

Legislative Council—No 8A

As reported with an amendment, report adopted, Standing Orders suspended and passed remaining stages, 16 June 2015

South Australia

**Water Industry (Third Party Access) Amendment
Bill 2015**

A BILL FOR

An Act to amend the *Water Industry Act 2012*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *Water Industry Act 2012*

- 4 Amendment of section 3—Objects
- 5 Insertion of section 5A
 - 5A Provisions related to operation of Part 9A
- 6 Repeal of section 26
- 7 Insertion of new Part

Part 9A—Third party access regime

Division 1—Preliminary

- 86A Interpretation
- 86B Application

Division 2—Regulator

- 86C Appointment of regulator
- 86D Report to Minister

Division 3—Information to facilitate access proposals

- 86E Segregation of accounts and records
- 86F Information brochure
- 86G Specific information to assist proponent to formulate proposal
- 86H Information to be provided on non-discriminatory basis

Division 4—Negotiation of access

- 86I Access proposal
- 86J Duty to negotiate in good faith
- 86K Existence of dispute

Division 5—Conciliation

- 86L Settlement of dispute by conciliation
- 86M Voluntary and compulsory conferences

Division 6—Reference of dispute to arbitration

- 86N Power to refer dispute to arbitration
- 86O Application of *Commercial Arbitration Act 2011*
- 86P Principles to be taken into account
- 86Q Parties to the arbitration
- 86R Representation
- 86S Participation by other parties
- 86T Arbitrator's duty to act expeditiously
- 86U Hearings to be in private
- 86V Procedure on arbitration
- 86W Procedural powers of arbitrator
- 86X Giving of relevant documents to the arbitrator
- 86Y Power to obtain information and documents
- 86Z Confidentiality of information
- 86ZA Proponent's right to terminate arbitration before an award is made
- 86ZB Arbitrator's power to terminate arbitration
- 86ZC Time limit for arbitration
- 86ZD Formal requirements related to awards
- 86ZE Consent awards
- 86ZF Proponent's option to withdraw from award
- 86ZG Termination or variation of award

	86ZH	Costs
	86ZI	Contractual remedies
	86ZJ	Appeal on question of law
	86ZK	Injunctive remedies
	86ZL	Compensation
	Division 7—Related matters	
	86ZM	Confidential information
	86ZN	Access by agreement
	86ZO	Copies of access contracts to be supplied to regulator
	86ZP	Regulated operator's duty to supply information and documents
	86ZQ	Unfair discrimination
	86ZR	Review of Part
8	Amendment of section 90—Consultation between agencies	

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

5 This Act may be cited as the *Water Industry (Third Party Access) Amendment Act 2015*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

10 In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Water Industry Act 2012*

4—Amendment of section 3—Objects

Section 3—after paragraph (f) insert:

and

15 (g) 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.

5—Insertion of section 5A

After section 5 insert:

20 **5A—Provisions related to operation of Part 9A**

(1) The Governor may, by proclamation made under this subsection, declare the extent to which Part 9A will apply in relation to—

(a) specified water infrastructure or sewerage infrastructure, or a specified class of such infrastructure; or

(b) specified infrastructure services, or a specified class of such services.

(2) A proclamation under subsection (1) will have effect according to its terms (including so as to limit the operation of Part 9A or a proclamation made under that Part).

(3) The Governor may, by proclamation, vary or revoke a proclamation under subsection (1).

(4) Subject to subsection (5), the provisions of Part 9A are declared to be Commonwealth water legislation displacement provisions for the purposes of section 250D of the *Water Act 2007* of the Commonwealth in relation to the operation of Part 4 Division 1 of that Act.

(5) Subsection (4) has operation if or when the Governor, by proclamation made under this subsection, declares that that subsection takes effect as a law of the State.

