SYDNEY WATER *Inc.*

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An essential public resource is being used to set up a new model for corporatisation. Will it work?

Consumers of water and sewerage services in Sydney and the Illawarra will be facing a 'new water order' under a corporatised Water Board. The New South Wales Parliament corporatised the Board on 5 December 1994.

The Australian Conservation Foundation has claimed the corporatisation law is 'the first of its kind: when completed it will set a world precedent for water management'. The NSW Government has claimed it is 'landmark legislation'. What is behind these claims?

The corporate model

In essence, the Bill that corporatised the Water Board deviates from the orthodox model of corporatisation.

The framework or template for corporatisation of government businesses in NSW is the *State Owned Corporations Act 1989*. This is modeled on New Zealand's *State-Owned Enterprises Act 1986* (which is also reflected in ACT and Victorian legislation). The Hunter Water Board had been corporatised under the NSW Act in 1991.

The Act requires state-owned corporations to have a principal objective of being 'a successful business'. It is this prime focus on being a successful business that has concerned critics on the Left. The Public Interest Advocacy Centre, for example, has argued that:

> Consideration of commercial decisions needs to be tempered by the public interest in universal supply where the product or service provided is essential to the well being of the individual and the society. A clear example of this would be a commercial decision to discontinue water supply and sewerage for non payment of accounts. While discontinuation of supply might be a normal commercial decision in such circumstances, it would have to be weighed against the fact that universal supply of clean running water and sanitation was possibly the biggest public health improvement in the history of humanity. Discontinuation of water supply could result in direct deaths of individuals (since water is essential for life) and the spread of diseases like typhoid and cholera. Such commercial decisions would be clearly contrary to the public interest when all factors are taken into account.[1]

The Act makes mention of 'a sense of social responsibility', but in the New Zealand case *Auckland Electric Power Board v Electricity Corp. of NZ Ltd* [1993] 3 NZLR 53 the Court found a similar provision unenforceable by way of judicial review or civil action.

The concept of 'corporate social responsibility' is being given a fillip in the Hilmer era. A range of activities can fall under this heading. They include focusing on quality outcomes for customers, commitment to ethical values, ethical investments, donations and sponsorships, partnerships with non-profit organisations, education and training, and eco-friendliness.

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Making Sydney Water

The NSW Liberal–National Government tabled a Bill to corporatise the Water Board in September 1994. It was a minority government, whose existence depended on a formal pact and good relations with three 'non-aligned Independents', one of whom was Peter Macdonald. Macdonald represented Manly, a beach side constituency, had been chairperson of the Parliament's Joint Select Committee upon the Sydney Water Board, and had good relations with environmental groups.

A network of environmental, consumer and welfare groups led by the Total Environment Centre and Australian Conservation Foundation sought to use this Bill as a 'window of opportunity'. They knew the Water Board was the biggest polluter in the State. They knew that '. . . public utilities are the bedrock of social welfare in contemporary society'.[2] They were aware of the comparable situation in New Zealand — where more weight is given to state enterprises being profitable and efficient than being a good employer or socially responsible, though 'there is no warrant whatsoever in the statute for doing so'.[3]

They lobbied for a different model of corporatisation to that provided by the *State Owned Corporations Act*, to make good corporate citizenship explicit in terms of both environmental and social outcomes. They rejected the draft Bill and negotiated a package of amendments that was not quite everything they wanted, but close to it.

The Government's readiness to negotiate followed from its minority status, and the chance to put a feather in its cap at the end of a bumpy sitting — expected to be the last before the State election. It was also a chance to send a strong signal that NSW supports national microeconomic reform of utilities following from the 1993 Hilmer National Competition Policy Review. In these objectives the Government had the enthusiastic support of the Board's management.

The new water law

The *Water Board (Corporatisation) Act 1994* has these main elements:

- the Water Board is dissolved and its assets transferred to a new Sydney Water Corporation Ltd covered by the State Owned Corporations Act;
- it gives the Corporation economic, social and environmental objectives;
- it grants Sydney Water a five-year operating licence to trade in certain services and sets out matters to be included in this licence;
- it provides for a new body, the Licence Regulator, to monitor compliance with the conditions of the operating licence;
- the integrity of water catchments is protected and pollution reduction targets are required;
- enforcement rights are recognised for third parties on environmental protection and customer service.

