



National Water Reform 2020
Productivity Commission
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27 August 2020

Dear Commissioners,

Re: SACOSS Submission to the Productivity Commission's National Water Reform Issues Paper

The South Australian Council of Social Service (SACOSS) is the peak body for the community services sector in South Australia, with a long-standing interest in the efficient delivery of essential services such as water, energy and telecommunications. This is because of the profound issues that can arise for individuals and households who are faced with disadvantage and poverty.

We thank the Productivity Commission for the opportunity to provide feedback on the National Water Reform 2020 Issues Paper. The information provided below, and attached in support of this submission, responds both to the broader issues under consideration by the Commission and to the specific information requests contained within the Issues Paper.

INFORMATION REQUEST 1

The Commission welcomes feedback on:

- *whether the signatories to the NWI are achieving the agreed objectives and outcomes of the agreement*
 - *which elements of the NWI have seen slow progress*
 - *whether there are cases where jurisdictions have moved away from the actions, outcomes and objectives of the NWI*
 - *any other data and information sources that might be useful for assessing progress.*
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INFORMATION REQUEST 2

Is the NWI adequate to help Governments address the identified challenges?

Are there any other current or emerging water management challenges where the NWI could be strengthened?

SACOSS has recently completed a mapping exercise of existing data sources and monitoring frameworks against the UN Sustainable Development Goal (SDG) 6, around the sustainable management of water and sanitation (refer to **Attachment A** of this submission). Whilst the achievement of SDG6 is not directly covered in the National Water Initiative (NWI), SACOSS notes that submissions to the 2017 Productivity Commission Inquiry supported greater alignment between the NWI and the SDGs.¹

One of the challenges identified in the 2017 Productivity Commission Report was around the ability of small regional water service providers to overcome lack of economies of scale, high costs and efficient pricing. SACOSS believes these issues remain, with the Essential Service Commission of South Australia's (ESCOSA) most recent Performance Report for Minor and Intermediate retailers suggesting that 71 per cent of retailers in South Australia self-reported full compliance with all of the relevant NWI pricing principles.² It is unclear what the relative thresholds are for self-reported compliance with the NWI pricing principles, and SACOSS notes that there is a need for balance between voluntary self-assessment, reducing administrative burden for small-scale water providers, and public transparency and accountability.

INFORMATION REQUEST 3

The Commission welcomes feedback on the matters that should be considered for inclusion in a renewed NWI.

INFORMATION REQUEST 5

How could the NWI be amended to support best practice monitoring and compliance across jurisdictions?

SACOSS reiterates calls made by others to introduce an independent national body responsible for coordinated oversight of the NWI.³

¹ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.322 See: https://www.pc.gov.au/data/assets/pdf_file/0007/228175/water-reform.pdf

² Essential services Commission of SA, *Minor and Intermediate Retailers Regulatory Performance Report 2018-19*, June 2020, <https://www.escosa.sa.gov.au/ArticleDocuments/547/20200702-Water-RegulatoryPerformanceReport-2018-19-MIR.pdf.aspx?Embed=Y>

³ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.323 See: https://www.pc.gov.au/data/assets/pdf_file/0007/228175/water-reform.pdf

We note that the fragmented nature of the existing governance frameworks for water trading has been highlighted in the recent ACCC *Interim Report on the Murray-Darling Basin Water Markets Inquiry*:

“Many of the issues that the ACCC views as harmful to open and efficient water trading are grounded in failures of governance. Water markets have developed at different times across different regions as an adjunct to broader water management reform, resulting in an extremely complex, fragmented and inconsistent system.”⁴

Our research has observed similar fragmentation in roles and responsibilities for different aspects of water management, planning, supply, and monitoring across South Australia. In better aligning water monitoring, we refer the Commission to the following principles developed to guide a state-wide water monitoring investment and strategy⁵:

1. **Monitoring is coordinated** to minimise duplications and to help identify gaps and opportunities
2. **Monitoring is fit for purpose** and aligned to long-term objectives (e.g. safe reliable water supplies, sustainable environments, economic and industry growth, resilient communities)
3. **Monitoring is adaptive** and responsive to new priorities, and are regularly reviewed
4. **Monitoring is consistent** with regards to aligning to best practice standards for data collection, analysis and reporting
5. **Monitoring information is accessible** and available for re-use by relevant stakeholders
6. **Monitor once, use many times**
7. **Existing investment is leveraged** rather than creating individual, standalone data collections
8. **Collaborative partnership opportunities are realised**

⁴ Australian Competition and Consumer Commission, *Murray-Darling Basin Water Markets Inquiry: Interim Report*, 30 June 2020, P. 7 <https://www.accc.gov.au/system/files/Murray-Darling%20Basin%20inquiry%20-%20interim%20report.pdf>

⁵ Geraghty, K. and Barratt, R. (2012) South Australian Water Monitoring Investment Framework and Strategy. South Australian Water Information Program Board, https://www.waterconnect.sa.gov.au/Content/Publications/DEW/South_%20Australian_Water_Monitoring_Investment_Framework_%20and_Strategy.pdf

INFORMATION REQUEST 6

Are environmental outcomes specified clearly enough in water plans to guide management actions, monitoring and accountability?

Are institutional and administrative settings effective in supporting these outcomes? Do environmental water managers have the necessary authority, resources and tools to achieve agreed outcomes?

Is environmental water management (including planning for use of held water, delivery of held water, use of markets and compliance with planned environmental water) sufficiently integrated with complementary natural resource planning and management frameworks?

