

Third Party Access – Water

Information Session March 2016



Protection of the long term interests of South Australian consumers with respect to the price, quality and reliability of essential services

Purpose of Session



- To inform stakeholders about the Third Party Access Regime to take effect in South Australia from 1 July 2016.
- Focus is on the requirements of the legislation and the Commission's role.
- For the Commission to gain information on matters that could assist the effectiveness of the regime.

Structure of Session



- Opening Remarks (Sandy Pitcher CE, DEWNR)
- Overview of ESCOSA (Adam Wilson CEO, ESCOSA)
- Process to date
- Broad overview of the Regime
- Q&A

Opening Remarks



Sandy Pitcher CE, DEWNR

Overview of ESCOSA



Adam Wilson CEO, ESCOSA

Process to date



- 1 July 12 Water Industry Act 2012 commenced (s26)
- 1 Feb 13 Report released for public comment
- 26 Sept 13 Consultation Draft of Bill tabled and released for public comment
- 11 Feb 15 Bill introduced
- 22 Oct 15 Bill passed
- Prior 1 July Proclamation, Ministerial Direction

Overview of TPA Regime



PURPOSE

- The *Water Industry (Third Party Access) Amendment Act 2015* amends the Objects of the *Water Industry Act 2012* by inserting the following objective:

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

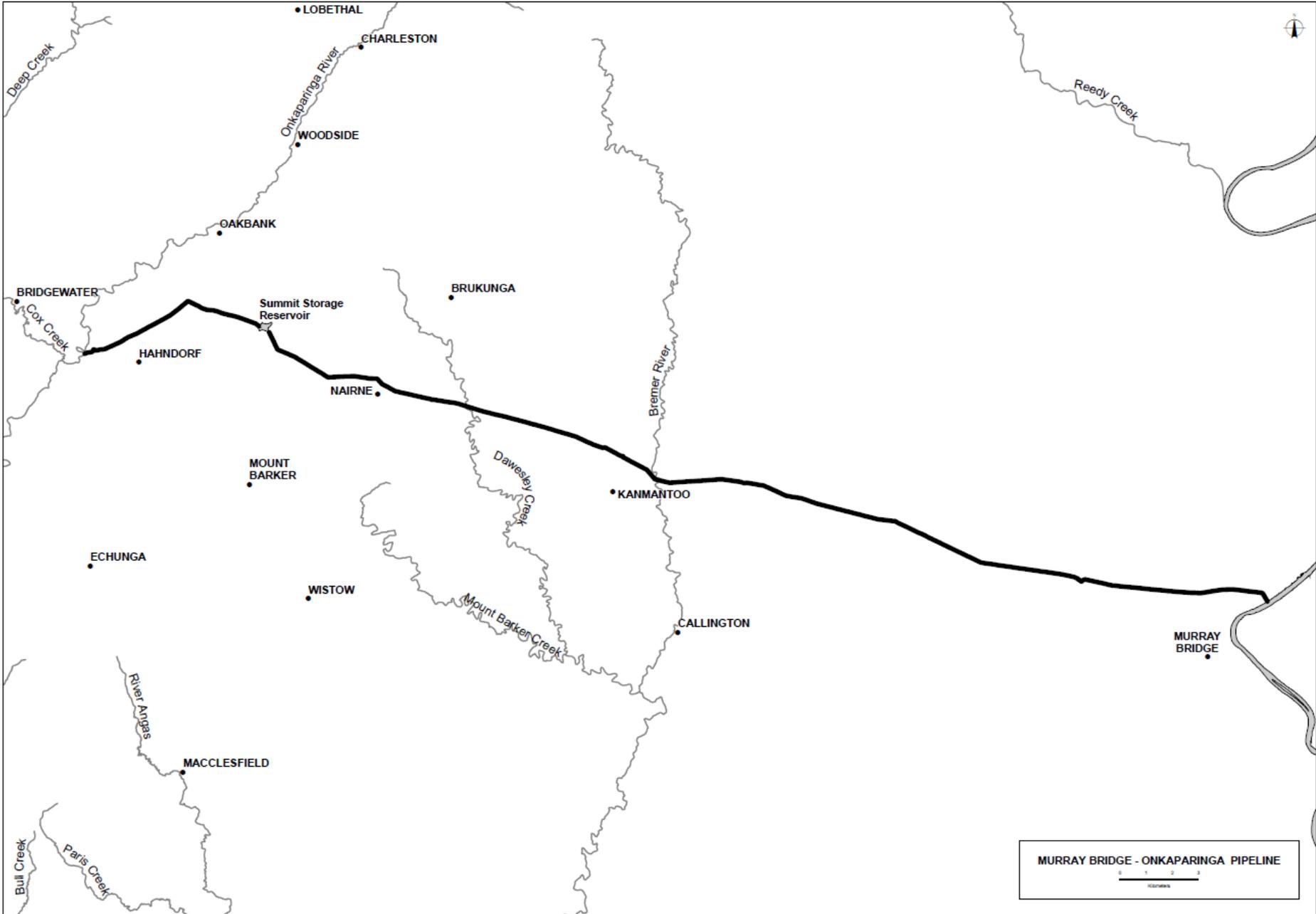
Overview of TPA Regime



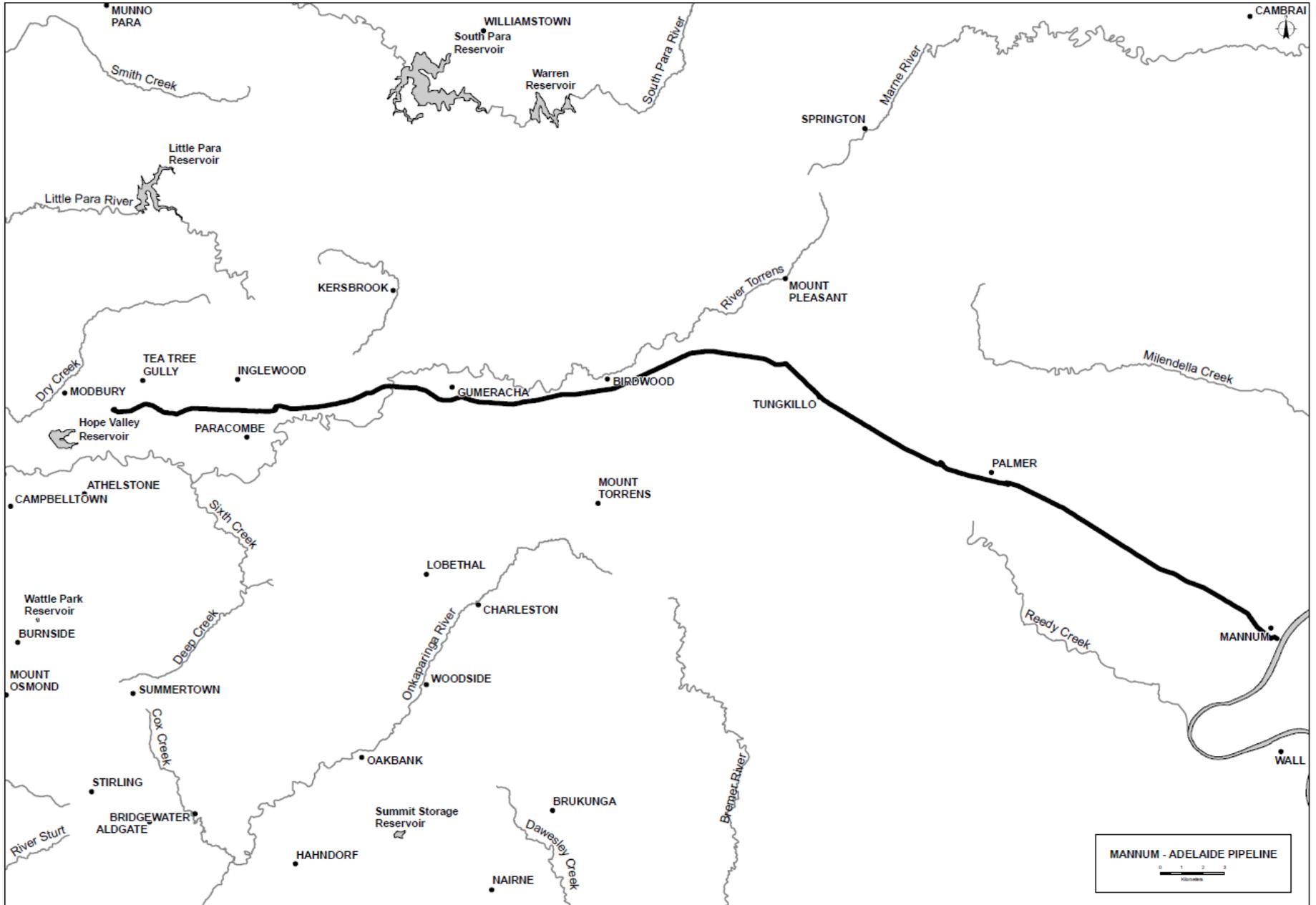
SCOPE OF COVERAGE

- Determined by Proclamation by the Governor
- SA Water water pipelines:
 - Murray Bridge to Onkaparinga
 - Mannum to Adelaide
 - Swan Reach to Paskerville
 - Myponga to Adelaide
 - Morgan to Whyalla
 - Taillem Bend to Keith
 - Glenelg to Adelaide

