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# Issues paper

## Review of the access regime that applies to the South Australian water industry

August 2023

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## Request for submissions

The Essential Services Commission (**Commission**) invites written submissions from members of the community on this paper. Written comments should be provided by **15 September 2023**.

It is the Commission's policy to make all submissions publicly available via its website ([reviews@escosa.sa.gov.au](mailto:reviews@escosa.sa.gov.au)), except where a submission either wholly or partly contains confidential or commercially sensitive information provided on a confidential basis and appropriate prior notice has been given.

The Commission may also exercise its discretion not to publish any submission based on length or content (for example containing material that is defamatory, offensive or in breach of any law).

Responses to this paper should be directed to: **Review of the water third party access regime**

It is preferred that submissions are sent electronically to: [reviews@escosa.sa.gov.au](mailto:reviews@escosa.sa.gov.au)

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## Glossary of terms

CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Commission	Essential Services Commission of South Australia
Minister	Minister for Climate, Environment and Water
NCC	National Competition Council
Sapere	Sapere Research Group, an economic consulting firm engaged to undertake a research paper on behalf of the Commission
Act	<i>Water Industry Act 2012</i>

# 1 Summary

## 1.1 Overview and purpose of access regime

The South Australian Parliament introduced Part 9A of the *Water Industry Act 2012 (Act)* – a third party access regime – to promote competition in upstream and downstream markets, to encourage efficiency, competition and innovation in the water industry, and to maintain protections for the security of the state’s water supply and the health and safety of South Australians.

The access regime establishes a negotiate-arbitrate framework to allow third parties to pay to move water or sewerage through SA Water’s water and sewerage infrastructure. The access regime provides a backstop to commercial negotiations between access seekers and SA Water, which can allow parties to negotiate on a more equal footing.

The broad roles of the regulator under the access regime include to monitor and enforce compliance with the Act, resolve disputes by conciliation and determine whether a dispute should be referred to arbitration, and prepare and deliver reports to the Minister for Climate, Environment and Water (**Minister**). SA Water’s broad roles – as a regulated operator under the access regime – include to negotiate in good faith with access seekers, provide certain information and documents to access seekers and the regulator, keep separate accounts and records, and comply with requirements of the arbitrator.

Currently, the access regime applies in full to services provided by, or through, certain declared water pipelines operated by SA Water. It applies only in part (for example, includes certain provisions for information provision, but does not allow for conciliation and arbitration) to bulk and local sewerage networks, water distribution networks to which SA Water’s license relates, and infrastructure and infrastructure services the use of which is necessary for the transport of water in declared water pipelines.

Other water industry entities are not covered under the regime at this stage. Furthermore, SA Water is required under [Ministerial Direction](#), issued under section 6 of the *Public Corporations Act 1993*, to use a state-wide retail-minus avoidable cost pricing methodology to calculate access prices for declared water pipelines unless otherwise approved by the Minister.<sup>1</sup> This particular price-setting method involves setting an access price based on SA Water’s prices for retail services plus any facilitation costs minus an amount that SA Water could avoid (over the long term) in providing access.

## 1.2 Five-year review

The Essential Services Commission (**Commission**) is the designated regulator under the access regime.<sup>2</sup> Under section 86ZR of the Act, the Commission must conduct a review of the water infrastructure and sewerage infrastructure subject to Part 9A and form a view as to whether or not the access regime should continue from 30 June 2024 for a period of five years. The Commission’s final report setting out the review’s conclusions and recommendations must be provided to the Minister. The decision to continue or terminate operation of the access regime rests with the Minister.

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<sup>1</sup> Hon. I.K. Hunter, *Direction to the SA Water Corporation pursuant to section 6 of the Public Corporations Act 1993*, 24 June 2016.

<sup>2</sup> Section 86C of the Act.

The access regime has been in operation since 1 July 2016, and the Commission [last reviewed](#) the regime in 2019. At that time, the Commission recommended that the regime continue for a five-year period from 1 July 2019 to 30 June 2024.<sup>3</sup> In line with this, the Government extended operation until 30 June 2024.<sup>4</sup>

### 1.3 Feedback from stakeholders

This issues paper outlines the scope of the five-year review and highlights key matters that the Commission intends to consider. The Commission will consult with stakeholders, including current and prospective access seekers and SA Water. The Commission will consider information provided by stakeholders in preparing its draft report. The draft report will contain a further call for submissions prior to the final report.