Can environmental outcomes be more cost-effectively achieved with greater and more innovative use of water markets and market-like mechanisms?

Is the monitoring and assessment of environmental outcomes sufficient?

How effective has adaptive management and planning decision-making been during the recent drought?

Do environmental water managers maximise opportunities to achieve social or cultural outcomes alongside environmental watering? How could this be improved?

SACOSS is conscious that South Australia in particular, and Australia more broadly, is challenged by a conflict between the economic and social interests of having access to water and those of the environment. SA is commonly recognised as one of the driest states in one of the driest countries in the world and is heavily reliant on the Murray Darling Basin for access to water reserves.

There is a growing body of evidence suggesting current arrangements are not ensuring the proper administration of the MDB Plan and this is having significant impacts for downstream flows into SA.

Given the range of downstream communities who draw and rely on the Murray River for economic activity and the environmental risks attached to a lack of flows, it is imperative that issues of access, compliance and planning for adequate environmental flows are both properly specified and subsequently regulated and enforced.

Relevantly, we note the South Australian Department for Environment and Water (DEW) is currently seeking feedback on *Draft Water Register Regulations* to support the implementation of Schedule 4 to the new *Landscape South Australia Act 2019* which establishes the South Australian Water Register.⁶ The new Water Register Regulations are intended to come into operation during the middle of next year, and will align with the launch of a new online water management portal currently being developed through the Water Management Solutions (WMS) Program (funded by

⁶ See consultation details at: <https://yoursay.sa.gov.au/decisions/draft-regulations-enhanced-water-register/about>

the Australian and South Australian Governments). The proposed changes under the Regulations are intended to enhance the Water Register to enable improved management of water assets and better access to more reliable information.

INFORMATION REQUEST 7

What progress are States and Territories making on including Indigenous cultural values in water plans, and how are they reporting progress?

How could a refreshed NWI help Indigenous Australians realise their aspirations for access to water, including cultural and economic uses?

From a South Australian perspective, there is evidence to suggest some progress on including Indigenous cultural values in water plans.

The new *Landscape South Australia Act 2019* (Landscape Act), which came into effect on 1 July 2020, ensures the following principles are considered in connection with achieving sustainable development (section 7(a), (b) and (e)):

- *recognition should be given to the spiritual, social, customary and economic significance of landscapes, and especially natural resources, to Aboriginal people*
- *shared responsibility between local, State and the Commonwealth governments, the private sector, and the community more generally, and enduring and effective partnerships should be promoted and supported*
- *decision-making should be informed by local knowledge and expertise, and traditional Aboriginal knowledge, together with the best available science, to achieve a functioning, resilient and productive landscape and avoiding, where practicable, serious or irreversible damage to the environment.*

Eight regional landscape boards and a metropolitan Green Adelaide Board have been established under the Landscape Act. The Regional Landscape Boards,⁷ are tasked with preparing a regional landscape plan and (where relevant) water allocation plans, landscape affecting activities control policies and water affecting activities control policies. In undertaking these functions, the Landscape Act provides Regional Landscape Boards should seek to work collaboratively with:⁸

- other regional landscape boards
- constituent councils for the region, and other councils as may be relevant
- relevant sections and cross-sections of the community, including Aboriginal people, and persons who own and occupy land within the region of the board (insofar as may be relevant).

⁷ Part 2, Division 2, Subdivision 2 of the *Landscape South Australia Act 2019*

⁸ Section 25(4) of the *Landscape South Australia Act 2019*

Members of the new Regional Landscape Boards have now been appointed. There are seven members on each of the eight Boards for the identified Regions, and nine members on the metropolitan Green Adelaide Board (including a Chair). All members have been appointed by the Minister for Environment, but from 2022 three members will be elected by the community (except in the Alinytjara Wilurara board and the specialist Green Adelaide board). While the Alinytjara Wilurara board retains its all-Aboriginal membership, concerning only one Aboriginal member has been appointed to the metropolitan Green Adelaide Board, and no Aboriginal members have been appointed to the Boards for the remaining seven regions (Eyre Peninsula, Adelaide Hills and Fleurieu, Kangaroo Island, Limestone Coast, Murraylands and Riverland, Northern and Yorke, and South Australian Arid Lands).⁹ This will clearly limit the degree to which informed local expertise and traditional Aboriginal knowledge will be present at the highest levels of Board decision-making, thus undermining the likelihood that these principles will be successfully upheld.

In terms of reporting progress, section 39 of the Act outlines annual reporting requirements for Regional Landscape Boards, including:

- an assessment of the extent to which the board has succeeded in implementing its annual business plan, and any water allocation plan, landscapes affecting activities control policy and water affecting activities control policy for which the board is responsible or that applies in the board's region.

It is unclear if under the new decentralised model there will be any specific evaluation or oversight of the extent to which Indigenous cultural values are embedded into water planning in practice, both under the auspice of individual Boards or taking a collective view of the Boards' work in this respect. SACOSS considers that independent evaluation and foregrounding the perspectives of First Nations peoples and their experiences are crucial in water planning.

INFORMATION REQUEST 8

Are the institutional arrangements for metropolitan water service providers fit-for-purpose? Is there evidence of inefficient pricing or investment decisions?

INFORMATION REQUEST 12

Are there examples of projects that have not met the NWI criteria for new water infrastructure investment?

What principles should inform government funding or financing of new water infrastructure?

⁹ See InDaily Article, 26.8.2020 at: <https://indaily.com.au/news/2020/08/26/sa-aboriginal-community-concern-over-landscape-board-representation/>

The information provided by SACOSS below, falls within the broader scope of the 2020 Inquiry, but also responds to Commission's specific Information Requests 8 and 12.