6—Repeal of section 26

Section 26—delete the section

7—Insertion of new Part

After section 86 insert:

Part 9A—Third party access regime

Division 1—Preliminary

86A—Interpretation

In this Part, unless the contrary intention appears—

access contract means a contract giving access to regulated infrastructure and infrastructure services or a contractual variation of an existing access contract affecting access to regulated infrastructure and infrastructure services in a significant way or to a significant extent;

access proposal—see section 86I;

infrastructure services means a service provided by means of water infrastructure or sewerage infrastructure and includes—

- (a) the use of such infrastructure;
- (b) the service of operating such infrastructure or any associated equipment;
- (c) other related or ancillary services;

interested third party means an interested party under section 86J;

regulated infrastructure means infrastructure to which this Part applies by virtue of the operation of section 86B;

regulated operator means an operator of infrastructure who is subject to the access regime that applies under this Part by virtue of the operation of section 86B;

regulator—see section 86C;

Supreme Court means the Supreme Court of South Australia;

water/sewerage service business means a business consisting of—

- (a) the provision of water services or sewerage services; or
- (b) the service of providing—
 - (i) access to regulated infrastructure to another person; and
 - (ii) infrastructure services associated with such access.

86B—Application

- (1) This Part applies in relation to operators of water infrastructure or sewerage infrastructure, and infrastructure services, to the extent that it is declared by proclamation to apply.
- (2) The Governor may, by proclamation—
 - (a) declare that operators of water infrastructure or sewerage infrastructure and infrastructure services, or a specified class of such infrastructure or services, are subject to the operation of this Part; and
 - (b) vary or revoke a declaration under this section.
- (3) This Part does not (and cannot) apply in relation to infrastructure operated by an irrigation infrastructure operator that may be subject to water charge rules under Part 4 Division 1 of the *Water Act 2007* of the Commonwealth (whether or not such rules have been made in relation to the infrastructure (or in relation to any service that may be provided in connection with the infrastructure)).
- (4) In subsection (3)—

irrigation infrastructure operator has the meaning given by section 7(4) of the *Water Act 2007* of the Commonwealth.

Division 2—Regulator

86C—Appointment of regulator

- (1) The Commission is the regulator under this Part.
- (2) The regulator has the function of monitoring and enforcing compliance with this Part (in addition to the other functions conferred under the other provisions of this Act or under the *Essential Services Commission Act 2002*).

86D—Report to Minister

- (1) The regulator must, within 3 months after the end of each financial year, deliver to the Minister a report of the work carried out by the regulator under this Part during that financial year.
- (2) The Minister must cause a copy of the report to be laid before both Houses of Parliament within 12 sitting days after receipt of the report.

Division 3—Information to facilitate access proposals

86E—Segregation of accounts and records

- (1) A regulated operator must keep accounts and records of its water/sewerage service business so as to give a true and fair view of that business as distinct from other businesses carried on by the regulated operator.
- (2) A regulated operator whose water/sewerage service business includes providing (or providing and operating) regulated infrastructure for another person must keep accounts and records of that part of its water/sewerage service business so as to give a true and fair view of that part of the business as distinct from the remainder of its water/sewerage regulated infrastructure.
- (3) The accounts and records must be kept in a way that gives—
 - (a) a comprehensive view of the regulated operator's legal and equitable rights and liabilities in relation to water/sewerage infrastructure; and
 - (b) a true and fair view of—
 - (i) income and expenditure derived from, or relating to, water/sewerage infrastructure; and
 - (ii) assets and liabilities of the regulated operator's business so far as they relate to water/sewerage infrastructure.

86F—Information brochure

- (1) A regulated operator must, on the written application of any person, provide an information brochure containing (or accompanied by)—
 - (a) the terms and conditions on which the regulated operator is prepared to make the regulated operator's regulated infrastructure available for use by others; and
 - (b) the procedures that the regulated operator will apply in determining a proposal for access to any regulated infrastructure and infrastructure services; and
 - (c) information about relevant prices and costs associated with gaining access to (and using) regulated infrastructure and infrastructure services; and

- 5
- (d) a copy of a standard access arrangement used by the regulated operator; and
- (e) the contact details of the regulated operator's representative who is the initial point of contact for responding to questions about access to regulated infrastructure and infrastructure services prior to the making of an access proposal, and information about how to lodge an access proposal; and
- (f) other information prescribed by the regulations.
- 10 (2) The information brochure must be provided within 30 days (or a longer period allowed by the regulator) after the regulated operator receives the application.
- (3) The regulated operator must, within 14 days after providing a person with an information brochure under this section, give a copy of the information brochure, and details of the person to whom the information has been provided, to the regulator.
- 15 (4) If a regulated operator fails to comply with this section in any respect, the regulated operator is guilty of an offence.
- Maximum penalty: \$20 000.

