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BusinessSA
South Australia's Chamber of Commerce and Industry

13 December 2013

Regulatory Policy
Department of Treasury and Finance
GPO Box 1045
Adelaide SA 5001

Dear Sir/Madam

I write to you in relation to the Department of Treasury and Finance's *Exposure Draft Bill on Access to Water and Sewerage Infrastructure* and the associated *Explanatory Memorandum.*

Executive Summary:

Business SA supports the development of arrangements that enable greater access to water and sewerage infrastructure in South Australia and has advocated for allowing third party access to water distribution networks. Business SA broadly supports the E*xposure Draft Water Industry (Third Party Access) Amendment Bill 2013,* but recommends that amendments are made to ensure the effective operation of a legislated State-based access regime.

Background:

In February 2013 the Department of Treasury and Finance issued a report - *Access to Water and Sewerage Infrastructure* discussing options for third-party access to water and sewerage infrastructure services and seeking public input.

Business SA's submission dated 11 March 2013 recommended that:

- a legislated State-based access regime be implemented;
- it should apply to bulk water transport, water distribution transport, local sewage transport and bulk sewage transport;
- the Essential Services Commission of South Australia (ESCOSA) be appointed the regulator;
- a light-handed regime be applied;
- a negotiation framework modelled on the *Railways (Operations and Access) Act 1997* be considered; and
- robust dispute resolution procedures be implemented.

Although Business SA is pleased that our recommendations largely are reflected in the *Exposure Draft Water Industry (Third Party Access) Amendment Bill 2013*, Business SA submit that the Bill can be further improved by the adoption of the following amendments:

86ZS – Review of Part

It is appropriate that the third party access regime is subject to a periodic review by ESCOSA to determine whether it should continue to apply in South Australia. While it is important that the scheme is allowed to operate for a sufficient period of time before a review is undertaken, five years appears to be excessive before Part 9A is reviewed.

The proposed five year review period could be contrasted with the requirement under section 277 of the *Work Health and Safety Act 2012* for a review to be conducted "as soon as practicable after the expiry of one year from its commencement" and then a further review "as soon as practicable after the expiry of 3 years from its commencement".

A review period of four years would be sufficient to evaluate the experiences of the scheme and in particular whether proponents and regulated operators have been able to successfully negotiate terms for the provision of access.

Hence, it is proposed that section 86ZS(7) be amended as follows:

"(7) In this section –

prescribed period means –

(a) the period 30 June 2018; and
(b) each successive period of 4 years thereafter."

86P – Principles to be taken into account

Under section 86P(3)(c) the arbitrator cannot make an award that is inconsistent with laws relating to health, safety or the environment, including the *Natural Resources Management Act 2004* and the *Safe Drinking Water Act 2011.* Further, under section 86P(4) the arbitrator must accept any advice provided by a department of the Public Service or other public sector agency.

To ensure the integrity and consistency of any legal advice provided to the arbitrator which the arbitrator is compelled to accept, the advice should be provided from one specialised source. Given that the Crown Solicitor's Office is responsible for the provision of legal advice to Cabinet, Ministers and government agencies, it would be appropriate for any advice to the arbitrator under section 86P(4) to be provided by the Crown Solicitor's Office.

Hence, it is proposed that section 86P(4) be amended as follows:

"(4) Without limiting subsection (3)(c), the arbitrator must accept any advice provided by the Crown Solicitor's Office about whether or not a particular decision or course of action would be inconsistent with the Act in question. "

86S – Participation by other parties

Under section 86S the Minister and the regulator have the right to participate in arbitration, including calling evidence and make representations in relation to the matter subject to arbitration.

Given that the dispute subject to arbitration is essentially of a commercial nature, involving the proponent, the regulated operator and interested third parties, the process should be focused on promptly and efficiently making a binding decision on the parties. Giving additional parties, not directly affected by the dispute, a right to participate could unnecessarily prolong and complicate the arbitration process.

Although the Minister and ESCOSA may have a legitimate interest in a dispute subject to arbitration, the participation by the Minister and ESCOSA should be limited to circumstances in which it would be in the public interest for the Minister and/or ESCOSA to intervene. This would be consistent with ministerial intervention in other disputes, including under State and Federal industrial relations laws.

Hence, it is proposed that section 86S be amended as follows:

Delete: 86S – Participation by other parties

Insert:

“86S – Minister’s and regulator’s right to intervene

(1) The Minister and the regulator may intervene in arbitration if the Minister or the regulator believes it is in the public interest to do so.”

86ZD – Formal requirements related to awards

Under section 86ZD(1) the arbitrator must before making the award provide a copy of the draft award to each party, the Minister and each designated agency and take their representations into account.

Although the arbitrator is required under section 86ZC(1) to make an award within 6 months, there is no requirement that each party, the Minister and each designated agency provide a response on the draft award within a specified period of time. Practically this could have the effect of unnecessarily delaying the making of the final award. For example, if a draft determination was issued by the arbitrator within two months of the dispute being referred to arbitration, each party, the Minister and each designated agency would have up to four months to respond.

To ensure that a response is provided to the arbitrator within a reasonable timeframe, a party, the Minister and a designated agency wishing to comment on the draft award should be required to do so within 28 days of receiving a copy of the draft award.

Hence, it is proposed that section 86ZD be amended as follows:

Insert new subsection (2) and renumber accordingly:

"(2) Any representations under subsection (1) by a party, the Minister and a designated agency must be received by the arbitrator within 28 days of a copy of the draft award having been provided."

In conclusion, Business SA broadly supports the E*xposure Draft Water Industry (Third Party Access) Amendment Bill 2013,* but recommend that the amendments above are made to ensure the effective operation of a legislated State-based access regime.

Who we are:

As South Australia's peak Chamber of Commerce and Industry, Business SA is South Australia's leading business membership organisation. We represent thousands of businesses through direct membership and affiliated industry associations. These businesses come from all industry sectors, ranging in size from micro-business to multi-national companies. Business SA advocates on behalf of business to propose legislative, regulatory and policy reforms and programs for sustainable economic growth in South Australia.

Should you require any further information or have any questions, please contact Mr. Rick Cairney, Director of Policy, Business SA on (08) 8300 0060 or rickc@business-sa.com.

Yours sincerely

Rick Cairney

Director of Policy