



Negotiation protocols

**Water Industry Competition (Access to Infrastructure Services)
Regulation 2007**

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Preliminary

1 Introduction

- (1) Part 3 of the *Water Industry Competition Act 2006* (**WIC Act**) establishes a regime for access to water industry infrastructure services. The object of Part 3 is to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream or downstream markets.

- (2) Part 3 sets out two coverage declaration pathways as follows:

- (a) coverage declaration

Coverage declaration of water industry infrastructure services is available under Part 3 Division 2. Section 26 of the Act provides that the Minister may only declare a service under this Division if all of the declaration criteria specified in section 23 of the WIC Act are satisfied and the service is not the subject of a binding non-coverage declaration or an access undertaking.

Any person (an **Access Seeker**) may make an application for coverage declaration to IPART in respect of infrastructure services under section 24 of the WIC Act.

- (b) voluntary access undertakings

Voluntary access undertakings may be provided to IPART by a person who has, or is to have, control of water industry infrastructure by means of which the service is, or is to be, provided, whether or not the person is a licensed network operator (a **Service Provider**) under Part 3 Division 5.

A Service Provider may provide IPART with an access undertaking with respect to any one or more of its infrastructure services (whether or not they are the subject of coverage declarations), setting out the Service Provider's arrangements for the provision of access to its infrastructure services.

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

Importantly, coverage declaration and access undertakings are only available for certain types of water industry infrastructure and services provided by means of that infrastructure. For more information, please refer to IPART's *Guide to declaration of infrastructure under the Water Industry Competition Act 2006*.

- (3) If either of these access pathways apply, an Access Seeker obtains a right under Part 3 Division 6 of the WIC Act to:
 - (a) negotiate access to the service with the Service Provider; and
 - (b) if necessary, apply to IPART for an access dispute to be determined through arbitration. 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.

- (4) Clause 8 of the *Water Industry Competition (Access to Infrastructure Services) Regulation 2007* (**Access Regulation**) sets out factors that IPART must have regard to in determining whether or not the parties to a dispute have, in good faith, attempted to resolve the dispute by negotiation.
- (5) These negotiation protocols set out certain minimum standards that may assist to show that the Access Seeker and the Service Provider have acted in good faith in relation to:
 - (a) the matters relevant to negotiating access to infrastructure services; and
 - (b) the dispute resolution procedures to be attempted before an application is made to IPART for the dispute to be determined by arbitration,

in respect of the terms and conditions of access to infrastructure services that are the subject of coverage declaration or an access undertaking, any matters arising under an access agreement and any matter arising under a determination under section 40 of the WIC Act.

2 Application of these negotiation protocols

2.1 Who do these negotiation protocols apply to?

These negotiation protocols apply to:

- (1) a Service Provider whose infrastructure services provided by water industry infrastructure are the subject of either a coverage declaration or an access undertaking under Part 3 of the WIC Act. The access regime in Part 3 of the WIC Act currently applies in respect of certain water industry infrastructure of Sydney Water Corporation and Hunter Water Corporation (each a Service Provider) as described in section 22(1) and Schedule 1 to the WIC Act. However, the Minister may amend Schedule 1 of the WIC Act to add more scheduled areas or include more land in the existing areas; and
- (2) an Access Seeker who wants access to an infrastructure service (that is the subject of a coverage declaration under Part 3 of the WIC Act or access undertaking) or wants a change to some aspect of the Access Seeker's existing access to the service.

2.2 When do these negotiation protocols apply?

These negotiation protocols apply on the commencement of the WIC Act.