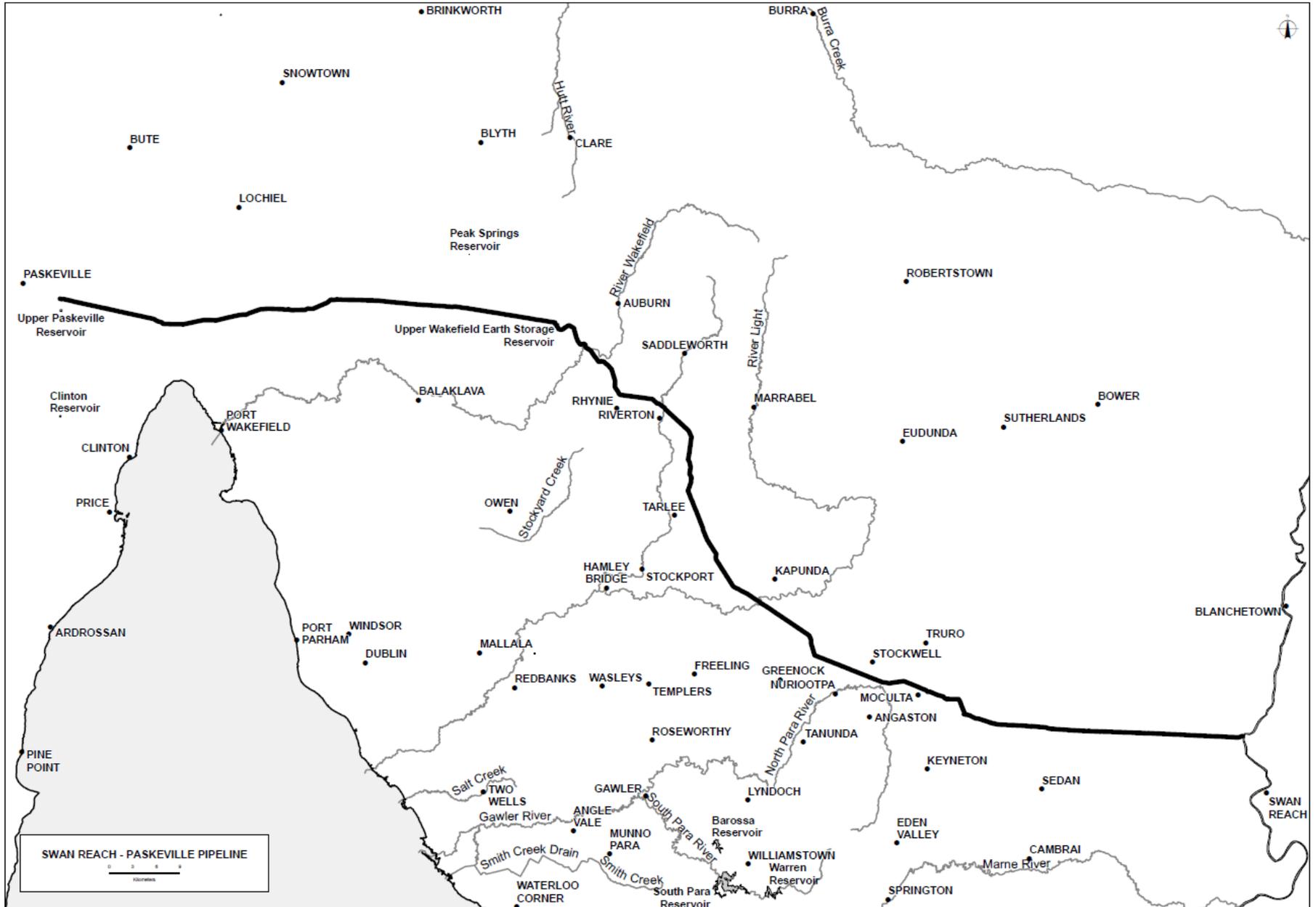
Murray Bridge to Onkaparinga



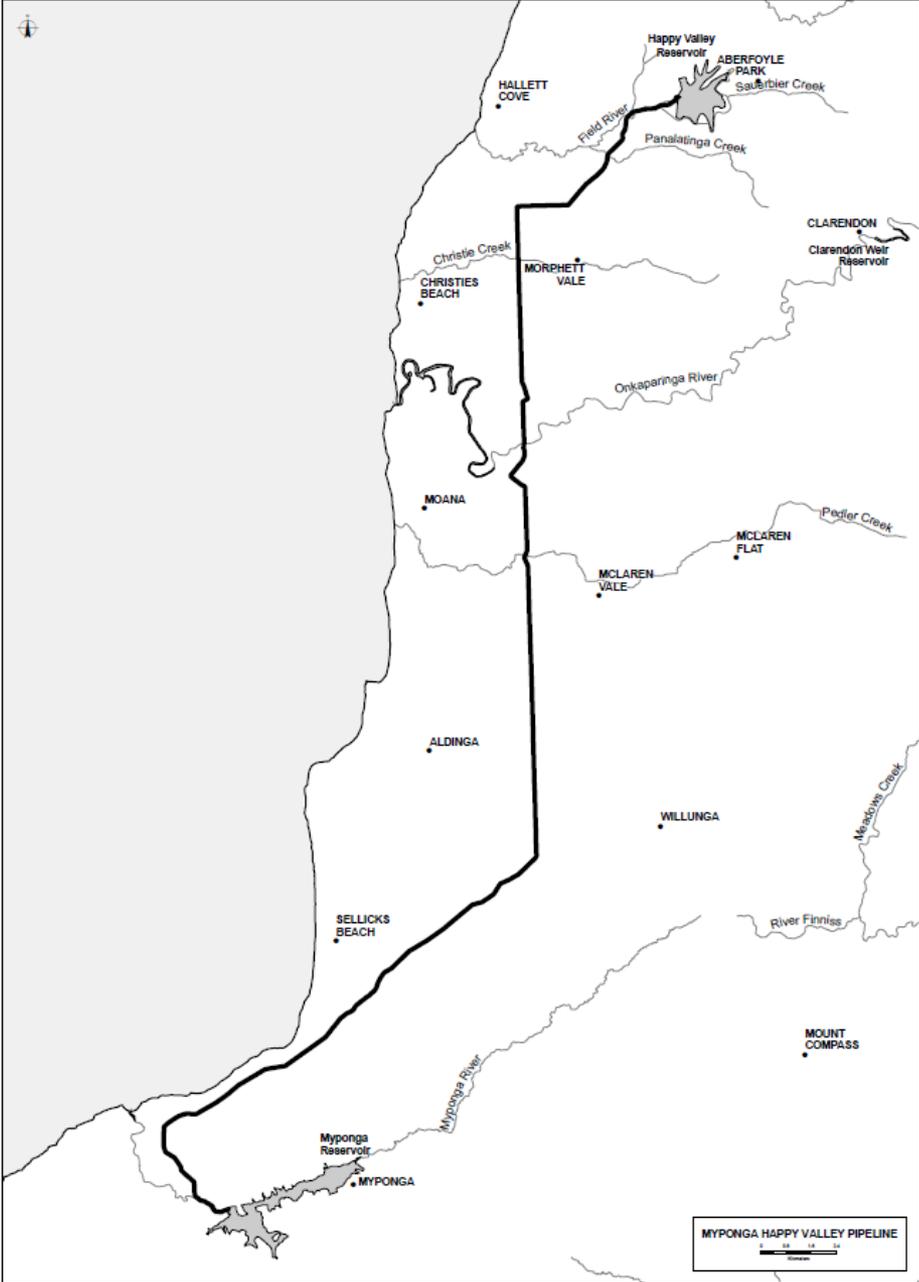