The NWI (2004)¹⁰ contains shared commitments by jurisdictional governments to implement water pricing and institutional arrangements to:

- *promote economically efficient and sustainable use of:*
 - *water resources*
 - *water infrastructure assets, and*
 - *government resources devoted to the management of water*
- *ensure sufficient revenue streams to allow efficient delivery of the required services*
- *facilitate the efficient functioning of water markets, including inter-jurisdictional water markets, and in both rural and urban settings*
- *give effect to the principles of user-pays and achieve pricing transparency in respect of water storage and delivery in irrigation systems and cost recovery for water planning and management*
- *avoid perverse or unintended pricing outcomes, and*
- *provide appropriate mechanisms for the release of unallocated water.*

These commitments are repeated in the introduction to the NWI Pricing Principles (2010).¹¹

Under paragraph 69 of the NWI, governments also agreed to ensure that '*proposals for investment in new or refurbished water infrastructure continue to be assessed as economically viable and ecologically sustainable prior to the investment occurring*', and under paragraph 77 the jurisdictions agreed '*to use independent bodies to set or review prices, or price setting processes, for water storage and delivery by government water service providers, on a case-by-case basis*'.

The 2017 Productivity Commission Inquiry examined jurisdictional compliance with these commitments and found that (SACOSS' emphasis):¹²

¹⁰ The National Water Initiative (NWI), agreed in 2004 by the Council of Australian Governments (COAG), is the national blueprint for water reform. Paragraph 64 of the NWI <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>

¹¹ Natural Resource Management Ministerial Council endorsed the National Water Initiative (NWI) pricing principles on 23 April 2010, <https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/national-water-initiative-pricing-principles.pdf>

¹² Productivity Commission, *National Water Reform*, Report no. 87, Canberra, 2018 p.418 See: https://www.pc.gov.au/data/assets/pdf_file/0007/228175/water-reform.pdf

*‘Given the multiplicity of elements that affect investment decisions, it is not realistic to make definitive judgements on whether the NWI’s requirement of economically viable and ecologically sustainable infrastructure investments is being achieved. Further, while good institutional and regulatory frameworks offer some protection against poor decisions, they are no guarantee. **Ultimately, good outcomes require a consistent commitment from governments, service providers and regulators to good governance frameworks, robust and transparent decision-making processes, and avoiding the politicisation of decisions.**’*

SACOSS notes in the current Inquiry, the Commission ‘will assess whether metropolitan water pricing practices are consistent with the NWI requirements, and with the NWI Pricing Principles (NRMCM2010).’¹³

SA Water’s Regulatory Determination 2020-24 - Background

SA Water provides drinking water and sewerage services to approximately 1.7 million South Australians, including approximately 207,000 regional drinking water customers. SA Water’s primary role is to source, treat, distribute and sell drinking water and non-drinking water, and to remove, treat and dispose sewage from homes and businesses.

As a monopoly provider of an essential service, wholly owned by the South Australian Government, SA Water’s services are highly regulated by a number of different entities.¹⁴

ESCOSA has responsibility for the economic regulation of the retail services provided by SA Water, pursuant to the *Water Industry Act 2012* (WI Act) and the *Essential Services Commission Act 2002* (ESC Act), the main elements of which are:

- Licensing to provide retail services (and associated conditions including the application of industry codes or rules) under the *Water Industry Act*; and
- Determining the maximum revenues that can be earned by SA Water for the provision of retail services over the regulatory period (2020-24) in accordance with the criteria in the *Essential Services Commission Act*.

In performing its regulatory functions, ESCOSA’s primary objective is the protection of the long-term interests of South Australian consumers with respect to price, quality and reliability of essential services.¹⁵ The importance of independent economic regulation was referenced in the Productivity Commission’s 2017 Inquiry into National Water Reform:¹⁶

¹³ Productivity Commission National Water Reform *Issues Paper*, May 2020, p.22
<https://www.pc.gov.au/inquiries/current/water-reform-2020/issues/water-2020-issues.pdf>

¹⁴ The water industry is declared to constitute a regulated industry for the purposes of the [Essential Services Commission Act 2002](#),¹⁴ and SA Water is a regulated entity pursuant to section 17 of the *Water Industry Act 2012*¹⁴.

¹⁵ Section 6(a) of the *Essential Services Commission Act 2002*

¹⁶ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.61 See:
https://www.pc.gov.au/data/assets/pdf_file/0007/228175/water-reform.pdf

'Independent economic regulation has been key to cost-reflective pricing. The NWI requires that independent economic regulators have a role in the review or setting of prices for water services. Independent economic regulation encourages efficient service delivery by applying rigorous scrutiny to operational and investment decisions. It facilitates consistent and improved planning, increases the transparency of decision making and reduces the risk of political interference in price-setting processes.'

SA Water's Regulatory Determination 2020 (SAW RD20) is the third regulatory determination made by ESCOSA and applies to SA Water for the four-year period from 1 July 2020 to 30 June 2024. The determination process commenced in November 2017, and was informed by extensive stakeholder engagement,¹⁷ with ESCOSA introducing a new process for SAW RD20 which allowed customers to challenge and scrutinise SA Water's regulatory business proposals through a Negotiation Forum involving SA Water, a Customer Negotiation Committee (CNC) and an Independent Probity Advisor.¹⁸

On 11 June 2020, ESCOSA released the Final Regulatory Determination (the Final Determination) for SAW RD20, establishing the maximum revenue that SA Water can recover from its customers for drinking water and sewerage retail services from 1 July 2020 to 30 June 2024.