3 Overview of these negotiation protocols

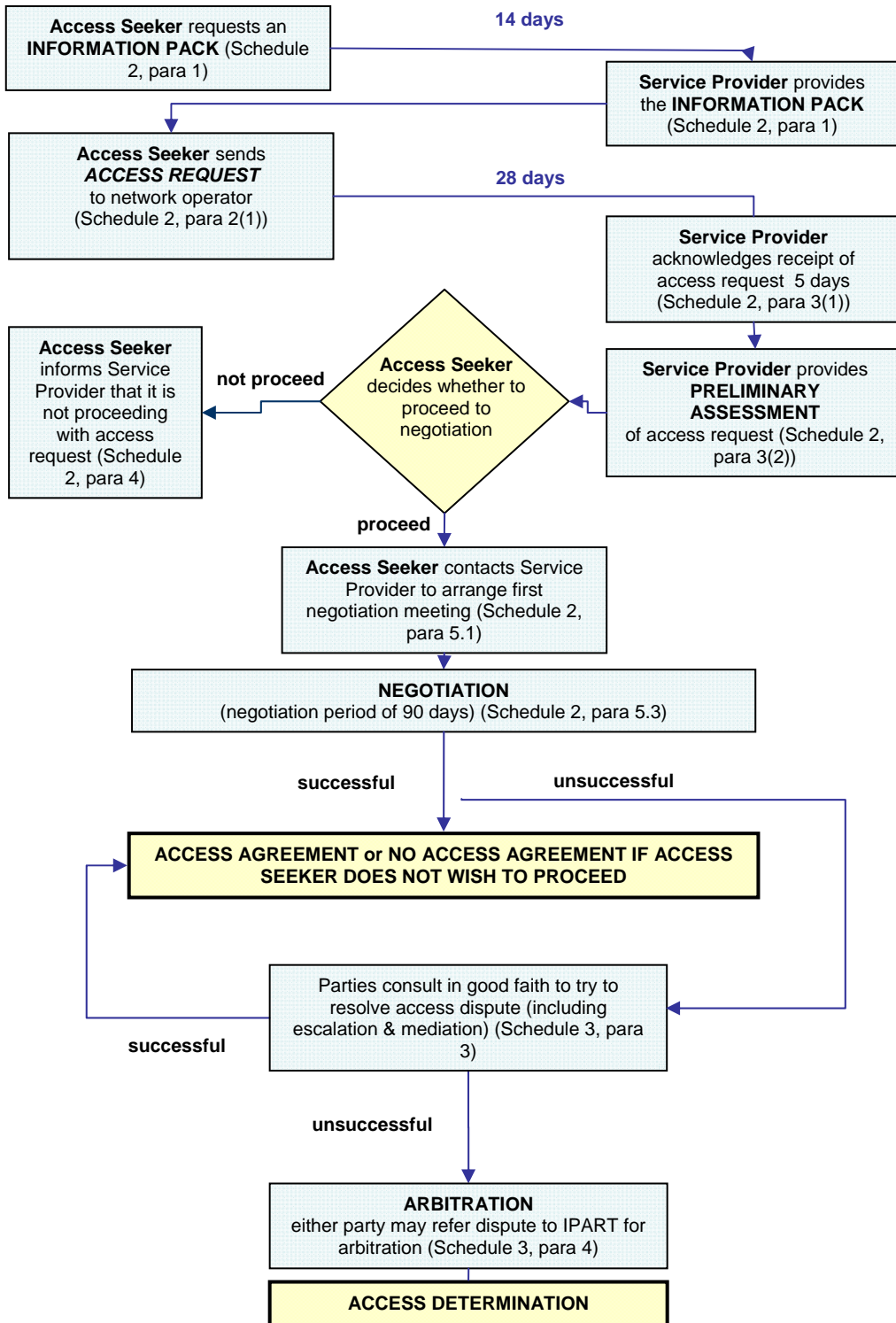
- (1) Schedule 1 sets out the information that a Service Provider must make available to an Access Seeker under Clause 8(2) of the Access Regulation.
- (2) Schedule 2 establishes the minimum requirements that Service Providers and Access Seekers should observe when negotiating access to infrastructure services.
- (3) Schedule 3 establishes the minimum dispute resolution procedures that Service Providers and Access Seekers should attempt before an application is made to IPART for the dispute to be determined by arbitration.
- (4) Schedule 4 sets out a dictionary of definitions and interpretation.