As part of the review, the Commission will also consult on options to improve the access regime. For instance, recognising stakeholders' concerns about access prices (expressed in [2019](#) and in [2020](#)),<sup>5</sup> the Commission engaged Sapere Research Group (**Sapere**) to prepare a background research paper on access prices. Sapere's technical research paper expresses its opinion the various issues. It aims to both provide general background information and also to elicit views and information from stakeholders about the potential advantages and disadvantages of access pricing methodologies. The research paper is available on the Commission's website.<sup>6</sup>

### 1.4 Next steps

The Commission will consider information provided by stakeholders in preparing a draft report. Submissions to the issues paper are due by Wednesday, 15 September 2023, and can be submitted electronically to [reviews@escosa.sa.gov.au](mailto:reviews@escosa.sa.gov.au) or following instructions above. The draft report will contain a further call for submissions prior to the final report.

Table 1: Timetable of review

Stage	Planned timing
Issues paper	August 2023
Public consultation	August 2023 to 15 September 2023
Draft report	Early 2024
Public consultation	Early 2024
Final report	Submitted to Minister April 2024

<sup>3</sup> Commission, *2019 Review of Water Third Party Access Regime*, May 2019, pp. 1-14.

<sup>4</sup> Government Gazette, *Water Industry Variation Regulations 2019*, 27 June 2019, p. 2363.

<sup>5</sup> See Commission, pp. 9-10. A similar view was expressed by stakeholders to the Government's Review of the Water Industry Act 2012; see Department for Environment and Water, *Review of the Water Industry Act 2012*, September 2020, pp. 10-13.

<sup>6</sup> Refer to: [www.escosa.sa.gov.au/ArticleDocuments/21968/20230802-Water-ReviewThirdPartyAccessSAWaterServices-BackgroundResearchPaper-SapereResearchGroup.pdf.aspx?Embed=Y](http://www.escosa.sa.gov.au/ArticleDocuments/21968/20230802-Water-ReviewThirdPartyAccessSAWaterServices-BackgroundResearchPaper-SapereResearchGroup.pdf.aspx?Embed=Y)

## 2 Purpose, operation and scope of access regime

### 2.1 Purpose of access regime

Part 9A of the Act sets out the framework for the operation of, and access to, declared water and sewerage infrastructure and infrastructure services. The full set of objects of the Act are:<sup>7</sup>

- ▶ to promote planning associated with the availability of water within the State to respond to demand within the community
- ▶ to promote efficiency, competition and innovation in the water industry
- ▶ to provide mechanisms for the transparent setting of prices within the water industry and to facilitate pricing structures that reflect the true value of services provided by participants in that industry
- ▶ to provide for and enforce proper standards of reliability and quality in connection with the water industry, including in relation to technical standards for water and sewerage infrastructure and installations and plumbing
- ▶ to protect the interests of consumers of water and sewerage services
- ▶ to promote measures to ensure that water is managed wisely, and
- ▶ to promote the economically efficient use and operation of, and investment in, significant infrastructure so as to promote effective competition in upstream and downstream markets.

In the development of the access regime, the Act was amended to incorporate the final object (listed above) in respect of promoting competition in related markets. Accordingly, a key aim of the access regime is to facilitate economic efficiency and investment in (monopoly) transportation services operated by SA Water, thereby encouraging competition in *upstream markets* (such as in trade in water entitlements and the development of water sources) and, over time, also in *downstream markets* (such as in the water and sewerage retail services provided to end-use customers).<sup>8</sup> At the same time, the access regime aims to promote innovation in the water industry, and to maintain protections for the security of the state's water supply and the health and safety of South Australians.

As stated by Hon. I.K. Hunter in the 2015 second reading speech to the South Australian Parliament:<sup>9</sup>

*'The amendments to the Water Industry Act contained in the Bill provide for the establishment of a light-handed access regime the Government considers appropriate given the current stage of development of the State's water industry. The access regime will be monitored and regularly reviewed by the regulator and, where appropriate, it can be adjusted to suit changing circumstances.'*

*'While it may take some time to fully realise their benefits, the extensive reforms implemented by the Government establish a foundation for the development of a competitive, efficient, innovative and safe water services sector so crucial to the well-being of the whole South Australian community.'*

<sup>7</sup> Section 3 of the Act.

<sup>8</sup> Full retail contestability was not intended at the introduction of Part 9A of the Act; for instance, see Department of Treasury and Finance, *Access to Water and Sewerage Infrastructure*, Explanatory Memorandum, September 2013, p. 7, available at: [https://www.treasury.sa.gov.au/\\_data/assets/pdf\\_file/0005/515174/access-to-water-and-sewerage-infrastructure.pdf](https://www.treasury.sa.gov.au/_data/assets/pdf_file/0005/515174/access-to-water-and-sewerage-infrastructure.pdf).

<sup>9</sup> Hon. I.K. Hunter, *Second reading speech for Water Industry (Third Party Access) Amendment Bill*, 11 February 2015, Hansard.