Key outcomes of SA Water's Regulatory Determination 2020-24

ESCOSA's Final Determination set the total revenue that SA Water may recover from its customers over 2020 - 2024 at:

- \$2,541 million for drinking water
- \$1,215 million for sewerage.

This reduced SA Water's drinking water revenues by approximately \$30 million per annum. Underpinning this reduction were two key factors:

¹⁷ SACOSS provided a briefing to the SA Consumer Experts Panel Meeting in early 2018, as well as four submissions to ESCOSA: SACOSS, Submission to ESCOSA on SA Water Regulatory Determination 2020-24 – Draft Determination, 15 April 2020 See: <https://www.sacoss.org.au/submissions/energy-water-climate-change>, SACOSS, Submission to ESCOSA on SA Water's 2020-2024 Regulatory Business Proposal: 'Our Plan' 2020, 19 December 2020 see: https://www.sacoss.org.au/sites/default/files/public/documents/Submissions/Utilities%20Submissions/191220_SACOSS_Submission_SAW_RBP.pdf, SACOSS, Submission on ESCOSA's Consumer Experts Panel Background Briefing: Review of the Water Retail Code - Major Retailers, 30 August 2019 see: https://www.sacoss.org.au/sites/default/files/public/documents/Submissions/Utilities%20Submissions/190830_SACOSS_Submission_Water%20Retail%20Code%20Review.pdf, SACOSS, Submission to the Essential Services Commission of South Australia on the SA Water Regulatory Determination 2020: Draft Framework and Approach, https://www.sacoss.org.au/sites/default/files/public/documents/Submissions/Utilities%20Submissions/180131_Submission%20to%20ESCOSA%20on%20SAW%20F%26A.pdf

¹⁸ ESCOSA, SAW RD20, Final Determination, Statement of Reasons, June 2020, p.9 see: <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-SAWRD20-FinalDetermination-StatementOfReasons.pdf.aspx?Embed=Y>

- Re-evaluation of SA Water’s Regulatory Asset Base (‘RAB’) which values SA Water’s drinking assets, from \$7.77 billion to \$7.25 billion, in line with recommendations from the South Australian Water Pricing Inquiry completed in the 2018-19 financial year¹⁹ and the Treasurer’s 2020 Pricing Order, as well as the removal of the ‘Zero Cost Energy Future’ assets from the RAB,²⁰ and
- Significantly lower interest rates, as reflected in SA Water’s regulated ‘rate of return’ on its assets which fell from 4.53% in 2016-17 to 2.96% in 2020-21.

Whilst overall revenue was reduced due to the impact of the lower RAB and rate of return, ESCOSA did approve an *increase* of \$362 million in capital expenditure (28 percent) and an increase of \$33 million in operating expenditure (1.7 percent) for 2020-24, compared to the current regulatory period. The increases in capital expenditure will be incorporated into the RAB in future regulatory periods.²¹

Key issues for the NWI Inquiry arising from SA Water’s Regulatory Determination 2020-24

On 25 May 2020, just prior to ESCOSA making its Final Decision on SA Water’s allowed revenue for 2020-24, the State Treasurer issued an additional Pricing Order to ESCOSA.²² On 28 May 2020, the Minister for Environment and Water issued a Ministerial Direction to SA Water.²³ Together, these Orders and Directions operated to require the inclusion of capital expenditure allowances for multiple water infrastructure projects in the Final Determination, significantly impacting the amount of SA Water’s allowed revenue for 2020-24. This is relevant to the current Inquiry, as these infrastructure projects have not visibly undergone transparent cost-benefit analysis, as expected by the NWI. In the 2017 Water Reform Inquiry, the Commission referred to (SACOSS’ emphasis):²⁴

¹⁹ For more info, see: <https://www.treasury.sa.gov.au/south-australia-water-pricing-inquiry>

²⁰ ESCOSA, SAW RD20, Final Determination, Statement of Reasons, June 2020, p.236 see: <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-SAWRD20-FinalDetermination-StatementOfReasons.pdf.aspx?Embed=Y>

²¹The capital expenditure and operating expenditure allowed by ESCOSA is still below that sought by SA Water in its regulatory business proposal (‘Our Plan 2020’). ESCOSA found the additional \$471 million in capital expenditure and \$121 million in operating expenditure sought by SA Water were not justified and were ‘not consistent with customers’ main priority that SA Water’s prices are kept as low as possible while at least maintaining current levels of service’. See ESCOSA, SAW RD20, Final Determination, Statement of Reasons, June 2020, p.2 <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-SAWRD20-FinalDetermination-StatementOfReasons.pdf.aspx?Embed=Y>

²² Hon Rob Lucas MLC, Treasurer, Pricing Order for the Regulatory Period 1 July 2020-30 June 2024, 25 May 2020 https://www.treasury.sa.gov.au/_data/assets/pdf_file/0003/215139/Second-Pricing-Order-for-the-Regulatory-Period-1-July-2020-to-30-June-2024.pdf

²³Hon David Speirs, Minister for Environment and Water, Direction to SA Water pursuant to section 6 of the *Public Corporations Act 1993*, <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-DirectionsUnderSection6PublicCorporationsAct1993-GazetteNotice.pdf.aspx?Embed=Y>

²⁴ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.418 See: https://www.pc.gov.au/_data/assets/pdf_file/0007/228175/water-reform.pdf

'A range of institutional elements can support economically viable and ecologically sustainable infrastructure investments. These include:

- *governance arrangements that support robust decision making by service providers*
- ***clear institutional responsibilities around investment planning processes***
- ***rigorous review of investment decisions, such as is provided by independent economic regulation***
- *not distorting investment decisions through the provision of government subsidies.'*

Whilst SACOSS acknowledges SA Water is subject to the direction and control of its Minister, and ESCOSA must comply with pricing orders issued by the Treasurer, SACOSS remains concerned about issues of transparency in decision-making and perceived interference in the regulatory process and independence of the economic regulator. SACOSS is not convinced the Minister's powers to direct SA Water necessarily extend to requiring SA Water undertake specific water infrastructure projects at a specified cost pre-determined by the Minister for Environment, with no independent economic analysis. SACOSS also considers this could be seen to potentially be in conflict with the ESCOSA's guaranteed independence and statutory decision-making duties under the *Essential Services Commission Act 2002*.²⁵

This is of relevance to the Productivity Commission's current Information Request 8 and 12 in the Issues Paper, as under the NWI, jurisdictions agree 'to use independent bodies to set or review prices, or price setting processes, for water storage and delivery by government water service providers, on a case-by-case basis'.²⁶

As noted in the 2017 Inquiry (SACOSS' emphasis):²⁷

'Independent supervision or regulation of prices is crucial to efficient service delivery. Independent regulatory processes scrutinise the prudence and efficiency of expenditure, supporting better operational and investment decisions. This is partly achieved by requiring utility businesses to produce sound proposals in support of expenditure that demonstrate that operational expenditure is efficient and investments maximise net benefits. Economic regulation also supports the separation of service delivery and government policy-making by ensuring that pricing processes are transparent and

²⁵ Noting Section 6(2) of the *Public Corporations Act 1993*: 'A direction may not be given by the Minister under this section contrary to the provisions of another Act'.

<https://www.legislation.sa.gov.au/LZ/C/A/PUBLIC%20CORPORATIONS%20ACT%201993/CURRENT/1993.36.AU TH.PDF>

²⁶ National Water Initiative paragraph 77

<https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/water/Intergovernmental-Agreement-on-a-national-water-initiative.pdf>

²⁷ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.210 See:

https://www.pc.gov.au/_data/assets/pdf_file/0007/228175/water-reform.pdf

undertaken in accordance with the long-term interests of consumers (encompassing both cost and quality considerations), rather than being driven by, for example, a short-term desire to extract dividends or keep prices low for consumers.'

Background to the making of the Treasurer's Pricing Orders

Section 35(3) of the *Water Industry Act 2012* (WI Act) requires that 'in addition to the requirements of section 25(4) of the *Essential Services Commission Act 2002*, the Commission must, in acting under subsection (1), comply with the requirements of any pricing order issued by the Treasurer under this section'.

On 28 October 2018, the Treasurer issued a Pricing Order²⁸ pursuant to section 35(4) of the WI Act to assist ESCOSA in preparing its Draft Determination on SA Water's allowed revenue for 2020-24 (the 2018 Pricing Order). The Treasurer issued a Second Pricing Order under the WI Act on 25 May 2020 (the 2020 Pricing Order),²⁹ deleting and replacing Clauses 5.3 and 5.7 of the 2018 Pricing Order.

Part 4 of the 2018 Pricing Order (which was not amended by the subsequent Order) deals with the 'Adoption of the NWI Pricing Principles', and provides at Clause 4.1 that:

'Subject to Parts 5 and 6 of this Order, the Commission must adopt or apply the NWI Pricing Principles (other than the Principles for Recovering the Costs of Water Planning and Management Activities) when making a determination, to the extent that those, or any of those, principles are relevant to the determination in question.'

The Pricing Orders therefore envisage ESCOSA's practices being largely consistent with the NWI requirements, and with the NWI Pricing Principles.

Clause 5.3 in the 2018 Pricing Order originally provided:

'The determination must apply a separate total revenue control for drinking water retail services and sewerage retail services respectively.'

The 2020 Pricing Order deleted Clause 5.3 and replaced it with the following (SACOSS' emphasis):

*'The determination must apply separate total revenue controls for drinking water retail services and sewerage retailer services (respectively), each expressed as a single dollar value in real terms. The determination must not provide for or permit the total revenue controls to vary in real terms during the regulatory period, **except as required by clauses 5.5 and 5.6** or where such variation would **allow SA Water to recover during the***

²⁸ Treasurer, Pricing Order for Regulatory Period 1 July 2020-30 June 2024, 28 October 2018 see: https://www.treasury.sa.gov.au/_data/assets/pdf_file/0011/41123/Pricing-Order-for-the-Regulatory-Period-1-July-2020-to-30-June-2024.pdf

²⁹ The first 2020-24 Pricing Order was released on 28 October 2018 see clause 5.8.2: https://www.treasury.sa.gov.au/_data/assets/pdf_file/0011/41123/Pricing-Order-for-the-Regulatory-Period-1-July-2020-to-30-June-2024.pdf, The Second Pricing Order, 25 May 2020 see variation to clause 5.3 of the first Pricing Order as per clause 3.1: https://www.treasury.sa.gov.au/_data/assets/pdf_file/0003/215139/Second-Pricing-Order-for-the-Regulatory-Period-1-July-2020-to-30-June-2024.pdf

regulatory period such costs (less any contributions) as are provided for in clause 5.8.2 of the Pricing Order’.