Mannum to Adelaide



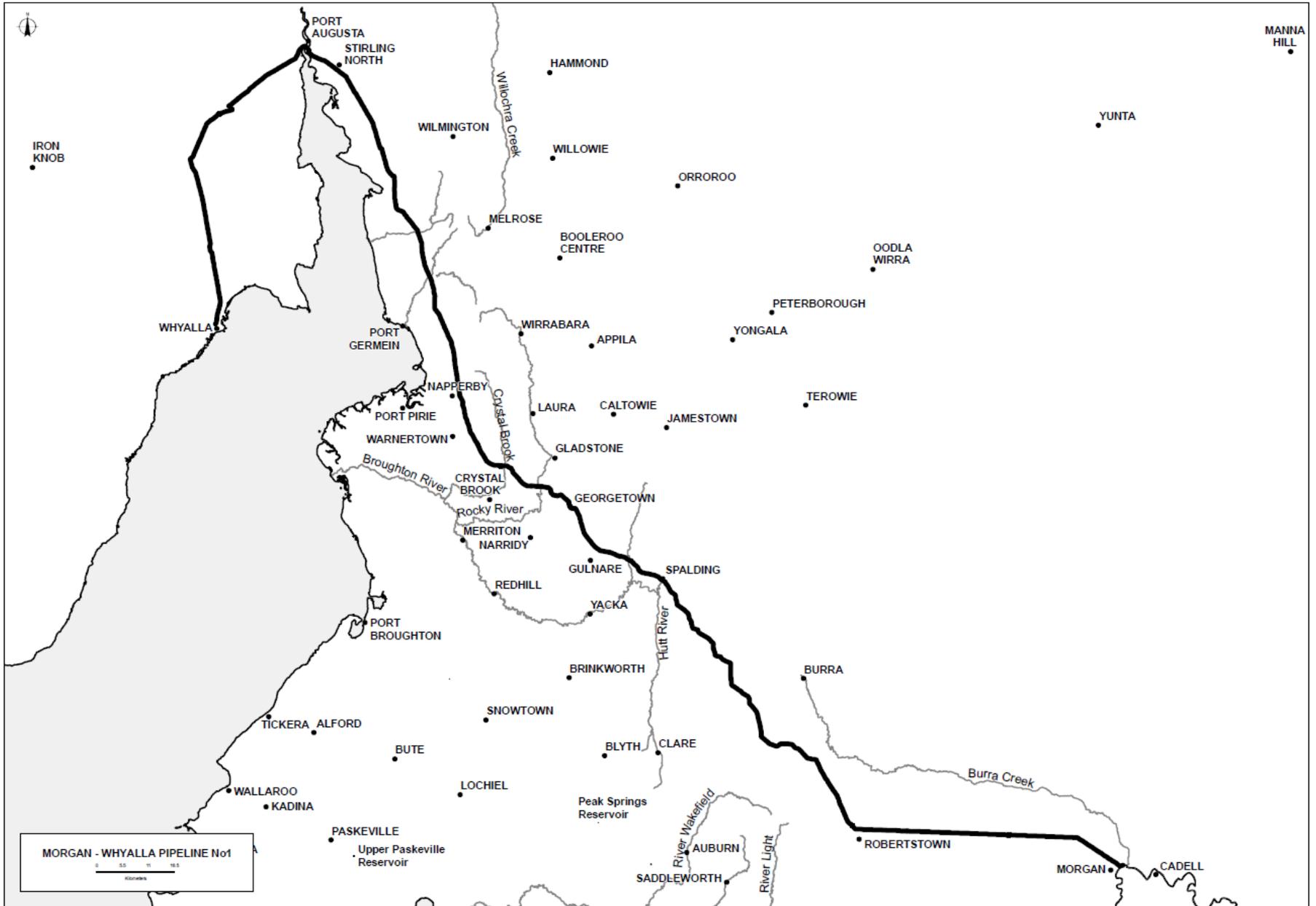
Swan Reach to Paskerville