The access regime finds its origins in *Water for Good*, a 2010 South Australian Government plan outlining proposed water industry reforms.<sup>10</sup> The proposal for an access regime was seen as a complement to other water industry reforms. As stated in the Government's Water for Good plan:<sup>11</sup>

*'Allowing new entrants access to existing monopoly infrastructure is a necessary step to encourage the entry of new, innovative and diverse supply sources, including non-rain-dependent sources. Access may help to achieve economically viable investment and encourage efficient use of urban and regional water and wastewater infrastructure...'*

*In practice, third-party access could involve a company securing its own water supply and accessing SA Water's network to deliver the water to customers. Alternatively, a competitor could source wastewater and use SA Water's wastewater network to transport this to a treatment plant for sale to recycled water customers. The greatest opportunities for access may be in supplying non-residential customers.'*

In practice, if a party seeks access to transport water through SA Water's network, the access regime's purpose can be represented diagrammatically in Figure 1.

Figure 1: Purpose of access regulation for water transportation services

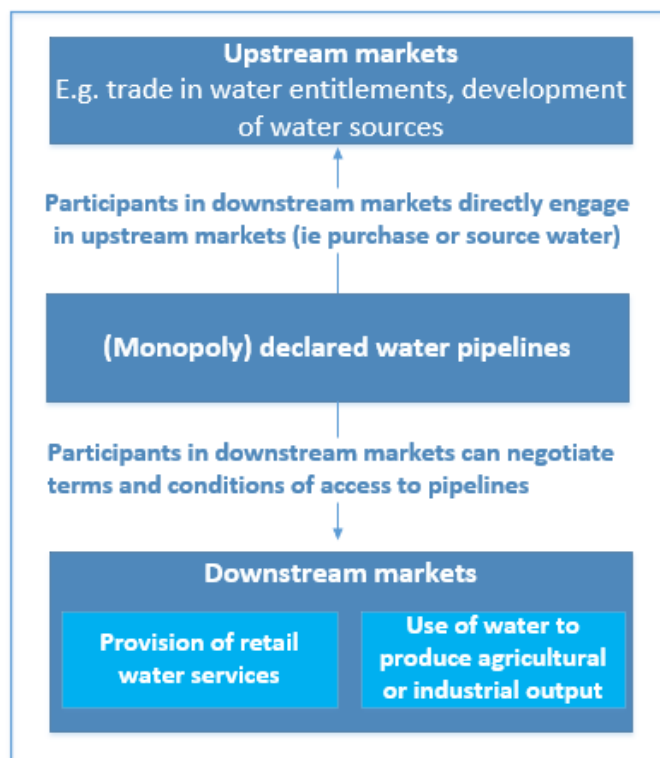


Figure 1 illustrates that 'downstream markets' can involve new entrants in the retail sector as well as parties looking to purchase and/or develop water sources for end purposes unrelated to the provision of retail services (for example, water transported for use as an input to agricultural and/or industrial production). The term 'upstream markets' can have multiple interpretations. The example in Figure 1 refers to the market for water entitlements, and the market for existing and/or new sources of water. Potential new entrants and producers may engage directly in water markets and/or may look to invest in and develop water sources. Consequently, to the extent that pipeline capacity exists, and transportation services are operated efficiently, then an access regime can, in principle, promote new

<sup>10</sup> Hon. I.K. Hunter, Government Gazette, 16 June 2015: *'...this bill [Water Industry (Third Party Access) Amendment Bill] is an important step in the water industry reforms that this government has progressed since the release of the state's water security plan, Water for Good, in 2009'*

<sup>11</sup> South Australian Government, *Water for Good*, June 2010, pp. 148-149.



entry in the retail sector, and also provide support to trade in water markets, to investment in upstream markets and to production in industries that are reliant on water as a key input.

## 2.2 Operation of access regime

The access regime establishes a negotiate-arbitrate framework that provides a fallback regulatory option to improve the position of those seeking to commercially negotiate with SA Water for access to declared infrastructure services. The availability of that regulatory option may reduce SA Water's capacity to dictate terms and conditions and thereby allow parties to negotiate on a more equal footing. This situation can support voluntary commercial access agreements that are mutually beneficial relative to the case where such a regulatory option is not in place.

The access regime requires SA Water to provide information to assist access seekers.<sup>12</sup> For example, if requested in writing, SA Water must provide an information brochure,<sup>13</sup> and on an application from an access seeker, SA Water must provide specific information to assist the access seeker in formulating an access proposal.<sup>14</sup>

The access seeker can submit a formal access proposal to SA Water (outside of any commercial voluntary negotiations), and, after receiving the proposal, SA Water must notify the proponent as to whether they are prepared to provide access and, if so, on what terms and conditions.

Should voluntary negotiations for access to water or sewerage infrastructure and infrastructure services fail,<sup>15</sup> the access regime establishes a role for the Commission to, in the first instance, seek to resolve the dispute between the parties by conciliation. If a dispute is not resolved by conciliation, the Commission may refer the dispute to arbitration. By way of background, an arbitration [flow chart](#) is available on the Commission's website. To date, there have been no disputes referred to the Commission.