Clause 5.8.2 of the 2020 Pricing Order requires ESCOSA’s final determination must adopt or apply Principle 1 of the *NWI Principles for Urban Water Tariffs* **subject to** allowing:

‘SA Water to **recover such costs** that are attributable to **activities** that SA Water is **required to provide** in accordance with a direction under section 6 of the *Public Corporations Act 1993*³⁰ and are either (a) *specified in the relevant direction*, or if not specified, (b) determined by the Commission to be efficient’ (SACOSS’ emphasis).

Principle 1 of the *NWI Urban Water Tariffs* deals with Cost Recovery and provides:

‘Water businesses should be moving to recover efficient costs consistent with the National Water Initiative (NWI) definition of the upper revenue bound: ‘to avoid monopoly rents, a water business should not recover more than the operational, maintenance and administrative costs, externalities, taxes or tax equivalent regimes, provision for the cost of asset consumption and cost of capital, the latter being calculated using a Weighted Average Cost of Capital (WACC)’. Notes: Application of this principle would be in the context of commitments to full cost recovery in accordance with paragraph 66 of the NWI’.

The 2020 Pricing Order also deleted clause 5.7 of the 2018 Pricing Order, and replaced it with a clause that provides:

The determination must adopt or apply the NWI Pricing Principles for the Recovery of Capital Expenditure,³¹ **subject to the following:**

- *The determination must adopt or apply the value of \$7.25 billion as at 1 July 2013 as the regulated asset base (RAB) in relation to assets used by SA Water in the provision of drinking water services*
- *The determination must allow SA Water **to recover the efficient costs of assets**³² **acquired** (or to be acquired) after 1 July 2016, which are **required to support activities that SA Water is required to provide** in accordance with a direction under section 6 of the *Public Corporations Act 1993*.*

³⁰ Public Corporations Act 1993

<https://www.legislation.sa.gov.au/LZ/C/A/PUBLIC%20CORPORATIONS%20ACT%201993/CURRENT/1993.36.AU TH.PDF>

³¹ The NWI Pricing Principles contain 6 Principles related to Capital Expenditure. South Australia is a signatory to the Intergovernmental Agreement on a National Water Initiative. The [National Water Initiative Agreement](#) contains pricing principles for the recovery of capital expenditure. (for further information on the National Water Initiative is available at <http://www.agriculture.gov.au/water/policy/nwi11>).

³² It is unclear who is determining the ‘efficient cost of the assets’ referred to here, as the 2020 Ministerial Direction contained a set amount of capital expenditure for each project to be funded by SA Water over 2020-24 which was did not undergo any form of efficiency analysis.

Therefore, on the basis of the 2020 Pricing Order, Principle 1 of the NWI Urban Water Tariffs and all of the NWI Principles for the Recovery of Capital Expenditure will not apply to:³³

- Costs that are attributable to **activities** that SA Water is **required to provide** in accordance with a direction under section 6 of the *Public Corporations Act 1993* and are either *specified in the relevant direction*, or determined by the Commission to be efficient, and
- The recovery of efficient costs of assets acquired which are **required to support activities that SA Water is required** to provide in accordance with a direction under section 6 of the *Public Corporations Act 1993*.

Also, the effect of the amendments to Clause 5.3 in the 2020 Pricing Order means the allowed revenue that can be recovered from SA Water customers during the 2020-24 regulatory period may *increase* on the basis of a '**a new or further direction** issued by the Minister for Environment and Water,'³⁴ under section 6 of the *Public Corporations Act 1993*. In addition, the 2020 Pricing Order precludes ESCOSA from making annual updates to the regulatory rate of return, and also precludes it from including revenues for contingent projects within the 2020-24 regulatory period, both of which were proposed in ESCOSA's Draft Determination. This then leaves the door open for SA Water to be directed by the Minister for Environment and Water to undertake subsequent capital projects during the next four years at a cost determined by the Minister, paid for by SA Water customers, and unscrutinised by ESCOSA for prudence and efficiency (as is expected by the NWI Pricing Principles, and required under the WI Act and *Essential Services Commission Act*).

Relevantly, the 2017 Water Reform Inquiry found that (SACOSS' emphasis):³⁵

'Despite jurisdictions making progress in implementing National Competition Policy and NWI reforms, further effort is required to separate policy-making and service delivery to support efficient outcomes. For example, the NWC found that:

There is a need to clarify, and clearly articulate the role of government and in particular to separate the roles of owner, policy maker, regulator and price setter, and those which sit with the utility service provider. (2014b, p. 69)

Ongoing government interference in price-setting was of particular concern to the NWC.

Political intervention in independent economic regulatory determinations, whether motivated by shareholder-return considerations or short-term political dynamics, is

³³ It is worth noting that under the NWI Pricing Principles, governments agreed 'that if a decision was made not to apply these principles in a particular case, the reasons for this would be table in parliament' (introductory para 10). It is unclear whether the Treasurer tabled reasons for a departure from the NWI Pricing Principles in relation to Ministerial Directions made by the Minister for Environment and Water under section 6 of the Public Corporations Act.

³⁴ ESCOSA, Final Determination, p.21 see: <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-SAWRD20-FinalDetermination-StatementOfReasons.pdf.aspx?Embed=Y>

³⁵ Productivity Commission, *National Water Reform*, Report no. 87, Canberra, p.208 See: https://www.pc.gov.au/data/assets/pdf_file/0007/228175/water-reform.pdf

deferring cost-reflective pricing and efficient price signalling. This behaviour is a clear barrier to the achievement of efficiency and innovation outcomes sought through corporatisation. (2014b, p. 7).'