20 **86G—Specific information to assist proponent to formulate proposal**

- (1) A regulated operator must, on the application of a person with a proper interest in making an access proposal to the regulated operator, provide the applicant with information reasonably requested by the applicant about—
- 25 (a) the extent to which the regulated operator's regulated infrastructure is currently being utilised; and
- (b) the extent to which it would be necessary, and technically and economically feasible, to alter or add to the regulated operator's infrastructure so that it could meet requirements stated in the application; and
- 30 (c) whether the regulated operator would be prepared to provide access to regulated infrastructure and infrastructure services of a specified description and—
- (i) if so, the general terms and conditions (including an indication of the likely price) on which the regulated operator would be prepared to provide access; and
- 35 (ii) if not, the reasons why access cannot be provided.
- (2) A regulated operator may make a reasonable charge (to be determined after taking into account any provision made by the regulations for the purposes of this subsection) for providing information under this section.
- 40

86H—Information to be provided on non-discriminatory basis

A regulated operator must provide information to persons interested in making access proposals to the regulated operator on a non-discriminatory basis.

Division 4—Negotiation of access

86I—Access proposal

- (1) A person (the *proponent*) who wants access to regulated infrastructure, or who wants to vary an access contract in a significant way or to a significant extent, may make a written proposal (the *access proposal*) to the regulated operator of that infrastructure setting out—
 - (a) the nature and extent of the required access or variation; and
 - (b) terms and conditions for the provision of access, or for making the variation, that the proponent considers reasonable and commercially realistic and to which the proponent is prepared to agree.
- (2) If the implementation of an access proposal would require an alteration of or addition to water infrastructure or sewerage infrastructure, the access proposal may include a proposal for that alteration or addition.
- (3) If the regulated operator requires, a proponent must provide further information about the proponent's proposal that the regulated operator reasonably requires in order to assess and respond to the proposal.
- (4) The regulated operator must, within 1 month after the relevant day—
 - (a) give written notice of the proposal to—
 - (i) the regulator; and
 - (ii) any person (an *affected third party*) whose rights would be affected by the implementation of the proposal; and
 - (b) notify the proponent of the name and address of any affected third party and give the proponent a preliminary indication about—
 - (i) whether the regulated operator is prepared to provide access to the regulated infrastructure and infrastructure services and, if so, on what terms and conditions; and
 - (ii) if some alteration of, or addition to, existing infrastructure would be necessary to provide the access, whether the regulated operator would agree to the alteration or addition and, if so, on what terms.

(5) The *relevant day* is the day on which the written proposal is made to the regulated operator or, if the regulated operator requires further information under subsection (3), the day on which that information is provided.

5 (6) Notice of an access proposal may be given to affected third parties by publishing a notice in a newspaper circulating generally in the State stating—

(a) the name of the proponent and an address at which the proponent may be contacted; and

10 (b) the name of the operator and an address at which the regulated operator may be contacted; and

(c) the general nature of the access proposal.

(7) A regulated operator may recover the reasonable costs of giving notice under this section, as a debt, from the proponent.

15 **86J—Duty to negotiate in good faith**

(1) The regulated operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements) could reasonably be met, and, if so, the terms and conditions for the provision of access for the proponent.

20 (2) An interested third party must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of the interested third party's rights (or prospective rights) of access.

25 (3) An *interested third party* is an affected third party who, by notice given to the proponent or the regulated operator, indicates its interest in the negotiations.

30 **86K—Existence of dispute**

(1) If, within 2 months after the proposal is made, the regulated operator, the proponent, and any interested third parties have not agreed on terms for the provision of access, a dispute exists.

(2) A party to the dispute may refer the dispute to the regulator.

