

WICA ACCESS FACT SHEET NO 2

Water Industry Competition Act 2006

The access regime – coverage, revocation and binding non coverage declarations and access undertakings

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 water and the provision of sewerage services; and
- ▼ a dispute resolution process to resolve disputes under the access regime and other disputes arising in connection with sewer mining.

This fact sheet contains more information about coverage, revocation and binding non coverage declarations and access undertakings. An overview of the access regime and 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 3: Dispute resolution.

Services covered by the access regime

The access regime applies only to water infrastructure services and sewerage infrastructure services (services) that fall within a Scheduled area (see WICA Schedule 1) and are the subject of either a coverage declaration or an access undertaking. At the moment, the Scheduled areas are the area of operations of the Sydney Water Corporation (as referred to in *Sydney Water Act 1994* (NSW) s 10) and the Hunter Water Corporation (as referred to in *Hunter Water Act 1991* (NSW) s 16).

Coverage declarations

A coverage declaration is a ruling made by the Minister that a particular service is covered by the access regime.

The application process

An application for a coverage declaration may be made by or on behalf of:

- ▼ the service provider for that service;
- ▼ someone who has sought access to that service, or sought to change some aspect of their existing access to that service, and failed; or

- ▼ if the service is provided by a public water utility, the Minister.

A copy of the coverage declaration form is available on IPART's website.

An application for a coverage declaration is to be lodged with IPART, who must provide a copy of the application to the Minister and certain prescribed persons and invite submissions on the application from those prescribed persons and from the public. After considering the application and any submissions it receives, IPART must report to the Minister on whether it considers the declaration criteria (see below) are met and, if they are, make a recommendation about the terms on which, and period for which, a declaration should be made.

If satisfied that the declaration criteria are met and that the service is not the subject of a non-coverage declaration or an access undertaking, the Minister must make a coverage declaration in respect of the service. The Minister must consider but is not bound to accept any advice or recommendation in IPART's report on the application, and may seek further advice from IPART in relation to the application.

IPART must be notified of the Minister's decision and the reasons for it, and will make the information contained in the decision, together with its report on the coverage application, available to the public on its Internet site.

A coverage declaration will state the period for which it will have effect, although the declaration can be renewed or revoked in certain circumstances.

Declaration criteria

The declaration criteria that must be considered by IPART when it considers a coverage declaration application are the following:

- ▼ that the infrastructure is of State significance, having regard to its nature and extent and its importance to the State economy;

- ▼ that it would not be economically feasible to duplicate the infrastructure;
- ▼ that access (or increased access) to the infrastructure by third parties is necessary to promote a material increase in competition in an upstream or downstream market;
- ▼ that safe use of the infrastructure can be ensured at an economically feasible cost, and that appropriate regulatory arrangements exist for any safety requirements; and
- ▼ that access (or increased access) would not be contrary to the public interest.

IPART has published a guide to help interested parties to better understand and participate in water industry access issues in New South Wales. This guide is available on IPART's website.

Cost allocation manuals

Within three months after an infrastructure service becomes the subject of a coverage declaration, the service provider must keep separate accounts for those of its infrastructure services that are the subject of the declaration. They must also submit a cost allocation manual to IPART in respect of that infrastructure, setting out the basis on which the service provider proposes to establish and maintain accounts for those of its infrastructure services that are the subject of a coverage declaration. The Minister may establish rules for the preparation of cost allocation manuals.

IPART may approve the cost allocation manual as submitted or require it to be amended and resubmitted for approval.

The service provider must, on and from the expiry of three months after IPART approves the manual, ensure that costs are allocated between each of those services, and between those services and other activities, in accordance with its manual.

The service provider must also keep its manual available for inspection by the public during normal office hours free of charge, but this requirement can be satisfied if a copy is made available on the service provider's Internet site.

Services deemed to be the subject of coverage declarations

Certain services were automatically deemed to be the subject of coverage declarations upon the commencement of the WICA. These services include certain sewerage services within the Bondi, Malabar and North Head Reticulation Networks (see WICA Schedule 4 Part 2).

Revocation of coverage declarations

The Minister may revoke a coverage declaration, on the application of a service provider for an infrastructure service, if any of the declaration criteria are not met. The application process is similar to that which applies when an application is made for a coverage declaration - an application must be made in the prescribed form and lodged with IPART, who must provide a copy of the application to the Minister and certain prescribed persons and invite submissions on the application from those prescribed persons and from the public. IPART must also, after considering the application and any submissions received, report to the Minister on whether the declaration criteria are met.

A copy of the revocation declaration form is available on IPART's website.

If satisfied that any of the declaration criteria are not met, the Minister must revoke the coverage declaration. The Minister must consider but is not bound to accept any advice or recommendation in IPART's report on the application, and may seek further advice from IPART in relation to the application.

IPART must be notified of the Minister's decision and the reasons for it, and must make the information contained in the decision, together with its report on the revocation application, available to the public on its Internet site or by some other means.

Access undertakings

An access undertaking is a document given to IPART by a service provider setting out their arrangements for providing access to their infrastructure services to access seekers. Having an access undertaking approved by IPART should give a service provider greater certainty about the way in which any access disputes will be resolved.

An access undertaking must provide for any disputes about the provision of access to its infrastructure to be referred to IPART for arbitration in accordance with the WICA.

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

When deciding whether to approve an access undertaking, IPART must have regard to:

- ▼ the legitimate business interests of the service provider;
- ▼ the public interest, including the public interest in having competition in markets;
- ▼ the interests of prospective access seekers;
- ▼ any other matters that IPART considers relevant.

IPART must also take into account the following pricing principles:

- ▼ the price of access should generate expected revenue for the service that is at least sufficient to meet the efficient costs of providing access to the service, and include a return on investment commensurate with the regulatory and commercial risks involved;
- ▼ the price of access should allow multi-part pricing and price discrimination when it aids efficiency;
- ▼ the price of access should not allow a vertically integrated service provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent to which the cost of providing access to other operators is higher;

- ▼ the price of access should provide incentives to reduce costs or otherwise improve productivity.

However, these principles must be implemented in a manner consistent with any relevant pricing determinations for the supply of water and provision of sewerage services.

An access undertaking does not take effect until it has been approved by IPART. It will have effect for the period specified in the undertaking, and can only be varied during that time with IPART's consent.

The service provider must keep its access undertakings available for inspection by the public, free of charge, during normal office hours, but this requirement can be satisfied by making copies of the undertakings available on their website. However, the service provider must also make copies of the undertakings available to members of the public, at cost, during normal office hours.

If an infrastructure service is covered by both an access undertaking and a coverage declaration, the coverage declaration will not apply to the service.

Binding non-coverage declarations

An application for a binding non-coverage declaration can be made by a service provider or prospective service provider. The declaration can be made by the Minister if any of the declaration criteria are not met.

A copy of the binding non coverage declaration form is available on IPART's website.

Review of decisions made under the access regime

In certain circumstances, a decision made by a Minister or IPART about a coverage declaration, access undertaking or binding non-coverage declaration may be the subject of judicial review in the Supreme Court.

If the decision relates to an access seeker's access to water infrastructure or sewerage infrastructure services, the decision may be a dispute that can be referred to IPART for arbitration (see WICA Access Fact Sheet No 3).

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.