The impact of the Ministerial Direction on the observance of the NWI Pricing Principles in ESCOSA's Price Determination for SA Water 2020-24

As outlined above, on 28 May 2020, a couple of weeks prior to the publication of ESCOSA's Final Determination on 11 June 2020 (which involved three years of stakeholder consultation), the Minister for Environment and Water issued SA Water with a Ministerial Direction³⁶ pursuant to section 6 of the *Public Corporations Act 1993*, to purchase or provide a number of specified services, facilities and contributions from 1 July 2020. The Minister's Direction requires SA Water to undertake certain projects (both drinking water and sewerage), and to fund those projects up to a specified amount (both capital expenditure per annum and operating expenditure³⁷), see specifically Directions J, K, M and N. Collectively, the capital expenditure for these projects as set out in the Direction amounts to around \$288m over 2020-24.³⁸

ESCOSA has included this expenditure in SA Water's allowed revenue for 2020-24, to be recovered from SA Water customers, in accordance with the Treasurer's 2020 Pricing Order.³⁹ As noted earlier, the \$288m will be incorporated into the RAB for future regulatory periods.

The NWI Pricing Principles for the Recovery of Capital Expenditure were not applied by ESCOSA to any of the projects set out in the Minister's Direction (in accordance with the Treasurer's 2020 Pricing Order).

Issues with transparent decision-making processes and efficient expenditure

To be clear, in raising these issues SACOSS is not making any comment on the worth of the projects SA Water has been directed to fund. Rather SACOSS is attempting to illustrate how the Directions from the Minister, coupled with the Treasurer's Pricing Orders have operated to exclude those projects from the scrutiny expected by the NWI Pricing Principles and required under the WI Act and the *Essential Services Commission Act*.

³⁶Direction to SA Water pursuant to section 6 of the Public Corporations Act 1993, <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-DirectionsUnderSection6PublicCorporationsAct1993-GazetteNotice.pdf.aspx?Embed=Y>

³⁷ It is worth noting section 6(2) of the *Public Corporations Act 1993*: 'A direction may not be given by the Minister under this section contrary to the provisions of another Act'.

³⁸ See summary of 'services, facilities and contributions' contained in the Ministerial Direction on p. 22-24 of ESCOSA's Final Determination SAWRD 2020 <https://www.escosa.sa.gov.au/ArticleDocuments/21489/20200611-Water-SAWRD20-FinalDetermination-StatementOfReasons.pdf.aspx?Embed=Y>

³⁹ ESCOSA, SA Water Regulatory Determination 2020 - Final Determination: Statement of Reasons, June 2020, p.21 and p.133

This scrutiny includes consumer consultation processes and questions of economic efficiency. SACOSS suggests that disregarding these factors has the potential to undermine the primary objective of the regulatory process to ‘protect the long-term interests of South Australian consumers with respect to the price, quality and reliability of essential services’.⁴⁰

It is worth noting ESCOSA’s Draft Determination (made in accordance with all relevant statutory factors and objectives and considering all relevant evidence) was not to allow expenditure for two of these projects (Directions J and K) and to allow reduced expenditure for the project the subject of Direction N.⁴¹ It is unclear whether ESCOSA considered the \$64.1m Tea Tree Gully Community Wastewater acquisition covered by Direction M.

The decision-making discretion vested in ESCOSA by the WI Act and the *Essential Services Commission Act* is not an open discretion, it is conditional upon the existence of certain factors set out in the *Essential Services Commission Act* being established to the satisfaction of ESCOSA. The decision-making process is a balancing exercise involving questions of judgment and issues of degree. When it comes to the amount of revenue to recover from customers for a certain project, ESCOSA must be satisfied of the facts that are pre-requisite to the exercise of the discretion. Even where expenditure is driven by regulatory obligations, this does not negate ESCOSA’s role in determining whether the expenditure associated with that regulatory obligation is prudent and efficient.

SACOSS is concerned the Ministerial Directions coupled with the Pricing Orders effectively operate to interfere with ESCOSA’s decision-making powers and the independent economic regulatory processes envisaged by the NWI and established by the legislature. The Second Reading Speech for the *Water Industry Act* in 1992 The Hon. I.K. Hunter stated:

‘The Bill lays an appropriate legislative foundation for an efficient, competitive and innovative water industry. A key element of this is the introduction of independent economic regulation for the industry, with the appointment of the Essential Services Commission of South Australia (or ESCOSA). Independent economic regulation provides a transparent means of setting service standards and prices. Ultimately this is about

⁴⁰ Section 6(a) of the *Essential Services Commission Act 2002*

⁴¹ For the reticulated water mains network management project the draft decision was that \$107.0 million is a prudent and efficient amount to be included in SAW RD20 (see p. 122 of the Draft Determination). For the regional non-potable water supply upgrades the Draft Decision was this should be a matter of government policy and the solution proposed by SA Water was partial and at great cost, therefore, the draft decision was to not include the \$37.7 million proposed to upgrade non-potable water supply for 340 properties (see p.130 of the Draft Determination). In relation to the KI de-salination plant ESCOSA found SA Water had not yet provided robust evidence that the future demand is firm and all costs associated with the project were removed and placed on a ‘contingent project’ list (see p. 132 of the Draft Determination).
<https://www.escosa.sa.gov.au/ArticleDocuments/21462/20200304-Water-SAWRD20-DraftDecision-StatementOfReasons.pdf.aspx?Embed=Y>

*protecting the long-term interests of customers and encouraging efficient investment in infrastructure.*⁴²

As outlined earlier, SACOSS considers the effect of the Ministerial Direction and Pricing Orders calls into question the transparency⁴³ independent economic regulation is intended to provide,⁴⁴ potentially interferes with the goal of encouraging efficient investment in infrastructure, and undermines ESCOSA's primary objective to protect the long-term interests of South Australian consumers (and importantly, vulnerable consumers) with respect to the price, quality and reliability of essential services.