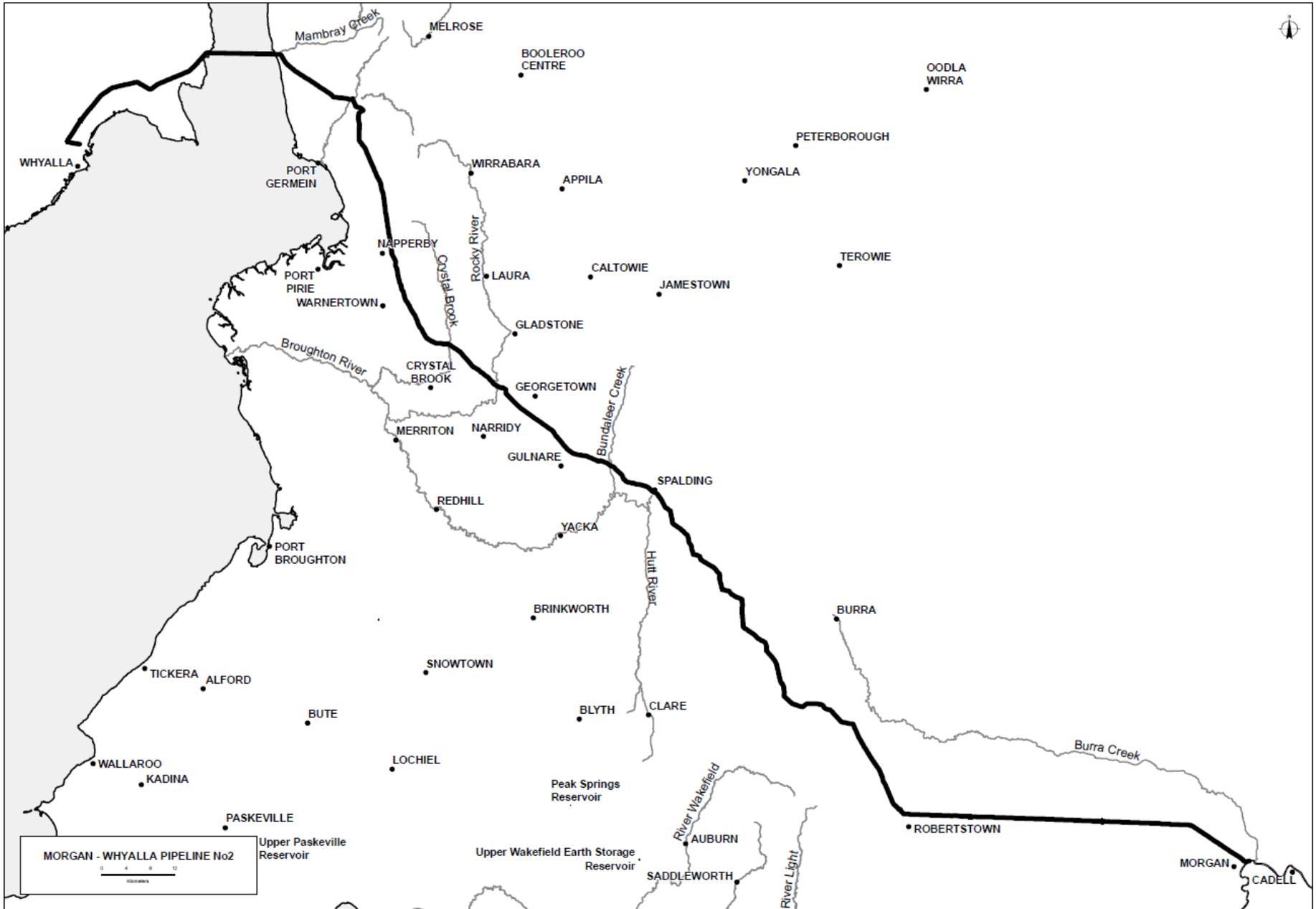
Myponga to Adelaide



Morgan to Whyalla



Morgan to Whyalla (2)



