Essential Services Commission 2009

***Inquiry into an Access Regime for Water and Sewerage Infrastructure Services—Draft Report*, June.**

RESPONSE TO INVITATION FOR COMMENTS

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1. Introduction:

I refer to the *Inquiry into an Access Regime for Water Infrastructure Services – Draft Report* (Draft Report) prepared by the Essential Services Commission of Victoria in June 2009. Several comments in the Draft Report indicate that the Commission has taken account of the New South Wales Government's approach to, and experience with, developing an access regime for water industry infrastructure under the *Water Industry Competition Act 2006* (NSW) (WICA) and its application for certification of that regime under Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA). I refer the Commission to my submissions in respect of the application for certification of the WICA access regime as background to the comments I make in relation to the Draft Report. [See http://www.ncc.gov.au/images/uploads/WICASu-002.pdf and http://www.ncc.gov.au/images/uploads/WICASu-008.pdf].

The following paragraphs offer comments on some of the recommendations of the Commission by way of support rather than advocating a change of direction. The comments are of a general nature, but the primary focus of my review of the Draft Report has been to consider the impact of the proposals in the urban context.

2. Staged Implementation

The Draft Report does not convey an urgency to conclude a legislative regime to provide access to water industry infrastructure in Victoria. This is reflected in the Commission's recommendation to follow a staged process of implementation, and thus use the opportunities offered by that approach to produce a regime that will meet the Government's objectives.

The Commission notes that:

> In designing a Victorian access regime, the Commission and the Victorian Government have an opportunity to address the concerns expressed by the NCC in relation to New South Wales' regime. Staged implementation of the regime will allow the development of a more comprehensive and well-defined regime that provides greater clarity, certainty and transparency. It will also allow the Victorian Government to fine-tune the access regime in response to industry developments and a better understanding of the nature and extent of demand for access, prior to an application for certification. [Draft Report, p 37]

Staged implementation provides an opportunity for the use of flexible and adaptive mechanisms to develop the framework for a legislative access regime. Changes can be made to the evolving paradigm to accommodate experience gained without the constraints that apply to amendment of formal legislative provisions. Draft Recommendation 3.1 is strongly supported.

3. Coverage

The scope of the regime's influence is clear from the outset. The Draft Report recommends that the entire State of Victoria be covered by the access regime. [Draft Recommendation 4.1]

However, the treatment of interstate issues was of some concern in the consideration of the application for certification of the WICA regime. The principle embodied in Clause 6(2) of the Competition Principles Agreement (CPA) provides that an access regime established in a state or territory cannot be effective if the facility has influence across a jurisdictional boundary or if the facility is located in more than one jurisdiction. The CPA calls for cross-jurisdictional consistency and co-operation where more than one regime can apply to a service so that an access seeker can follow a single process, a single body will resolve disputes and there will be a single forum for enforcement. The Commission comments in the Draft Report that:

> In Victoria, interstate issues could arise in respect of services located in the Murray Darling Basin, where trading has created a single market that crosses state borders. The relevant state governments, including the Victorian Government, have agreed that consistent regulatory arrangements should be put in place through a national scheme. [Draft Report, p 51]

A staged approach would facilitate consideration of the issues in the Murray Darling Basin and perhaps lead to an integrated inter-jurisdictional approach in the area but the Commission's final comments in relation to the consummation of an inter-governmental agreement to deal with the matter do not bode well for resolution of a difficult issue:

> At present, the Murray-Darling Basin is not included within the scheduled geographic area covered by New South Wales' access regime. No other state currently has a state-based access regime for its water industry. Therefore, including the Murray-Darling Basin within a Victorian access regime would not result in infrastructure facilities located in this area becoming subject to more than one state-based access regime. If the Basin were to subsequently become subject to another state-based access regime, an inter-governmental agreement could be made to ensure that a single process applied for seeking access.
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> The Commission has concluded that the entire state should be covered by a Victorian access regime. In respect of the Murray-Darling Basin, it seeks further information on whether any barriers to gaining access to infrastructure facilities arise as a result of differing state arrangements. It also seeks further information in relation to existing arrangements for sharing the use of rural infrastructure facilities [Draft Report, p 51]

It is open to debate whether the mechanism of an inter-governmental agreement will offer a 'comprehensive, clear and transparent' extension of the regime to the sensitive water industry environment of the Murray Darling Basin.

4. Dispute Resolution

Draft Recommendation 5.3 provides for the inclusion of limited merits review of arbitration decisions. The Draft Report explores the relevance of merits review in a number of circumstances. While I support the draft recommendation, I would encourage further consideration of full merits review.

5. Access seekers and licensing

The Commission canvasses elements to be included in a licensing system for new water and sewerage service providers. The Draft Report suggests that:

> In order to obtain a licence, access seekers would be required to demonstrate that they have sufficient capacity to carry out the activity and comply with the licence obligations. [Draft Report p 98]

The Draft Report then records that:

> The Commission recommends that financial capacity be a consideration in granting licences to ensure the long term financial viability of the water industry in Victoria.

This statement is not included in the body of a formal recommendation of the Draft Report. The fact that 'financial capacity' is to be a 'consideration' is a positive development of the requirement of section 10(4)(a) of the WICA that:

> A licence may not be granted unless the Minister is satisfied…
>
> (a) that the applicant has, and will continue to have, the capacity (including technical, financial and organisational capacity) to carry out the activities that the licence (if granted) would authorise

The ability of regulators to accurately assess the financial capacity of a potential licensee, and confidently base a decision on such an assessment at any point in time, raises a number of issues in the light of experiences of the global financial crisis of the past 18 months.

6. Entitlements to water

The need for a comprehensive system of entitlement to water, regardless of source, to enable an access regime to be effective is recognised by the Commission and raised in a number of sections of the Draft Report. [See for example Draft report p 50] Actions under the National Water Initiative support the development of entitlements for new sources and integration of water management planning and urban planning. I strongly urge regulators to prioritise the inclusion of new sources (especially raw water for recycling and salt water for desalination) into regional water planning in urban contexts so that appropriate water sharing principles, inclusive of all water resources, can be defined in those regions.

7. Conclusion

The Commission's comment that work is currently underway to develop sewer mining guidelines is noted. [Draft Report p 13-14] The notion of sewer mining in the context of an access regime poses certain challenges. Sewer mining offers the opportunity for smaller operators to obtain and use the contents of water industry infrastructure without recourse to access provisions. Does sewer mining defeat the purpose of an access regime with regard to smaller operators? At the other end of the spectrum, where an access seeker and an infrastructure owner are able to negotiate terms of access on a commercial basis without the support of an access regime, is there a real need?

It is to be hoped that there is sufficient uptake by the Victorian water industry of the opportunities offered by the staged implementation of an access regime to permit proper assessment of that regime as it develops.