Overall, the access regime fits within the broader framework of national access legislation. The National Competition Council (NCC) [assessed](#) the access regime and the then Commonwealth Treasurer [certified the regime](#) as effective for a period of ten years from 22 May 2017.<sup>16</sup> This means that alternative pathways for access under Part IIIA of the *Competition and Consumer Act 2010 (Cth)* (CCA) (for instance, via a declaration or a voluntary access undertaking) are not available during the period in which the access regime is certified.<sup>17</sup>

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<sup>12</sup> For instance, see section 86F and 86 of the Act.

<sup>13</sup> This should contain, among other things, terms and conditions of access, procedures to determine access, information about relevant prices and costs (general in nature), and a standard access agreement.

<sup>14</sup> This information includes details about infrastructure utilisation, technical and economic feasibility to add or alter infrastructure, and general terms and conditions including of a likely price.

<sup>15</sup> If, after two months, the regulated operator, the proponent, and any interested third parties have not agreed on terms for the provision of access, a dispute automatically exists. See section 86K of the Act.

<sup>16</sup> Hon. S Morrison, *Decision on effectiveness of access regime under section 44N of the Competition and Consumer Act 2010 (Cth)*.

<sup>17</sup> Certification provides a formal link between the national access regime under Part IIIA of the CCA and a state-based access regime. This serves to improve consistency and reduce regulatory duplication. See NCC, *South Australian Water Access Regime*, Final recommendation, March 2017, pp. 4-52.

## 2.3 Coverage of access regime

As noted earlier, the access regime has been in operation since 1 July 2016. The Government and the Minister determine the extent to which the access regime applies to water and/or sewerage infrastructure and/or applies to operators (noting that the Governor makes proclamations to give this effect). As outlined by [Proclamation](#) in 2016,<sup>18</sup> the access regime *applies in full* only to services provided by, or through, declared SA Water infrastructure, which at present comprises the following pipelines:

- ▶ Murray Bridge to Onkaparinga
- ▶ Mannum to Adelaide
- ▶ Swan Reach to Paskeville
- ▶ Myponga to Adelaide
- ▶ Morgan to Whyalla
- ▶ Taillem Bend to Keith
- ▶ Eyre Peninsula, and
- ▶ Glenelg to Adelaide.

Of the eight proclaimed water pipelines listed above, four are currently utilised by third parties for the commercial transportation of either treated or untreated water (Table 1).<sup>19</sup>

The movement of treated and untreated water can be a factor that access seekers need to consider. To the extent that water treatment occurs early in the supply chain and, therefore, its costs may not be avoidable, the access seeker may pay a higher cost than otherwise would be the case (i.e. transportation could be of a water quality higher than needed for the access seekers' purposes).

Table 1: Declared water pipelines and commercial transportation (access) agreements, as of 2021-2022<sup>20</sup>

Declared pipelines covered under access regime	Currently used for transportation services under voluntary commercial agreements	No. of commercial access agreements
Murray Bridge to Onkaparinga (untreated water)	Yes	1
Mannum to Adelaide (untreated water)	Yes	10
Swan Reach to Paskeville (treated water)	Yes	62
Myponga to Adelaide (treated water)	No	0
Morgan to Whyalla (treated water)	Yes	94
Taillem Bend to Keith (treated water)	No	0
Eyre Peninsula (treated water)	No	0
Glenelg to Adelaide (recycled water)	No	0

<sup>18</sup> Government Gazette, *Water Industry (Third Party Access) Proclamation 2016*, 16 June 2016, p. 2109.

<sup>19</sup> Note that the pipelines listed in Table 1 as 'not currently used for transportation services' are still actually being used by SA Water, just not by third parties.

<sup>20</sup> The source of information on access agreements is SA Water.

### 2.3.2 Area of partial coverage

The access regime applies *only in part* to SA Water's bulk sewerage and local sewerage networks, the water distribution networks to which SA Water's license relates, and infrastructure and infrastructure services (such as treatment plant, pumping stations, storage tanks and surge protection units and valves) the use of which is necessary for the transport of water or sewerage in water/sewerage infrastructure that is declared by [Proclamation](#).<sup>21</sup>

The relevant parts of the access regime that apply to the services provided by such infrastructure are:

- ▶ provision of an information brochure by SA Water to prospective access seekers<sup>22</sup>
- ▶ provision of information by SA Water to access seekers on a non-discriminatory basis<sup>23</sup>
- ▶ provision by SA Water of all copies of access contracts to the Commission,<sup>24</sup> and
- ▶ provision of specified access information by SA Water to the Commission.<sup>25</sup>

For instance, an access seeker looking to innovate and source wastewater could use SA Water's bulk and local sewerage network to transport wastewater to a treatment plant for sale to recycled water customers.<sup>26</sup> In this circumstance, the access seeker would have access to certain information supplied by SA Water and SA Water would have certain obligations that it must meet. However, the partial coverage of the access regime means that any access seekers are not afforded the same level of protection as is the case for the fully covered water pipelines specified earlier. That is, access seekers have no recourse to conciliation or arbitration under the access regime.