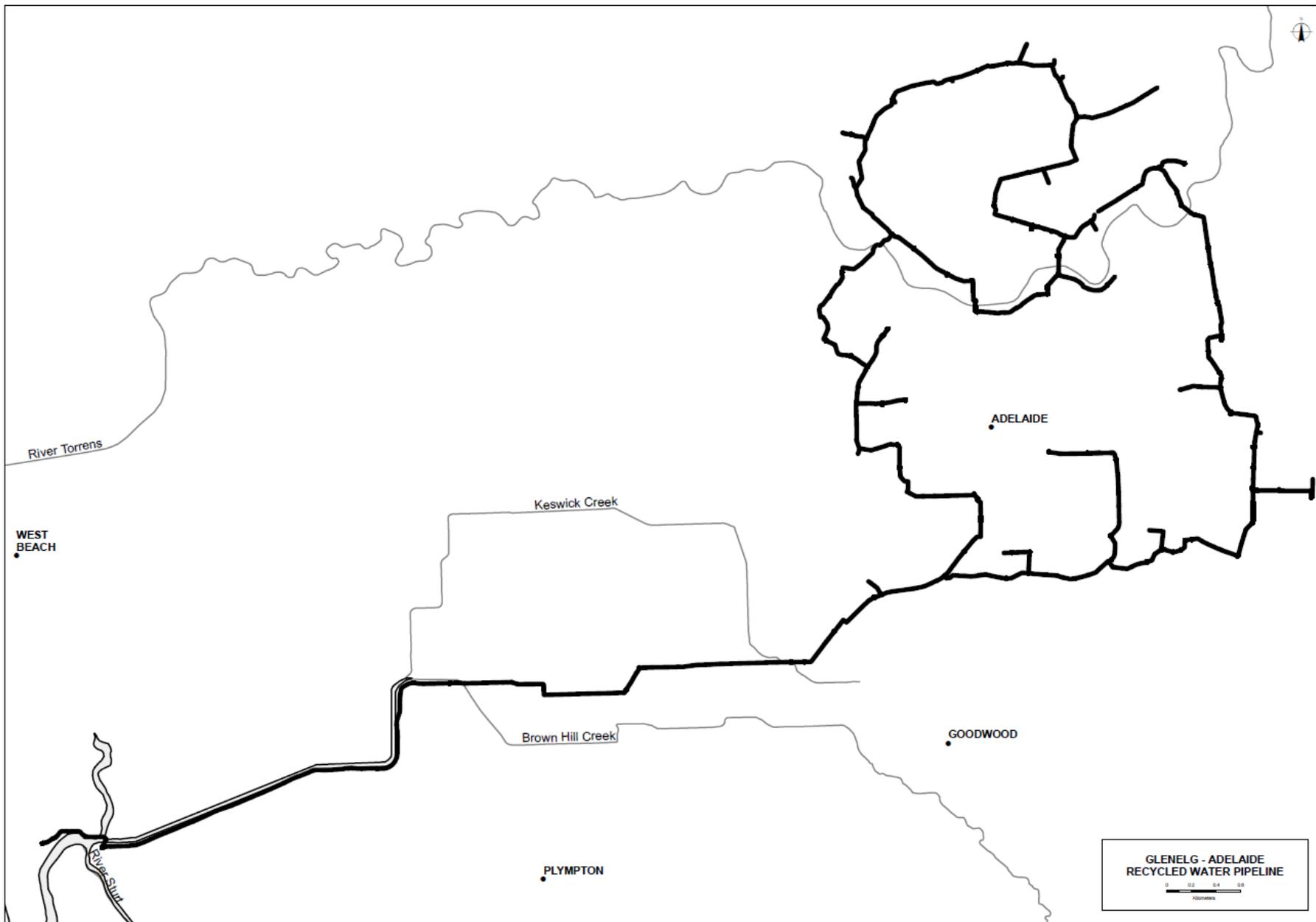
Tailem Bend to Keith



Eyre Peninsula



Glennelg to Adelaide



Overview of TPA Regime



SCOPE OF COVERAGE

- SA Water's bulk sewage and local sewage networks
- Infrastructure and infrastructure services that are necessary for the transport of water or sewage
- (Although only part of the Act applies):
 - 86F Information Brochure
 - 86H Information provided on a non-discriminatory basis
 - 86ZO Copies of access contracts to be supplied to Regulator
 - 86ZP Regulated operators must supply information to Regulator

Overview of TPA Regime



DOES NOT COVER

- Infrastructure operated by an **irrigation infrastructure operator**:

If the infrastructure operator operates the water service infrastructure for the purposes of delivering water for the primary purpose of being used for irrigation, the operator is an irrigation infrastructure operator.

- Other water industry entities are also not covered at this stage

Broad Roles of Parties



STATE GOVERNMENT/MINISTER

- Determines the extent to which the Regime applies
- Can issue a 'direction' under the *Public Corporations Act 1993* to SA Water which the arbitrator must take into account
- Considers the Commission's 5-yearly review of the Regime into whether or not the Regime should continue to apply

Broad Roles of Parties



REGULATED OPERATORS (SA WATER)

- Must keep separate accounts and records
- Must provide certain information to the access seeker
- Must negotiate in good faith
- Must provide information and documents to the Regulator
- Must comply with a requirement of the Arbitrator
- Must provide the Regulator with notice of any access proposals received and every access contract made

Broad Roles of Parties



ACCESS SEEKERS (PROPONENTS)

- If Regulated Operator reasonably requires, must provide further information about the Proponent's proposal
- Comply with a requirement of the Arbitrator
- Can terminate arbitration before an award is made, or choose to withdraw from an award