Division 5—Conciliation

35 **86L—Settlement of dispute by conciliation**

(1) If a dispute is referred to the regulator, the regulator must, in the first instance, seek to resolve the dispute by conciliation.

(2) The regulator need not attempt to resolve a dispute by conciliation if, in the regulator's opinion—

40 (a) the subject-matter of the dispute is trivial, misconceived or lacking in substance; or

(b) the parties have not negotiated in good faith.

- (3) In attempting to resolve a dispute by conciliation, the regulator must have regard to the same factors as would be relevant in an arbitration of the dispute.

86M—Voluntary and compulsory conferences

- (1) The regulator may call voluntary or compulsory conferences of the parties to the dispute to explore the possibility of resolving the dispute by agreement.
- (2) The regulator, or a nominee of the regulator, will preside at any such conference.
- (3) A party to a dispute who is asked by the regulator to attend a conference under this section must attend the conference if the regulator indicates in the request that attendance is compulsory.
Maximum penalty: \$20 000.

Division 6—Reference of dispute to arbitration

86N—Power to refer dispute to arbitration

- (1) If a dispute is not resolved by conciliation after the regulator has made reasonable attempts to do so, or if it appears unlikely that a dispute can be resolved by conciliation, or, in any event, if the dispute is not resolved within 6 months after the referral of the dispute to the regulator under Division 5, the regulator may refer the dispute to arbitration.
- (2) The regulator need not refer a dispute to arbitration if, in the regulator's opinion—
- (a) the subject-matter of the dispute is trivial, misconceived or lacking in substance; or
 - (b) the parties have not negotiated in good faith; or
 - (c) there are other good reasons why the dispute should not be referred to arbitration.
- (3) The arbitrator is to be a person selected by the regulator after consultation with the parties to the dispute and must be a person who—
- (a) is independent of the parties to the dispute; and
 - (b) is not subject to the control or direction of the South Australian Government in any capacity; and
 - (c) is properly qualified to act in the resolution of the dispute; and
 - (d) has no direct or indirect interest in the outcome of the dispute.

- (4) If for some reason an arbitrator does not complete an arbitration, the regulator may, after consultation with the parties, make a fresh appointment.

86O—Application of *Commercial Arbitration Act 2011*

5 The *Commercial Arbitration Act 2011* applies to an arbitration under this Part to the extent that it may operate consistently with the provisions of this Act.

86P—Principles to be taken into account

- (1) The arbitrator must take into account—
- 10 (a) the objects of this Act; and
- (b) the regulated operator's legitimate business interests and investment in the regulated infrastructure; and
- (c) the costs to the regulated operator of providing access as sought by the proponent (including the costs of any
15 necessary alteration of, or addition to, existing infrastructure) but not costs associated with losses arising from increased competition in upstream or downstream markets; and
- (d) the economic value to the regulated operator of any
20 additional investment that the proponent or the regulated operator has agreed to undertake; and
- (e) the interests of all persons holding contracts for use of any regulated infrastructure or infrastructure services; and
- (f) firm and binding contractual obligations of the regulated
25 operator or other persons (or both) already using any regulated infrastructure or infrastructure services; and
- (g) the operational and technical requirements necessary for the safe and reliable operation of the regulated infrastructure; and
- (h) the economically efficient operation of any regulated
30 infrastructure; and
- (i) the benefit to the public from having competitive markets; and
- (j) any direction given to the regulated operator (in the case of a
35 regulated operator that is a public corporation) by its Minister under the *Public Corporations Act 1993* that is relevant to the arbitration; and
- (k) the pricing principles specified in subsection (2); and
- (l) other matters the arbitrator considers appropriate.

(2) The pricing principles relating to the price of access are as follows:

- (a) that access prices should be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access and include a return on investment commensurate with the regulatory and commercial risks involved;
- (b) that access prices should allow multi-part pricing and price discrimination when it aids efficiency;
- (c) that access prices should not allow a vertically integrated operator to set terms and conditions that would discriminate in favour of its downstream operations, except to the extent that the cost of providing access to others would be higher;
- (d) that access prices should provide incentives to reduce costs or otherwise improve productivity.