- (5) Access Seekers and Service Providers may develop and agree alternate negotiation protocols (other than Schedule 1) whether or not based on these negotiation protocols provided that if the parties agree to dis-apply any part of these negotiation protocols they must notify IPART in writing. These negotiation protocols apply if such alternate negotiation protocols are not developed or not agreed.
- (6) The main steps of the information exchange, negotiation process and dispute resolution procedures prior to arbitration are summarised in **Table A** below.

4 Amending these negotiation protocols

IPART may vary these negotiation protocols by publishing a notice of the variation or an amended version of these negotiation protocols on its website and notifying any Service Provider and Access Seeker (that it has been notified are engaged in negotiations) of the variation.

Table A Main steps of the information exchange and negotiation process



Schedule 1 - Statement of the information to be included in a Service Provider's package of information

1. Statement of the information to be included in a Service Provider's package of information

Clause 8(3)(c) of the Access Regulation requires IPART to set out in these negotiation protocols a statement of the information to be included in a Service Provider's package of information, in addition to the information required under clause 8(2) of the Access Regulation.

2. What the Service Provider must provide to an Access Seeker

- (1) An Access Seeker may request information from a Service Provider that provides an infrastructure service that is the subject of a coverage declaration or access undertaking under clause 8(2) of the Access Regulation (**Information Request**). An Information Request should be made in writing.
- (2) Within 14 days after receiving an Information Request, the Service Provider must make the following package of information (**Information Pack**) available to the Access Seeker:
 - (a) a list of all such services that are provided by the Service Provider, as described in the relevant coverage declaration or access undertaking;
 - (b) information as to the procedure to be followed to obtain access to each such services, and as to the time it is likely to take to negotiate access (assuming the matter does not go to arbitration);
 - (c) the procedure the Service Provider will apply in determining a request for access to infrastructure services that are subject to coverage declaration or an access undertaking;
 - (d) a copy of the Service Provider's access undertaking (if applicable);
 - (e) a copy of the Service Provider's cost allocation manual approved under Section 42(4) of the WIC Act. If an approved cost allocation manual is not available, the Service Provider is to provide a draft cost allocation manual;
 - (f) a copy of any proposed access agreement together with such information as is necessary to understand the derivation of any derived elements that occur in that proposed access agreement;
 - (g) the contact details (including fax, telephone and email) of the Service Provider and the name and contact details of the Service Provider's representative who is the initial point of contact for responding to questions from Access Seekers prior to the lodgement of an Access Request and to whom an Access Request may be addressed;
 - (h) a copy of these negotiation protocols and a statement that these negotiation protocols apply unless and until the Access Seeker and Service Provider agree otherwise; and
 - (i) such other information as the Service Provider considers appropriate to include in the package.
- (2) The Service Provider may provide the Information Pack to the Access Seeker in written or electronic form.

Schedule 2 – Negotiation of access to infrastructure services

1 Request for information

- (1) Under clause (8)2 of the Access Regulation, an Access Seeker may submit an Information Request to the Service Provider.
- (2) A Service Provider must provide the Information Package within 14 days of receiving the Information Request.
- (3) Schedule 1 of these negotiation protocols sets out the information that should be included in the Information Package (in addition to the information required under clause 8(2) of the Access Regulation).

2 Requesting access

The Access Seeker should submit a written access request (**Access Request**) to the Service Provider that contains (at a minimum):

- (1) a detailed description of the terms, nature and extent of access requested by the Access Seeker in respect of the infrastructure service subject to coverage declaration or an access undertaking;
- (2) supporting information that will enable the Service Provider to assess and respond to the Access Request (including information relevant to price); and
- (3) the name and contact details of the person who has primary responsibility for the Access Request.

