After the determination has been made

The arbitrator will give IPART notice of the determination and a summary of the determination, and IPART will publish this information.

The parties must give effect to the determination. If necessary, the determination may be enforced in the same manner as a judgment or court order.

Costs of the arbitration

The arbitrator may ask the parties to make submissions about who should pay the costs of the arbitration (ie, the costs of the parties and the costs of the arbitrator).

The arbitrator may make any direction they consider appropriate about who should pay the costs of the arbitration. In deciding on a direction, there are a range of factors that the arbitrator must take into account, and several other factors that they may take into account (see *Commercial Arbitration Act 1984* s 34 and also the Practice Directions).

Appealing from the determination

A party who is unhappy with the determination has only limited rights to appeal against it. An appeal may be made to the Supreme Court on any question of law arising out of the determination. The Supreme Court may confirm the determination, vary the determination, set aside the determination or send the determination back to the arbitrator (with the court's opinion on the question of law) for reconsideration by the arbitrator.

The Supreme Court may also set aside part or all of the determination where there has been misconduct on the part of an arbitrator or the arbitration has been improperly procured (eg, by corrupt means).

Withdrawal, settlement or termination of the dispute

The party who referred the dispute to IPART may withdraw the dispute by filing the prescribed form and serving it on all other parties who received a notice of the dispute. The parties should then attempt to agree about who will pay the costs of the arbitration but if this is not possible, the arbitrator may order one party to pay these costs.

If all the issues in dispute between the parties are settled, the arbitrator should be notified immediately. The arbitrator will then take steps to

end the arbitration and will make a decision about the costs of the arbitration.

If only some of the issues in dispute between the parties are settled, the arbitrator should be notified immediately. The arbitrator will then continue to hear and determine those issues of the dispute which remain in dispute.

An arbitrator may terminate an access dispute arbitration (with or without the request of a party) if:

- the notification of the dispute was vexatious;
- the subject-matter of the dispute is trivial, misconceived or lacking in substance;
- the party who notified the dispute has not engaged in negotiations in good faith; or
- access to the service should continue to be governed by an existing contract between the provider and the access seeker.

Important

This fact sheet is intended to provide an overview of the reforms introduced by the *Water Industry Competition Act 2006* (NSW) (WICA). It is not intended to be a detailed or definitive guide to the operation of the WICA. If your rights or interests are affected by the WICA you should refer to that legislation and to the other regulatory materials referred to in this fact sheet, and if appropriate seek legal or other professional advice.