Nevertheless, partially covered infrastructure services may be the subject of an application for declaration or a voluntary access undertaking under the national access regime<sup>27</sup> (although, in line with the national [Competition Principles Agreement](#), for the infrastructure services to be covered they would need to be assessed as being of 'national significance'<sup>28</sup>).

### 2.3.3 Exclusions from the access regime

There are services and infrastructure that are excluded from the access regime's scope, as outlined by Proclamation.<sup>29</sup> These include:

- ▶ infrastructure operated by an irrigation infrastructure operator, if that operator operates the water service infrastructure for the purposes of delivering water for the primary purpose of being used for irrigation, and
- ▶ infrastructure operated by entities other than SA Water.

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<sup>21</sup> Government Gazette, *Water Industry (Third Party Access) Proclamation 2016*, 16 June 2016, p. 2109.

<sup>22</sup> Section 86F of the Act.

<sup>23</sup> Section 86H of the Act.

<sup>24</sup> Section 86ZO of the Act.

<sup>25</sup> Section 86ZP of the Act.

<sup>26</sup> South Australian Government, p. 148.

<sup>27</sup> NCC, p. 9.

<sup>28</sup> For declaration under Part IIIA of the CCA, five criteria must be met. One of those criteria, known as criteria (c), is that the facility is of national significance, having regard to the size of the facility, the importance of the facility to trade or commerce and the importance of the facility to the national economy. See subsection 44G(2) of the CCA.

<sup>29</sup> Government Gazette, p. 2109.

Also, it is worth noting that SA Water offers wholesale water services to customers. This includes the transportation and purchase of water. An example of this could be the purchase of wholesale water arrangements for the purposes of use by a new residential development. For many access seekers obtaining water at the right price is the priority. However, the third party access regime covers access to infrastructure services *only*, not the sale of wholesale water services.

## 3 Economic context of water infrastructure and infrastructure services

### 3.1.1 Nature and characteristics of demand

As the access regime applies in full to the declared water pipelines, the following section focuses on water transportation, rather than bulk or local sewerage transportation. (It is noted there have been no third-party commercial agreements in relation to sewerage infrastructure and infrastructure services.)

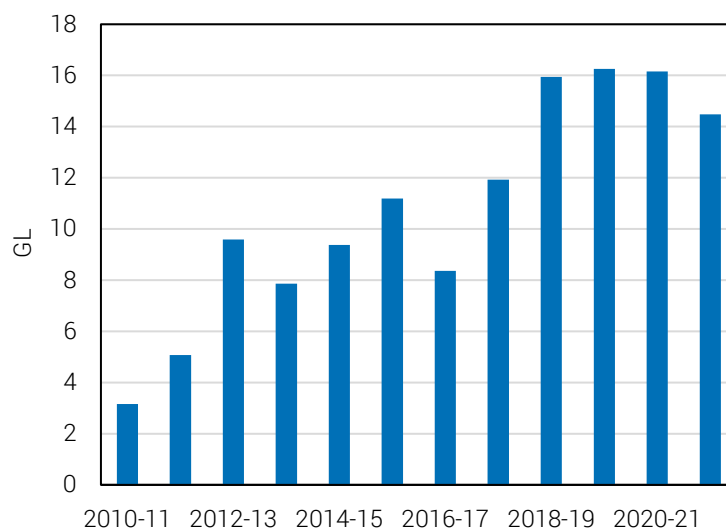
SA Water's water infrastructure and infrastructure services allows SA Water, which is a vertically integrated operator, to store, manage and deliver water to retail customers. In addition, SA Water's water infrastructure and infrastructure services facilitates, where capacity is available, the transportation of water to third parties. Those third parties may, for instance, purchase water in upstream markets, pay to transport it, and then use it either as an input into agricultural and/or industrial production or in providing water retail services (as a new entrant in the retail sector).

Given the fixed capacity of SA Water's pipeline infrastructure, any changes in demand for access can improve, or lessen, pipeline utilisation. This can result in more or less recovery of SA Water's fixed infrastructure costs. Ultimately, more utilisation and recovery of the fixed costs of pipelines by SA Water would be in line with the objective of efficient use and operation of the infrastructure.