3 Service Provider's assessment of an Access Request

- (1) The Service Provider must, by notice in writing to the Access Seeker, acknowledge receipt of an Access Request within 5 days.
- (2) Within 28 days of receiving an Access Request, the Service Provider must provide the Access Seeker with a written preliminary assessment of the Access Request, containing:
 - (a) the availability of the infrastructure service specified in the Access Request;
 - (b) the full service specification of the requested infrastructure service (described in Annexure A to these negotiation protocols);
 - (c) the terms and conditions on which the requested infrastructure service will be provided by the Service Provider;
 - (d) the proposed price or pricing methodology of the infrastructure service;
 - (e) a response to any other matter raised in the Access Request for which a response is requested or warranted;
 - (f) details of the Service Provider's operating protocols for the requested infrastructure service;
 - (g) such system operations and planning information (described in Annexure A to these negotiation protocols) which the Access Seeker can reasonably expect to require the Service Provider to supply to enable the Access Seeker and the Service Provider to conclude an access agreement for the infrastructure service; and
 - (h) any other information relevant to the Service Provider's assessment of the Access Request necessary to enable the Access Seeker and the Service Provider to conclude an access agreement for the infrastructure service.

4 If an Access Seeker decides not to proceed

- (1) If, after receiving the Information Pack or the Service Provider's preliminary assessment of the Access Request, the Access Seeker decides not to proceed with the Access Request, the Access Seeker must provide the Service Provider with notice in writing of the Access Seeker's intention to withdraw the Access Request (**Notice to Withdraw**).
- (2) If a Service Provider receives a Notice to Withdraw then the Service Provider is not obliged to respond to the Access Seeker unless the Access Seeker submits a new Access Request under paragraph 2 of this schedule.
- (3) All obligations of confidentiality between the parties continue and are enforceable, including in circumstances where the Access Seeker decides not to proceed.

5 Negotiating the access agreement

5.1 How to commence negotiations

The Access Seeker must contact the Service Provider to arrange the location, time and conduct of the first meeting between the parties (see paragraph 6 of this schedule) following:

- (1) submission of an Access Request by the Access Seeker to the Service Provider; and
- (2) the provision of a written preliminary assessment of the Access Request to the Access Seeker.

5.2 Representatives

- (1) Each party must promptly advise the other of:
 - (a) the name, position and organisation of the person who has primary responsibility for negotiations and for co-ordinating the party's negotiation team (**Commercial Representative**); and
 - (b) its negotiating team including the name, position and organisation of each member.
- (2) A party must notify the other of any change to its Commercial Representative or negotiating team within 5 days of the change. Notice must be given in writing.

5.3 Agreeing a negotiation period

The parties will agree a timeframe for negotiations, which must be no more than 90 days.

5.4 Conduct of negotiations

The Service Provider and Access Seeker must endeavour to accommodate each others' reasonable requirements in the course of negotiations. The Service Provider and Access Seeker must meet and negotiate in good faith with a view to reaching agreement on the terms and conditions, including price, on which the Service Provider must make the requested infrastructure service (as set out in the access request or some agreed modification of those requirements) available to the Access Seeker.

5.5 Access agreement

- (1) If the negotiation is successful, and agreement is reached between the Service Provider and the Access Seeker as to the terms on which the Service Provider is to

provide access to the infrastructure service the subject of a coverage declaration or an access undertaking, the parties must record their agreement in writing.

- (2) The access agreement must comply with section 39 of the WIC Act.

6 Meetings

6.1 Location of meetings

Meetings between the parties will be held at a mutually convenient location or failing agreement at the offices of the Service Provider.

6.2 Meeting agendas & papers

- (1) Before each meeting the parties must agree on the meeting agenda and whether any agenda item is to be considered on a 'without prejudice' basis.
- (2) Unless the parties agree otherwise:
 - (a) the meeting agenda will be prepared by the Service Provider and forwarded to the Access Seeker's Commercial Representative no less than 2 days before the relevant meeting;
 - (b) papers for discussion at meetings will be circulated no less than 2 days before a meeting.