Sydney Water has three principal objectives. It will have to protect the environment by conducting its operations in an ecologically sustainable way. It will have to protect public health by supplying safe drinking water to its customers and the public. And of course it will have to be a successful business. (In being a successful business the company must exhibit a sense of social responsibility by having regard to the interests of the community in which it operates.) Each of these objectives is of *equal* importance.

The operating licence is a regulatory mechanism on monopoly power. It includes the corporation's geographic area of operations and a customer contract. It will be audited independently on an annual basis and also mid-term. The new corporation has been given the licence by the Parliament. There is no contestability for the monopoly franchise of 'generating' and supplying the water to customers.

The Corporation's statement of corporate intent (required by s.21 of the *State-Owned Corporations Act*) sets out objectives and performance targets for commercial performance, customer service, environmental protection, and public health.

Who are the regulators?

The role of the Licence Regulator, a new statutory authority, is to monitor the Corporation's compliance with its operating licence and to give advice to the Minister responsible for the Corporation. It may advise the Minister on penalties or remedial action over the Corporation's performance under the operating licence. Its role is, therefore, more one of a public watchdog than a regulator, despite its name. However, as described by the Australian Conservation Foundation's Tony Simpson, it 'a very teethy watchdog'.

One of its five part-time members must have experience in and knowledge of consumer issues, from nominations by the Australian Consumers Association. Another must have experience in and knowledge of water conservation and environmental matters, from nominations by the Nature Conservation Council of NSW.

The creation of this body has raised broad questions about the nature of the regulatory regime for the water industry. This has been the subject of a 1993 discussion paper by the Government Pricing Tribunal of NSW, a 1994 NSW Government white paper and a 1994 parliamentary inquiry into the Sydney Water Board. There has been no proposal in NSW for a regulatory agency that spans the three utility industries of water, electricity and gas, as there is in Victoria under the *Office of the Regulator-General Act 1994* (Vic.).

At the national level there is hostility to industry specific regulators from both the Industry Commission and the Hilmer review. A counter position draws on a view that while deregulation of competition is necessary to assist economic efficiency, regulation of standards can assist competitive advantage. Implicit in this view is that regulation of standards might be best done on an industry basis because of the need for particular expertises.

The Corporation has also not been 'vertically separated'. The headworks business and distribution/supply business remain in the one agency, unlike in Victoria where the Melbourne Water Corporation retains the headworks but three retail businesses have been created to supply water.

In NSW the debate was complicated by a perception by the environmental groups, the 'non-aligned Independents' and the Labor Opposition, that the State's Environment Protection Authority was not a competent protector of the environment. The Labor Opposition supported corporatisation in principle, but it was concerned about the inadequacy of the environmental protection regime. It proposed (unsuccessfully) that corporatisation not commence until there was integrated and revised environmental protection legislation. Labor's spokesperson on the environment Pam Allan de-

scribed the Government's approach as a 'cart before the horse approach to corporatisation'.[4] While Macdonald and the environmental groups were critical of the Government for not having reformed the pollution laws, they did not want to delay corporatisation if suitable terms were possible.

The outcome of the parliamentary settlement can be described as *internalisation* of the regulatory framework. There is no new industry regulatory body; nor has the Hilmer recommendation that responsibilities for industry regulation be removed before competition is introduced to a sector traditionally supplied by a public monopoly been subverted. Rather, environmental outcomes that might otherwise have been imposed on the corporation by an external regulator have been written into the way it is to undertake its business. These are contained in its objectives, special provisions to reduce risks to human health and prevent the degradation of the environment, adoption of pollution reduction targets, and an aim to prevent dry weather discharges of sewage to waters (including ocean outfalls). Similar provisions do not apply to the Hunter Water Corporation.

The internalisation of the environmental regulatory framework in this way, and the adoption of three equal objectives for the corporation (economic, social and environmental), constitute a decisive rejection of the New Zealand model of corporatisation.

Old and new accountabilities

The Corporation will continue to be subject to administrative and regulatory laws about freedom of information, the Ombudsman, Auditor General, Government Pricing Tribunal, Independent Commission Against Corruption, annual reporting to Parliament, environmental protection and environmental planning, and affirmative action.