(3) In addition—

- (a) the arbitrator cannot make an award that would have the effect of requiring the regulated operator to bear any capital cost of an alteration of, or addition to, any infrastructure unless the regulated operator agrees; and
- (b) the arbitrator cannot make an award that would prejudice the rights of a person who has the use of the regulated infrastructure or infrastructure services under an earlier contract or award unless that person agrees; and
- (c) the arbitrator cannot make an award that is inconsistent with any requirement under—
 - (i) the *Natural Resources Management Act 2004*; or
 - (ii) the *Safe Drinking Water Act 2011*; or
 - (iii) the *South Australian Public Health Act 2011*; or
 - (iv) the *Environment Protection Act 1993*; or
 - (v) any other law or legislative requirement relating to health, safety or the environment.

(4) Without limiting subsection (3)(c), the arbitrator must accept any advice provided by a department of the Public Service or other public sector agency that is responsible for assisting a Minister in the administration of an Act referred to in that section about whether or not a particular decision or course of action would be inconsistent with the Act in question.

86Q—Parties to the arbitration

The parties to the arbitration are—

- (a) the proponent, the regulated operator and any interested third parties; and

- (b) any other person whose interests may be materially affected by the outcome of the arbitration and who is joined as a party to the arbitration by the arbitrator.

86R—Representation

5 A party to an arbitration may be represented by a legal practitioner or, by leave of the arbitrator, another representative.

86S—Participation by other parties

- (1) The Minister and the regulator both have a right to participate in an arbitration.
- 10 (2) The Minister or the regulator may, in participating in an arbitration, call evidence and make representations on the questions subject to the arbitration.

86T—Arbitrator's duty to act expeditiously

15 An arbitrator must proceed with the arbitration as quickly as the proper investigation of the dispute, and the proper consideration of all matters relevant to the fair determination of the dispute, allow.

86U—Hearings to be in private

- (1) Arbitration proceedings must be conducted in private unless all parties agree to have the proceedings conducted in public.
- 20 (2) An arbitrator may give directions about who may be present at arbitration proceedings conducted in private.
- (3) In giving directions under subsection (2), the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.
- 25 (4) A person must comply with a direction under subsection (2).
Maximum penalty: \$20 000.
- (5) If the arbitrator considers it in the public interest to do so, the arbitrator may give public notice of the outcome of an arbitration.

86V—Procedure on arbitration

- 30 (1) An arbitrator—
- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) may obtain information on matters relevant to the dispute in any way the arbitrator thinks appropriate.
- 35 (2) An arbitrator may require the presentation of evidence or argument in writing and may decide matters on which the arbitrator will hear oral evidence or argument.

86W—Procedural powers of arbitrator

- (1) An arbitrator may—
- (a) give procedural directions;
 - (b) make orders requiring—
 - (i) the delivery of documents clarifying the issues between the parties;
 - (ii) the discovery and inspection of documents;
 - (c) sit at any time or place;
 - (d) adjourn the arbitration proceedings from time to time and from place to place;
 - (e) refer a matter to an expert for report, and accept the expert's report in evidence;
 - (f) do anything else necessary for the expeditious hearing and determination of the dispute.
- (2) An arbitrator may hear 2 or more proceedings relating to the same general subject matter together.
- (3) An arbitrator may proceed with arbitration proceedings in the absence of a party if the party has been given at least 14 days notice of the proceedings.
- (4) An arbitrator may engage a legal practitioner to provide advice on the conduct of the arbitration and to assist the arbitrator in drafting the award.

86X—Giving of relevant documents to the arbitrator

A party to the arbitration may give the arbitrator a copy of all documents (including confidential documents) the party considers to be relevant to the dispute.

86Y—Power to obtain information and documents

- (1) If an arbitrator has reason to believe that a person is in a position to give information or to produce documents, that may be relevant to the dispute, the arbitrator may, by written notice—
- (a) require the person within a period stated in the notice—
 - (i) to give the arbitrator a written statement of specified information; or
 - (ii) to produce to the arbitrator specified documents or copies of specified documents; or
 - (b) require the person to appear before the arbitrator at a specified time and place to give evidence.