6.3 Attendance of meetings

A party may bring (in addition to its Commercial Representative and negotiating team) whomever it chooses to the meeting provided the other party is given 2 days notice of the person(s) attending, their position and organisation.

6.4 Recording meeting outcomes

- (1) The parties will agree on how to record each meeting. This may include using a third party to record meeting outcomes.
- (2) All negotiation outcomes may be made subject to the approval of a party's respective Boards and senior management.

6.5 Appointing an independent facilitator

The parties may jointly request in writing that a suitably qualified person (other than a representative of the parties or IPART) be engaged as an independent facilitator to attend meetings for the purposes of facilitating negotiations in a timely manner.

7 Sharing information

7.1 Confidentiality

- (1) Commercially sensitive and confidential information exchanged between the parties in relation to negotiations, including papers tabled for discussion at meetings must be kept confidential to the parties and the parties' advisors unless otherwise agreed.
- (2) Each party must give such undertakings as to confidentiality as the other party may reasonably require.
- (3) The procedures in Schedule 3 do not affect any other rights and remedies that may be available in respect of a breach of confidentiality between the parties.

7.2 No public statements

No party will make any public statement about the content or process of the negotiations without the other party's consent.

7.3 Information required for the purpose of negotiation

The parties are encouraged to voluntarily exchange information to facilitate negotiations in preference to exercising any rights they may have under the *Freedom of Information Act 1989* (an **FOI Request**). If however, a party does make an FOI Request, the parties will use reasonable endeavours:

- (1) to quarantine the negotiation of issues subject to the FOI Request; and
- (2) to continue to progress negotiation of issues not subject to or affected by the FOI Request.

7.4 Informing affected third parties

The parties will use reasonable endeavours to give a notice to any persons whose rights under an existing access agreement or determination (or sewer mining agreement, if applicable) would be affected by implementation of an access agreement between the Access Seeker and Service Provider. By way of example, this may include where an access agreement would involve augmentation of the Service Provider's existing infrastructure.

8 Obligations of Good Faith

- (1) Service Providers and Access Seekers must act in good faith in negotiating the terms of access and in complying with these negotiation protocols.
- (2) Service Providers must use all reasonable endeavours to accommodate the Access Seeker's requirements.

9 Costs

Each party will pay its own costs arising out of negotiations and any joint costs arising from negotiations will be apportioned equally between the parties.

Schedule 3 - Dispute resolution procedures to be attempted before arbitration

1 Disputes

A dispute between a Service Provider and an Access Seeker:

- (1) 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 access undertaking; or
- (2) 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 section 40 of the WIC Act; or
- (3) as to any matter arising under an access determination made under section 40 of the WIC Act,

is capable of being referred to IPART as a dispute to be determined by arbitration.

2 Applicant to Attempt to Resolve dispute by Negotiation

- (1) Under Section 40(2) of the WIC Act, IPART may refuse to accept an application for arbitration if IPART is not satisfied that the applicant has, in good faith, attempted to resolve the dispute by negotiation.
- (2) Under Clause 8(1) of the Access Regulation, IPART must have regard to the provisions of Clause 8 in determining whether or not the parties to the dispute have, in good faith, attempted to resolve the dispute by negotiation.
- (3) Whether the parties have complied with these negotiation protocols will be relevant to IPART's assessment of whether the parties have, in good faith, attempted to resolve the dispute by negotiation.

3. Escalating a dispute and mediation

- (1) Before referring a dispute to IPART for a determination by arbitration, the parties are required to attempt, in good faith, to resolve the dispute by negotiation. This may involve:
 - (a) notifying the other party of a dispute and the other party acknowledging that notification;
 - (b) the escalation of the dispute to senior management of both parties;
 - (c) the senior management of the parties holding discussions with the view of trying to resolve the dispute;
 - (d) mediation;
 - (e) where the dispute relates to the terms of access, the parties have followed the protocols set out in Schedule 2;
 - (f) where the dispute relates to a matter arising under an access agreement, the parties have followed the dispute resolution procedures set out in that access agreement.
- (2) In the event of mediation of a dispute, the parties are encouraged to seek to agree on a suitably qualified person (other than a representative of the parties or IPART) to undertake the mediation. Parties may agree that decisions reached by mediation will be final and binding on the parties.