The quantity of water transportation services demanded is determined by a range of supply- and demand-related factors. For example, rather than using SA Water's network to transport water, producers could instead source water from alternative supplies (if options existed) and/or could choose to invest in local storage and abstraction. In terms of the water retail sector, potential new entrants could be enticed, if there were latent, or explicit, demand from households and businesses for new and innovative service offerings and/or lower-cost retail services. Moreover, transportation services for third parties can depend on the extent to which capacity is available, including at cyclical points in time, and this can be impacted by household and business demand for SA Water's water retail services.

An effective regulatory backstop can incentivise commercial negotiations between an access seeker and SA Water. Voluntary access agreements have grown strongly over the past decade. This demand has come primarily from the agricultural sector. The annual average volume of access transportation volumes was around 15 GL between 2018-2019 and 2020-2021, up from an annual average of around 8 GL in the five years prior (Figure 2).

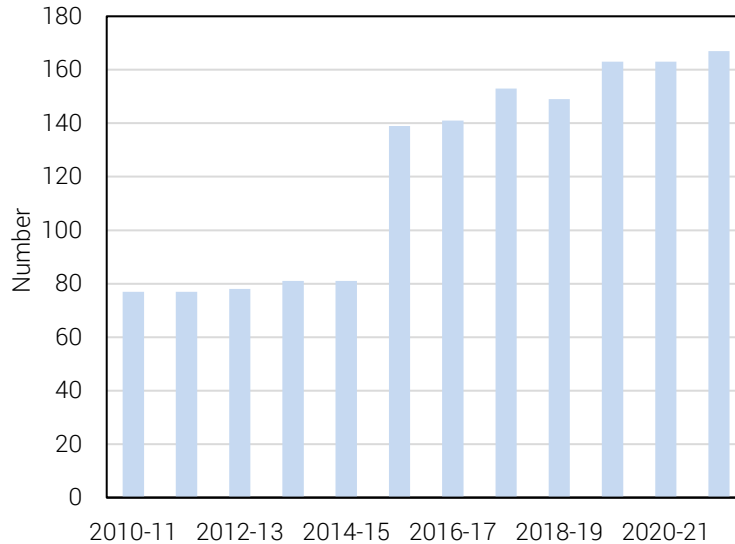
Figure 2: Volume of water transported for third parties through voluntary access agreements



Source: SA Water

The number of individual commercially negotiated access agreements has increased strongly, to currently sit at close to 170 (Figure 3). Many of these individual agreements are part of negotiated schemes to provide transportation of water to end users in the Clare Valley, Barossa Valley and Eden Valley.<sup>30</sup>

Figure 3: Number of individual commercial access agreements for water transportation services



Source: SA Water

The Commission is interested in information and views from stakeholders about the outlook for demand for access to SA Water’s infrastructure and infrastructure services.

**Questions for stakeholders**

What factors have led to the increase in voluntary access agreements over the past decade? Are these factors likely to support further growth in access agreements, or do stakeholders anticipate stable or decreased demand for commercial access in future?

Are current access seekers looking to expand? Are prospective access seekers considering any new third party access arrangements or schemes?

**3.1.2 Market power and competitive pressures**

Access regimes are generally implemented to counter information asymmetry and the risk of improper exercise of market power by owners of monopoly infrastructure, for example where anticompetitive advantages may be available to a regulated operator. The extent of market power, or conversely, the degree of competitive pressure is central to the question of whether the access regime is necessary to achieve the objects of the Act.

The Commission’s [previous review](#) in 2019 concluded that SA Water’s declared infrastructure has natural monopoly characteristics (i.e. high fixed costs and low variable costs) and these characteristics can create high barriers to entry and potentially allow the ability to set access prices regardless of the actual cost.<sup>31</sup>

<sup>30</sup> These water transportation schemes include those related to Clare Valley Peak Water Transportation; Clare Valley Off-peak Water Transportation; Barossa Valley, Eden Valley Water Transportation; and Barossa Infrastructure Limited Water Transportation.

<sup>31</sup> Commission, pp. 6-7.

The extent of market power, however, may not be uniform across the declared infrastructure. In particular, the location and nature of certain pipelines may mean that alternative supply options may be available. There may also be bargaining power among some access seekers, which can assist them during negotiations with SA Water. Further, to the extent there is available pipeline capacity and/or there is a desire to attract access seekers in future, then SA Water can have incentives to negotiate access agreements. These factors may exert competitive forces that allow parties to negotiate on a more equal footing.

On the other hand, there may be declared pipelines for which a current or prospective access seeker has no alternative available. Further, the cost of duplicating, or substantially expanding, certain pipelines may not be profitable without a significant increase in demand for transportation services. In this situation, this can raise barriers to entry and may increase the risk of market power being used for improper purposes (such as by preventing access to competitors and customers, setting prices in excess of the cost of supply and reducing service quality).

The Commission is interested in information and views from stakeholders about the extent to which SA Water has the potential to exercise market power for an improper purpose.