(2) A written statement must, if the arbitrator so requires, be verified by statutory declaration of the person providing the information or, if the person is a body corporate, an appropriate officer of the body corporate.

5 (3) If documents are produced to an arbitrator, the arbitrator may—

- (a) take possession of, make copies of, and take extracts from, the documents; and
- (b) keep the documents for as long as is necessary for the purposes of the arbitration.

10 (4) A person must—

- (a) comply with a requirement of the arbitrator under subsection (1) or (2); and
- (b) if the person is required to appear as a witness before the arbitrator—comply with further requirements to make an oath or affirmation, or to answer questions.

15

Maximum penalty: \$20 000.

(5) However, a person need not give information or produce a document if—

20

- (a) the information or the contents of the document are the subject of legal professional privilege, or would tend to incriminate the person of an offence; and
- (b) the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.

25

86Z—Confidentiality of information

(1) A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.

30

(2) The arbitrator may, after considering representations from the parties, impose conditions limiting access to, or disclosure of, the information or documentary material.

(3) A person must not contravene a condition imposed under subsection (2).

35

Maximum penalty: \$75 000.

86ZA—Proponent's right to terminate arbitration before an award is made

(1) The proponent may terminate the arbitration before an award is made.

40

- (2) The arbitration is terminated under this section by giving notice of termination to—
- (a) the regulator; and
 - (b) the arbitrator; and
 - (c) the other parties to the arbitration.

86ZB—Arbitrator's power to terminate arbitration

- (1) An arbitrator may at any time terminate an arbitration without making an award if the arbitrator is satisfied—
- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
 - (b) the proponent has not engaged in negotiations in good faith; or
 - (c) the terms and conditions on which the access is to be provided should continue to be governed by an existing contract or award.
- (2) Before terminating an arbitration under this section, the arbitrator must give the regulator an opportunity to make representations on the matter.

86ZC—Time limit for arbitration

- (1) An award must be made within the period of 6 months from the date on which the dispute is referred to arbitration (the *standard period*).
- (2) However, if after the commencement of the standard period the arbitrator exercises a power under this Part in relation to the provision of information or documents, any period between the date of the exercise of the power and the date of compliance is not to be taken into account when determining the end date of the standard period.

86ZD—Formal requirements related to awards

- (1) Before the arbitrator makes an award, the arbitrator must give each party, the Minister, the regulator and each designated agency a copy of the draft award and may take into account representations that any of them may make on the proposed award.
- (2) An award must—
- (a) be in writing; and
 - (b) set out the reasons on which it is based.
- (3) If an award confers a right of access, it must—
- (a) state the period for which the proponent is entitled to access; and
 - (b) state the terms and conditions on which the proponent is to have access; and

- (c) resolve, or provide for the resolution of, all related and incidental matters.
- (4) The arbitrator must, within 7 days after an award is made (including an award made by consent), give a copy of the award to—
- 5 (a) the Minister; and
- (b) the regulator; and
- (c) each party to the arbitration; and
- (d) each designated agency.
- (5) In this section—
- 10 *designated agency* means, in relation to an award (or draft award)—
- (a) the Technical Regulator; and
- (b) the Minister's Department; and
- (c) the Health Department; and
- (d) the Environment Protection Authority; and
- 15 (e) if any other department or agency has provided advice to the arbitrator under section 86P in connection with the arbitration—that department or agency.

86ZE—Consent awards

If—

- 20 (a) the parties to an arbitration consent to a proposed award; and
- (b) the arbitrator is satisfied that the award is appropriate in the circumstances,

the arbitrator may make an award in the terms proposed.

86ZF—Proponent's option to withdraw from award

- 25 (1) A proponent may, within 7 days after the making of an award or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator.
- (2) The regulator must, within 7 days after receiving a notice of election under subsection (1), notify the regulated operator and the other
- 30 parties to the arbitration.
- (3) If the proponent elects not to be bound by an award—
- (a) the award is rescinded; and
- (b) the proponent is precluded from making another proposal related to the same matter for 2 years from the date the
- 35 notice of election was given unless the regulated operator agrees or the regulator authorises a further proposal within that period.
- (4) An authorisation under subsection (3)(b) may be given on conditions the regulator considers appropriate.