We reaffirm that SACOSS is not commenting here on the actual initiatives funded, but on matters of process, and in that context we are expressing disappointment that years of positive customer engagement, negotiation, assessment, analysis and consultation associated with the expenditure proposals in SAWRD 2020 appear to have been negated by the Minister's Directions and the Treasurer's Pricing Orders.

SACOSS considers this has implications for the assessment by the Commission of South Australia's progress towards achieving the objectives and outcomes of the NWI.

INFORMATION REQUEST 9

How can small regional providers best balance affordability with longer-term service quality? Are there barriers to effective local planning?

Is there scope for greater collaboration between small providers? When might government support be warranted, and how should it be provided?

It is worth noting that on 7 August 2020, ESCOSA published a Draft Inquiry Report on the regulatory arrangements for small scale networks (which include Minor and Intermediate water retailers).⁴⁵ The Draft Inquiry Report proposes reforms to the regulatory framework, including reduced regulatory reporting requirements for water licensees. ESCOSA states that "if

⁴² See Hansard: <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-8303>

⁴³ Noting one of the Objects of the *Water Industry Act* (section 3(c)) is '*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*'.

⁴⁴ ESCOSA's **independence** is provided for under Section 7 of the *Essential Services Commission Act*: 'Except as provided under this Act or any other Act, the Commission is not subject to Ministerial direction in the performance of its functions'. (Noting that section 40 of the *Water Industry Act* provides that despite the Commission's independence the Minister for Environment and Water may give Directions to the Commission in relation to a **prescribed matter**. For the purposes of that section, a prescribed matter means any matter relating to water meters or disconnection of a retail service.)

⁴⁵ ESCOSA, Inquiry into regulatory arrangements for small-scale water, sewerage and energy services. August 2020, <https://www.escosa.sa.gov.au/ArticleDocuments/1003/20200807-Inquiry-SmallScaleNetwork-DraftReport.pdf.aspx?Embed=Y>

implemented, the proposed reforms would result in a regulatory framework which is targeted and flexible, and that places the accountability of providing a valued and sustainable service with the licensee”. The proposed “verified trust and accountability regulatory model” requirements will operate to **reduce** the amount of data that licensees are required to report to it on a regular basis.⁴⁶ This may result in less visibility of water access and sanitation for customers in regional and remote communities.

INFORMATION REQUEST 10

Do water service providers supply high-quality water services in regional and remote areas? Are there examples of poor water quality, service interruptions, or other issues? Have regional water service providers adequately planned for extreme events?

Are there sources of data that could be used to benchmark smaller providers’ water service levels (with fewer than 10 000 connections)?

In South Australia, beyond the main provider of drinking water and sewerage services (SA Water), there are an additional 66 “Minor and Intermediate Retailers” who provide drinking water services to approximately 5,600 customers and sewerage services to approximately 99,100 customers.⁴⁷ Minor and Intermediate retailers operating in South Australia are largely regional councils and private water providers.

In 2018-19, minor and intermediate retailers reported an increase in the number of legal actions and water restrictions (939 in total) to recover debts, compared to 908 in the previous year. In contrast, over the same period, SA Water reported a total of 29 residential restrictions and 9 residential legal actions across its 1.7 million customer base.⁴⁸

Other specific examples of issues in regional and remote areas are raised in SACOSS’ June 2020 scoping paper into water issues in Aboriginal communities (refer to **Attachment B**). As noted in SACOSS’ Scoping Paper, there is a lack of visibility around water, sanitation and hygiene (WASH) issues in Remote Aboriginal communities, which remains an ongoing challenge particularly in the context of COVID-19.

In terms of relevant data sources, SACOSS understands that the 2018 review of the Bureau of Meteorology’s National Performance Reporting (NPR) framework included a recommendation to

⁴⁶ ESCOSA, Inquiry into regulatory arrangements for small-scale water, sewerage and energy services. August 2020, <https://www.escosa.sa.gov.au/ArticleDocuments/1003/20200807-Inquiry-SmallScaleNetwork-DraftReport.pdf.aspx?Embed=Y>, p. 2

⁴⁷ Essential services Commission of SA, Minor and Intermediate Retailers Regulatory Performance Report 2018-19, June 2020, <https://www.escosa.sa.gov.au/ArticleDocuments/547/20200702-Water-RegulatoryPerformanceReport-2018-19-MIR.pdf.aspx?Embed=Y>

⁴⁸ Essential services Commission of SA, SA Water Regulatory performance – times series data, ‘restrictions and legal actions applied for non-payment’, see: <https://www.escosa.sa.gov.au/industry/water/regulatory-reporting/regulatory-performance-reports>

extend the reporting framework to include water service providers with less than 10,000 connected properties and that a working group has been tasked with progressing this particular recommendation.⁴⁹ Further discussion on relevant data sources for monitoring and benchmarking are detailed in **Attachment A**.

We thank you in advance for consideration of our comments. If you have any questions relating to this submission, please contact Rebecca Law

Yours sincerely,

Ross Womersley

Chief Executive Officer

⁴⁹ http://www.bom.gov.au/water/npr/framework-review/Urban_National_Performance_Report_Framework_Review_cover_letter_and_report.pdf, p. 11