#### Questions for stakeholders

Are substitute supply options available for current and prospective access seekers? If so, how feasible are these options? Do the availability and feasibility of substitute supply options differ according to regional locations and declared pipelines involved?

To what extent do access seekers have bargaining power when seeking access to declared pipeline infrastructure? Can this differ across SA Water's declared pipeline infrastructure and across geographic regions?

## 4 General assessment framework for 2024 review

The Commission's review takes the water infrastructure and sewerage infrastructure subject to the regime on an 'as it stands' basis, as it is set out in the Act and the [Proclamation](#). Then, given this, the Commission must determine whether the access regime should continue to apply.

In making its assessment, the Commission will be informed by the benefits and costs of the current access regime, taking into account the costs and benefits of feasible alternatives (such as, for instance, relying on the national access regime instead or having no formal type of access regime in place).

Where possible, the assessment will consider declared infrastructure in aggregate and separately. This type of assessment framework was used by the Commission in its [2019](#) review.

Table 2: Examples of benefits and costs under different access arrangements

<b>Status quo: Access regime continues to apply</b>
<ul style="list-style-type: none"> <li>- benefit of protecting against market power and promoting activity in related markets under current access arrangements</li> <li>- compliance costs under current access arrangements</li> <li>- risk of regulatory failure (such as any impact on investment)</li> </ul>
<b>Counterfactual 1: If access sought under national access regime</b>
<ul style="list-style-type: none"> <li>- benefit of protecting against market power and promoting activity in related markets under current access arrangements so long criteria are met including that declared infrastructure is of 'national significance' (a requirement under the Competition Principles Agreement)</li> <li>- compliance costs under the national regime</li> <li>- risk of regulatory failure (such as any impact on investment)</li> <li>- uncertainty and transition costs (from a state-based regime to access under the national regime)</li> </ul>
<b>Counterfactual 2: No access regime</b>
<ul style="list-style-type: none"> <li>- risk of misuse of market power, including impacts on related markets, but reduced compliance costs and removal of the risk of regulatory failure</li> </ul>

### 4.1 Benefits and costs arising from the presence of the access regime

The Commission will consider whether or not there is evidence that market power has been, or could be, used for improper purposes, and consider whether or not the protections provided by the access regime are effective.

The Commission is also interested in information on direct costs (regulatory compliance costs) and any indirect costs imposed by the access regime. Stakeholders' experience in paying for the costs associated with requests for further information about third party access is also of interest.<sup>32</sup>

<sup>32</sup> According to SA Water's website, the costs associated with obtaining further information about third party access is around \$5,500 for water and recycled water, and \$4,500 for sewerage.



**Questions for stakeholders**

To what extent do stakeholders see value in having an access regime as a form of protection for access seekers?

To what extent do stakeholders see value in the information disclosure requirements under the access regime?

For stakeholders that have sought access to SA Water's infrastructure, but did not reach a voluntary agreement, what were the key impediments (i.e. price, terms and conditions, other)? Was the process of conciliation and arbitration considered – if not, why?

What other benefits does the access regime deliver?

What are the direct and indirect costs of the access regime?

Have stakeholders sought further information and paid the cost charged by SA Water for obtaining it? Did the information prove to be useful in developing access arrangements?

## 4.2 Alternatives to the current access regime

If this state-based access regime expired, the national regime may provide some level of regulatory protection for access seekers;<sup>33</sup> however, as noted earlier, it may not apply to infrastructure if they do not meet relevant criteria in the national [Competition Principles Agreement](#), such as the 'national significance' test.<sup>34</sup> In other regulatory contexts (such as in the rail sector), it has been suggested by [certain stakeholders](#) that the time taken to resolve access applications under the national access regime can add uncertainty and cost.<sup>35</sup>

**Questions for stakeholders**

To what extent would the national access regime apply in the absence of a state regime?

What would be the costs and benefits of regulating access arrangements through the national regime?

<sup>33</sup> Access under this pathway may occur through declaration of services by the relevant Commonwealth Minister or an access undertaking submitted by the service provider and approved by the Australian Competition and Consumer Commission under Part IIIA of the CCA.

<sup>34</sup> See subsection 44G(2) of the CCA.

<sup>35</sup> For example, see South Australian Freight Council, *Submission to the 2020 SA Rail Access Regime Review Draft Report*, July 2020, p. 2.

## 5 Other issues

### 5.1 Access prices

As mentioned earlier, stakeholders have expressed concern about access prices. Those concerns were drawn out in [2019](#), as part of the Commission's periodic five-year review,<sup>36</sup> and also in [2020](#), as part of the Government's Review of the Water Industry Act 2012.<sup>37</sup> In particular, there have been concerns about a lack of transparency and that the methodology for access prices outlined in the [Ministerial Direction](#)<sup>38</sup> may deter entry and not provide support to activity in industries reliant on water as a key input.<sup>39</sup>

How access prices are set is an issue for Government policy and, in this respect, the Commission does not have the power to make changes to the current regime. Nonetheless, given stakeholder interest in the area, and recognising that the access regime's effectiveness can be linked to how access prices are currently set and/or are expected to be set, the Commission is seeking information and views from stakeholders on the issue.