86ZG—Termination or variation of award

- 5
- (1) An award may be terminated or varied by agreement between all parties to the award.
 - (2) A variation may include an extension of the period for which the award remains in force.
 - (3) If a material change in circumstances occurs, a party to an award may propose termination or variation of the award.
 - (4) The provisions of this Part about an access proposal and the arbitration of a dispute arising from an access proposal apply with necessary modifications to a proposal made under this section or a dispute arising out of such a proposal.
- 10

86ZH—Costs

- 15
- (1) The costs of an arbitration are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.
 - (2) However, if the proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety.
 - (3) The regulator may recover the costs of an arbitration as a debt.
- 20

86ZI—Contractual remedies

An award is enforceable as if it were a contract between the parties to the award.

86ZJ—Appeal on question of law

- 25
- (1) An appeal lies to the Supreme Court from an award, or a decision not to make an award, on a question of law.
 - (2) On an appeal, the Court may exercise 1 or more of the following powers:
 - (a) vary the award or decision;
 - (b) revoke the award or decision;
 - (c) make an award or decision that should have been made in the first instance;
 - (d) remit the matter to the arbitrator for further consideration or re-consideration;
 - (e) make incidental or ancillary orders (including orders for costs).
 - (3) An award or decision of an arbitrator cannot be challenged or called in question except by appeal under this section.
 - (4) Unless the Court specifically decides to suspend the operation of an award until the determination of the appeal, an appeal does not suspend the operation of an award.
- 30
- 35
- 40

86ZK—Injunctive remedies

- (1) The Supreme Court may grant an injunction—
- (a) restraining a person from contravening an award; or
 - (b) requiring a person to comply with an award.
- 5 (2) The power of the Court to grant an injunction restraining a contravention of an award may be exercised—
- (a) whether or not the defendant has previously contravened the relevant provision of the award; and
 - 10 (b) whether or not there is imminent danger of substantial damage to any person.
- (3) The power of the Court to grant an injunction requiring compliance with an award may be exercised—
- (a) whether or not the defendant has previously failed to comply with the relevant provision of the award; and
 - 15 (b) whether or not there is imminent danger of substantial damage to any person.
- (4) The Court may grant an interim injunction under this section.
- (5) An application for an injunction under this section may be made by—
- 20 (a) the regulator; or
 - (b) a person with a proper interest in whether the relevant provision is complied with.
- (6) The Court may grant an injunction by consent without inquiring into the merits of the application.
- 25 (7) If the regulator makes an application for an injunction, the Court cannot require the regulator or any other person to give an undertaking about damages as a condition of granting the injunction.
- (8) The Court may, on application by the regulator or an interested party, discharge or vary an injunction.

86ZL—Compensation

- (1) If a person contravenes an award, the Supreme Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.
- 35 (2) An order may be made under this section against the person who contravened the provision and others involved in the contravention.
- (3) A person is *involved in the contravention* of an award if the person—
- (a) aided, abetted, counselled or procured the contravention; or

- (b) induced the contravention through threats or promises or in some other way; or
- (c) was knowingly concerned in, or a party to, the contravention; or
- (d) conspired with others to contravene the award.

Division 7—Related matters

86ZM—Confidential information

- (1) Information obtained under Division 3, 4 or 5 that—
 - (a) could affect the competitive position of a regulated operator or a proponent; or
 - (b) is commercially valuable or sensitive for some other reason, is to be regarded as *confidential information*.
- (2) A person who obtains confidential information must not disclose that information unless—
 - (a) the disclosure is reasonably required for the purposes of this Act; or
 - (b) the disclosure is made with the consent of the person who supplied the information; or
 - (c) the disclosure is required or authorised by law; or
 - (d) the disclosure is required by a court or tribunal constituted by law; or
 - (e) the disclosure is in prescribed circumstances.

Maximum penalty: \$15 000.