Broad Roles of Parties



ARBITRATOR

- Makes an award if conciliation has not been successful
- May obtain information on matters relevant to the dispute in any way the Arbitrator thinks appropriate
- Must take certain principles in the Act into account when making an award
- Must proceed with the arbitration as quickly as properly is allowed

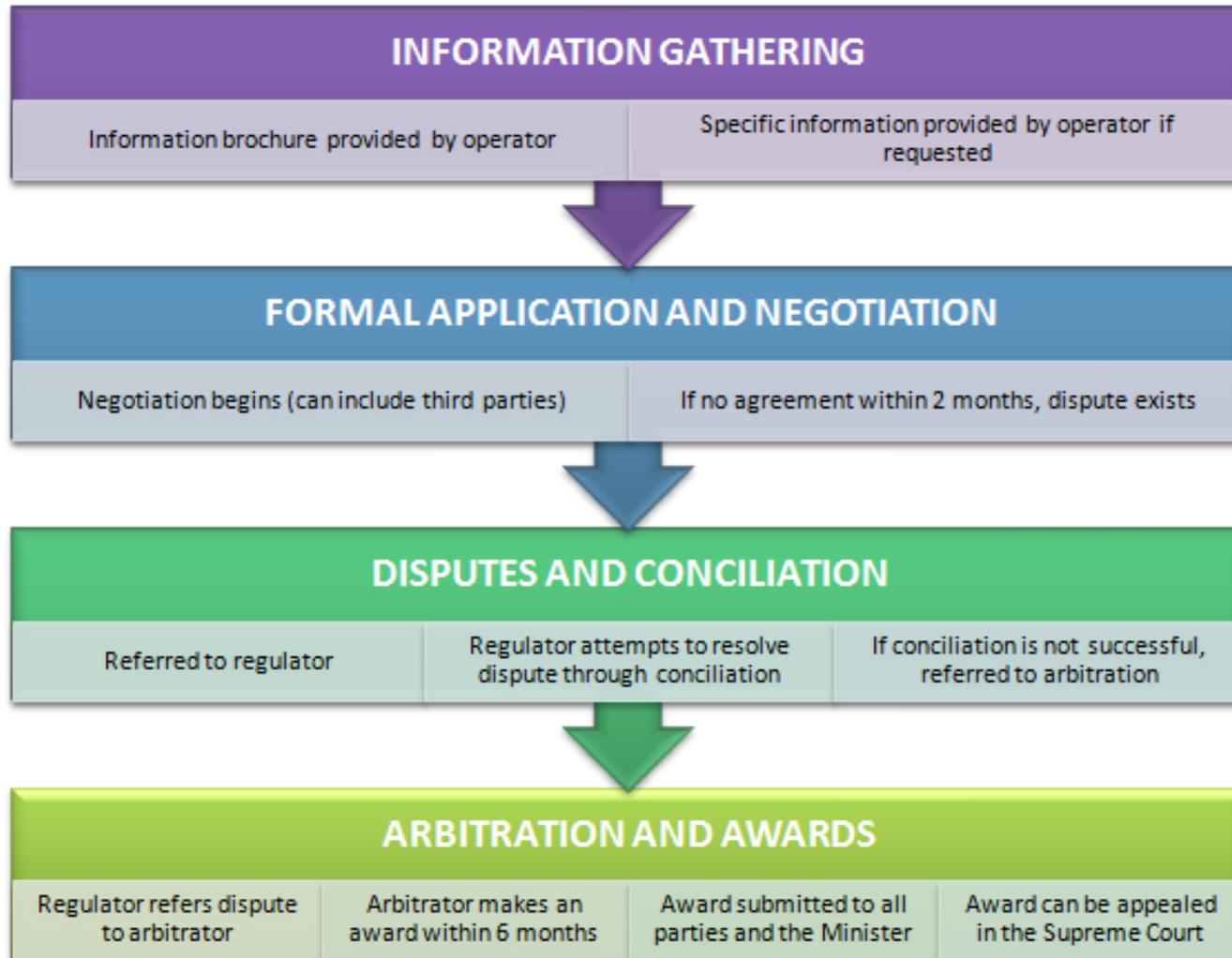
Broad Roles of Parties



THE COMMISSION

- Is the Regulator of the Regime, and provides an overall compliance and monitoring role
- Must seek to resolve a dispute by conciliation
- Determines whether a dispute should be referred to arbitration
- Reports annually on the work carried out by the Regulator as part of the Regime, and conducts 5 yearly reviews of Regime

Overview of the Process



Overview of the Process



STAGE 1: INFORMATION GATHERING

■ Information Brochure

- the **terms and conditions** on which the Regulated Operator is prepared to make regulated infrastructure available for use
- the **procedures** that the Regulated Operator will apply in determining a proposal for access
- information about **relevant prices and costs** associated with gaining access
- a copy of a standard **access contract**
- **contact details** of the Operator's representative

Overview of the Process



STAGE 1: INFORMATION GATHERING

- **Specific information to assist proponent**
 - the extent to which the regulated infrastructure is **currently being utilised**
 - the extent to which it would be necessary, and technically and economically feasible, to **alter/add** to the Operator's infrastructure
 - whether the Operator is **prepared to provide access**:
 - if so, **general terms and conditions (including an indication of the likely price)** on which the Regulated Operator would be prepared to provide access;
 - if not, the **reasons why access cannot be provided.**

Overview of the Process



STAGE 2: FORMAL APPLICATION FOR ACCESS AND NEGOTIATION

■ Application

- If a Proponent wants access, they can make a **written access** proposal setting out:
 - the **nature and extent** of the required access (or variation)
 - **terms and conditions** for access (or variation), that Proponent considers reasonable and commercially realistic.
- Within 1 month, Operator is to notify Proponent of any affected third parties, and give an indication of:
 - **whether the Operator is prepared to provide access** and, if so, on what terms and conditions
 - if some **alteration/addition** is required, whether they would agree to this, and on what terms.