Consulting firm, Sapere, has prepared a technical research paper to accompany the Commission's issues paper. This can be found on the Commission's website, published alongside this issues paper.

Sapere's research paper aims to provide background information and it aims to elicit views and information about the potential advantages and disadvantages of access pricing methodologies. The research paper expresses the opinions of Sapere on various access pricing issues.

The research paper highlights there could be benefits from:

- ▶ improving transparency on access pricing, including by removing any ambiguity about when and how the Ministerial Direction on access pricing is to be applied
- ▶ clarifying if a cost-based approach should be applied in determining access prices for third parties who, for instance, source water in upstream markets, pay to transport it, and then use it as an input into agricultural and/or industrial production, and
- ▶ increasing the potential financial and non-financial incentives for SA Water to encourage, subject to capacity availability, utilisation of its infrastructure, in order to provide transportation services for third parties who are sourcing water in upstream markets and using it as an input into agricultural or industrial production.

The suggestions outlined above are broadly in line with the stakeholder proposals in the Government's [Review of the Water Industry Act 2012](#).<sup>40</sup>

In relation to access prices and retail competition, Sapere's research paper highlights that there are varied issues to consider, each of which has costs and benefits. Issues include that retail competition could be encouraged through reduced information barriers and financial incentives, and, possibly, if SA Water's retail prices were aligned with the long-run marginal cost of supply. At the same time, the Sapere research paper highlights the common acceptance of the use of the state-wide retail-minus avoidable cost pricing methodology, in order to protect against the circumstances in which private providers gain access to low-cost sections of a supply network, leaving the incumbent monopoly to

<sup>36</sup> Commission, pp. 9-10.

<sup>37</sup> Department for Environment and Water, pp. 2-3, 10-13.

<sup>38</sup> Hon. I.K. Hunter, 24 June 2016.

<sup>39</sup> Commission, pp. 9-10, and Department for Environment and Water, pp. 10-13.

<sup>40</sup> In particular, the suggestions appear consistent with the 'economic expansion' model of access pricing, as described in the Government's Review of the Water Industry Act 2012; see Department for Environment and Water, p. 12.

serve high-cost sections of the network, and thereby potentially creating upward price pressure for remaining customers. The Commission has previously noted that any consideration of alternative access pricing arrangements should fully consider the costs and benefits.<sup>41</sup>

For more details, please see the Sapere research paper.

#### Question for stakeholders

Do stakeholders consider current access pricing to be transparent?

What changes could improve access pricing arrangements? What would be the costs of particular access pricing arrangements?

To what extent could financial or non-financial incentives within the regulatory framework be adopted in order to promote greater utilisation of declared infrastructure?

To what extent have current access pricing arrangements impacted on entrants (or potential entrants) in the retail segment of the market?

## 5.2 Limited criteria and mechanism to obtain declaration for infrastructure

Both the [Commission](#) and the [NCC](#) have previously highlighted that there is no formal mechanism for access seekers to apply to have water and/or sewerage infrastructure and infrastructure services covered under the access regime. Nor does the access regime formally set out criteria that the Governor should consider when making a coverage decision (by proclamation).<sup>42</sup> The Government's Review of the Water Industry Act 2012 recognised the issue and recommended the development of supporting policy to provide clarity on the issue.<sup>43</sup> The Commission is interested in stakeholders' experience and views on the issue of the criteria and mechanism to obtain declaration for infrastructure.

#### Questions for stakeholders

What would be the costs and benefits of introducing a mechanism for stakeholders to seek to have water and sewerage infrastructure and infrastructure services declared or excluded from the access regime, and what form should it take?

How would such a mechanism operate and what criteria should be included?

<sup>41</sup> Commission, p. 11.

<sup>42</sup> Commission, p. 10, and NCC, p. 16.

<sup>43</sup> Department for Environment and Water, p. 3, 11-13.

## 6 Next steps

The Commission will consider information provided by stakeholders in preparing a draft report. Submissions to the issues paper are due by Wednesday, **15 September 2023**, and can be submitted electronically to [reviews@escosa.sa.gov.au](mailto:reviews@escosa.sa.gov.au) or following instructions above. The draft report will contain a further call for submissions prior to the final report.

Table 2: Timetable of review

Stage	Planned timing
Issues paper	August 2023
Public consultation	August 2023 to 15 September 2023
Draft report	Early 2024
Public consultation	Early 2024
Final report	Submitted to Minister April 2024



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