- (3) A person who obtains confidential information must not (unless authorised by the person who supplied the information) use the information for a purpose which is not authorised or contemplated by this Act.

Maximum penalty: \$15 000.

- (4) Subsections (1), (2) and (3) do not prevent or restrict the disclosure of information to the regulator.
- (5) Despite subsections (1), (2) and (3), the regulator may, if the regulator considers it is in the public interest to do so, disclose confidential information to either or both of the following:
 - (a) the Minister;
 - (b) the public.

- (6) A person who obtains confidential information must not use the information for the purpose of securing an advantage for himself or herself or for some other person in competition with the person who provided the information.

Maximum penalty: \$100 000.

- (7) A regulated operator must, in connection with the operation of this section, develop and maintain a policy to ensure that confidential information obtained by the regulated operator is not disclosed or used except as authorised by this section.

- (8) The regulated operator must provide a copy of a policy developed under subsection (7) to the regulator and to any other person who requests a copy from the regulated operator.

86ZN—Access by agreement

Nothing in this Part prevents a regulated operator entering into an access contract with another person on terms and conditions agreed between the parties.

86ZO—Copies of access contracts to be supplied to regulator

A regulated operator must provide the regulator, on a confidential basis, with a copy of every access contract made with the regulated operator within 1 month after the making of the contract.

Maximum penalty: \$60 000.

86ZP—Regulated operator's duty to supply information and documents

- (1) The regulator may, by written notice, require a regulated operator to give the regulator, within a stated time or at stated intervals, specified information or copies of specified documents related to the regulated operator's water/sewerage service business.
- (2) A regulated operator must not, without reasonable excuse, contravene, or fail to comply with, notice under this section.

Maximum penalty: \$60 000.

86ZQ—Unfair discrimination

- (1) A regulated operator must not unfairly discriminate between proponents in preferring one access proposal to another.
- (2) A regulated operator must not unfairly discriminate between entities in the terms and conditions on which the regulated operator provides access to regulated infrastructure.
- (3) A regulated operator must not unfairly discriminate between entities by—
- (a) waiving rights under access contracts or awards on a non-uniform basis; or

(b) making a kick-back arrangement or arrangements (ie arrangements directly or indirectly returning a proportion of the consideration to which the regulated operator is entitled under the contract or award to another party or their associates) on a non-uniform basis.

(4) A person must not be a party to discrimination by a regulated operator that is contrary to this section.

(5) A person is a *party* to discrimination if the person—

(a) aids, abets, counsels or procures the discrimination; or

(b) induces the discrimination through threats or promises or in some other way; or

(c) is knowingly concerned in the discrimination; or

(d) conspires with the operator to discriminate.

86ZR—Review of Part

(1) The regulator must, within the last year of each prescribed period, conduct a review of water infrastructure and sewerage infrastructure subject to this Part to determine whether this Part should continue to apply.

(2) The regulator must give reasonable notice of the review in a newspaper circulating generally throughout the State inviting written submissions on the matters under review within a reasonable time specified in the notice.

(3) The regulator must consider submissions made in response to the notice and other submissions made in the course of other forms of public consultation undertaken by the regulator in connection with the review.

(4) On completing the review, the regulator must forward to the Minister a report on the review and the conclusions reached by the regulator as a result of the review and, in particular, must recommend either—

(a) that this Part should continue in operation for a further prescribed period; or

(b) that this Part should expire at the end of the existing prescribed period.

(5) The Minister must cause a copy of the report to be laid before both Houses of Parliament and must have the regulator's recommendation published in the Gazette.

(6) This Part expires at the end of a prescribed period unless—

(a) the regulator has, in the report of a review conducted during the prescribed period, recommended that it should continue in operation for a further prescribed period; and

(b) a regulation has been made extending the period of its operation accordingly.

(7) In this section—

prescribed period means—

- (a) the period ending 30 June 2019; and
- (b) each successive period of 5 years thereafter.

5 **8—Amendment of section 90—Consultation between agencies**

Section 90(1)—after paragraph (e) insert:

- (f) when an arbitrator has been appointed under Part 9A—the arbitrator.