Overview of the Process



STAGE 2: FORMAL APPLICATION FOR ACCESS AND NEGOTIATION

■ Negotiation

- If negotiations begin, the Regulated Operator must negotiate in **good faith**, with a view to reaching agreement on whether the Proponent's requirements could reasonably be met, and, if so, **the terms and conditions**
- The Operator may seek **input from other regulatory bodies** (e.g. EPA, Health, OTR).

Overview of the Process



STAGE 2: FORMAL APPLICATION FOR ACCESS AND NEGOTIATION

- **Pricing: Disclosure of access price**
 - *information brochure* must include information about **relevant prices and costs** (general in nature)
 - *specific information to assist the formulation of a proposal*, should include general terms and conditions – including an indication of the **likely price**
 - *after receiving the formal access proposal*, the Operator must notify the Proponent as to whether they are prepared to provide access and, if so, on what **terms and conditions**

STAGE 2: FORMAL APPLICATION FOR ACCESS AND NEGOTIATION

■ Pricing: Setting of the access price

- Minister for Water and the River Murray indicated in Parliament during the debate of the Bill, that

*“SA Water would be expected to establish contracts for access to its network infrastructure services on the basis of **retail prices minus avoidable costs** that SA Water, as the access provider, could avoid”*

[Hansard, 16 June 2015]

- This is to be achieved through the issuance of a Direction to SA Water by the Minister prior to 1 July 2016, which the Arbitrator must take into account.

Overview of the Process



STAGE 3: DISPUTES AND CONCILIATION

- **Dispute**
 - If, **after 2 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**.
 - A party to the dispute may then refer the dispute to the Regulator.

Overview of the Process



STAGE 3: DISPUTES AND CONCILIATION

■ Conciliation

- The Regulator must, in the first instance, seek to resolve the dispute by conciliation.
- The Regulator **need not attempt to resolve a dispute** by conciliation if, in the Regulator's opinion:
 - the subject-matter of the dispute is **trivial, misconceived or lacking in substance**; or
 - the parties **have not negotiated in good faith**.

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

- **Arbitration**
 - If a dispute is **not resolved by conciliation**, after Regulator has made reasonable attempts to do so, or
 - It **appears unlikely** that a dispute can be resolved by conciliation, or
 - If the dispute is not resolved **within 6 months** of being referred to the Regulator, the Regulator may refer the dispute to arbitration

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

■ Arbitration

- The Arbitrator:
 - Selected by the Regulator
 - Properly qualified
 - Independent of the parties of the dispute
 - is not subject to the control or direction of the South Australian Government in any capacity
 - has no direct, or indirect, interest in the outcome of the dispute.

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

■ Arbitration

- Principles the Arbitrator must take into account:
 - **Objects** of the Act
 - Operator's **business interests** and investment
 - **Costs** to the operator of providing access
 - Current **contractual obligations** of the Regulated Operator
 - Any **operational and technical requirements**
 - The **economically efficient operation** of any regulated infrastructure

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

■ Arbitration

- Arbitrator cannot make an award inconsistent with:
 - *The Natural Resources Management Act 2004*
 - *The Safe Drinking Water Act 2011*
 - *The South Australian Public Health Act 2011*
 - *The Environmental Protection Act 1993*
 - Any other law or legislative requirement relating to health, safety or the environment.

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

- **Arbitration**
 - Other procedural matters relating to Arbitrator:
 - May order the **delivery, discovery and inspection of documents**, or require someone to appear to **give evidence**
 - Do **anything else necessary** for the expeditious hearing and determination of the dispute
 - May give **public notice** of arbitration outcome
 - The Arbitrator has a duty to proceed with the arbitration as **quickly as is possible**, allowing for proper investigation and consideration of all relevant matters
 - An award must be made **within 6 months**.

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

■ Award

- A Proponent can (within 7 days) elect not to be bound by the award.
- If this happens
 - the Proponent is precluded from making another proposal related to the same matter for 2 years
 - the Proponent must bear all costs of the arbitration
- Otherwise, the costs of an arbitration are to be divided amongst the parties in proportions determined by the Arbitrator

Overview of the Process



STAGE 4: ARBITRATION AND AWARDS

■ Appeals

- An award, or the decision to not make an award, can only be appealed in the Supreme Court.
- Unless the Court decides to suspend the award, it continues to be in operation, pending the outcome of the appeal

■ Review of Regime

- A public review, to be conducted by the regulator every 5 years to determine whether the regime should continue to apply.

Q&A





Thank You