- (3) The dispute resolution procedures set out in paragraph 3(1) of this schedule are intended to be a non exhaustive guide as to what may constitute an attempt, in good faith, by the parties to resolve a dispute by negotiation. However, as each dispute may be different IPART will look at the facts and circumstances of each dispute to determine whether the applicant has attempted to resolve, in good faith, the dispute by negotiation.

4 Referring a dispute to IPART

Either party to a dispute may (under section 40 of the WIC Act) apply to IPART for the dispute to be determined by arbitration.

5 IPART procedural directions

- (1) Either party may notify IPART in writing that the other party has failed to comply with these negotiation protocols.
- (2) IPART may, following such a written request from a party and where IPART is satisfied that the other party has failed to comply with this schedule, give a written procedural direction requiring the other party to do (or refrain from doing) the matters specified in that direction, which in IPART's opinion are required to comply with these negotiation protocols.
- (3) If IPART is satisfied that the directed party has failed to comply with the direction (and including within any time period specified in the direction), then this may favour IPART accepting any application under section 40 of the WIC Act for the dispute to be determined by arbitration.

6 Costs

Each party will pay its own costs arising out of negotiations and any joint costs arising from negotiations will be apportioned equally between the parties. This paragraph will not apply to costs incurred by the parties (and their representatives) arising out of or in connection with an arbitration that may be subject to an IPART determination.

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Meetings between the parties will be held at a mutually convenient location or failing agreement at the offices of the Service Provider.

7.2 Meeting agendas & papers

- (1) Before each meeting the parties must agree on the meeting agenda and whether any agenda item is to be considered on a 'without prejudice' basis.
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- (3) The procedures in this schedule do not affect any other rights and remedies that may be available in respect of a breach of confidentiality between the parties.

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No party will make any public statement about the content or process of the negotiations without the other party's consent.

8.3 Information required for the purpose of negotiation

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- (1) to quarantine the negotiation of issues subject to the FOI Request; and
- (2) to continue to progress negotiation of issues not subject to or affected by the FOI Request.

9 Obligation of Good Faith

- (1) Service Providers and Access Seekers must act in good faith in respect of access disputes and in complying with these negotiation protocols.
- (2) Service Providers must use all reasonable endeavours to accommodate the Access Seeker's requirements.

Schedule 4 - Definitions and Interpretation

- 1 Words and expressions which are not otherwise defined in these negotiation protocols have the same meaning as in the *Water Industry Competition Act 2006*.
- 2 A reference to a paragraph or Annexure or Schedule is a reference to a paragraph or Annexure or Schedule of these negotiation protocols unless otherwise stated.
- 3 Notes are for guidance only and do not form part of these negotiation protocols.
- 4 A reference to a law or statute includes all amendments or replacements of that law or statute.

Annexure A System operations and planning information

The system operations and planning information that a Service Provider must provide under paragraphs 3(2)(b) and 3(2)(g) of the Schedule 2 include:

- (1) Details of the requested infrastructure service which relate to:
 - (a) the size of the infrastructure
 - (b) depth
 - (c) capacity
 - (d) flow issues (eg, Minimum flow requirements)
 - (e) specific connection requirements.
- (2) Details of that Service Provider's risk management processes for the requested infrastructure service.
- (3) Details of that Service Provider's current licences which are relevant to the requested infrastructure service.
- (4) Details of codes of practice which are relevant to the requested infrastructure service.
- (5) Details of guidelines which apply to that Service Provider for the requested infrastructure service (for example, Recycled Water Guidelines, Biosolids Guidelines).
- (6) Details of quality, environmental and safety standards such as ISO14001, ISO9001, AS4801 which are relevant to that Service Provider for the requested infrastructure service.