Accountability to Parliament is effected through a number of means. The Minister responsible for the Act's provisions on the operating licence is answerable to Parliament. This is a major change from the situation under the *State Owned Corporations Act*. It follows concerns from the Labor Opposition and the Independent MP, John Hatton, that the Westminster doctrine of ministerial accountability to parliament had been unacceptably weakened by that Act. The Corporation's shareholders are Ministers in the Government, but Ministers responsible for the Corporation and Acts regulating its activities may not be shareholders. The Parliament may disallow proposed amendments to the operating licence authorising the Corporation to operate. The Parliament's Public Accounts Committee is able to examine its financial statements.

Those 75% of New South Walesians who support government ownership of water supply (Saulwick Poll, cited in *Sydney Morning Herald*, 14 November 1994) might be reassured by a hurdle placed in the way of privatisation. Before shares in the Corporation are sold or disposed of to anyone except Government Ministers, the Licence Regulator must hold a public inquiry into the potential social, environmental and economic impacts of the move. This is in line with a recommendation of the Hilmer review, a recommendation, incidentally, that is not included in the Council of Australian Government's *National Competition Policy Draft Legislative Package* released in September 1994. Johnson and Paddon[5] note that a future government might amend the legislation, and that privatisation can be effected 'by stealth' through franchising out its operations.

The Corporation is the supplier of water and sewerage services to the biggest consumer market in the State. Consumers should expect that the pollution caused by the Corporation's sewerage operations is 'significantly' reduced. They should expect continued supply of water, within a context of conservation of a precious resource, protection of the quality of the catchments, and demand management.

Whither the consumer interest?

These changes in the framework within which the Corporation trades can assist the public interest in a number of ways. It could encourage better resource management for future generations of consumers. It could test new models of public accountability for government corporations. It could stimulate management and employees to reinvigorate their organisation to meet the new challenges.

The proof will be in the testing. In the front line will be the Corporation's management and its workers. Behind them will be environmental, consumer and welfare groups, Parliament, government agencies like the Auditor-General, Environment Protection Authority and NSW Health, and a new oversight body, the Licence Regulator.

It is said that the bible of public servants in New South Wales is the 1992 book *Reinventing Government* by Osborne and Gaebler. Its best known quotation is that the role of government is to be a 'steerer, not a rower'. But Osborne and Gaebler have a more pertinent message for consumers. They say governance should meet the needs of the customer, not the bureaucracy. The say customers should be put in the driver's seat.

The global process of microeconomic reform has focused on removing barriers to competitive markets. The primary motive has been economic growth and efficient allocation of resources. Advocates of such reform have not been slow to stress potential advantages for consumers. They argue that a free market empowers the consumer by giving more choice.

Consumer and welfare groups tend to be skeptical about whether textbook advantages of microeconomic reform, in hypothetical *ceteris paribus* situations, will ever trickle down to market-disadvantaged Australians. Yet, ironically, the talk among private and public sector managers about 'focus on outcomes' and 'customer focus' has provided a major boost for the consumer movement. Unless the customer is recognised as a player the market model does not work.

Sydney Water will have the key customer-oriented mechanisms developed in other utilities and government agencies, like customer councils.

The relationship between the consumer and the corporation is expressed in a Customer Contract, along the lines of that in the Hunter Water Corporation. This details the customer's rights to supply of water, sewerage and stormwater drainage services, to consultation and information, to maintenance and repairs, to disconnect and reconnect their land from the water or sewer main, and to assistance, redress and compensation.

Consumers will be able to use internal complaints mechanisms. A record of all customer complaints and the action taken will be provided to the Licence Regulator. Consumers will still be able to go to external agencies like the Ombudsman's Office and Consumer Claims Tribunal, and make freedom of information applications.

As a corporation Sydney Water will be covered by the *Trades Practices Act 1974* (Cth) and the *Fair Trading Act*

1987 (NSW). Unlike the case with the Hunter Water Corporation, regulations may not be made to exempt Sydney Water from any provision of the *Trades Practices Act*.

PIAC took a strong stand in the negotiations on the standing rights for third parties. The Trades Practices and Fair Trading Acts allow any person, whether competitors, consumers or interested parties, to take legal action to enforce their provisions. The corporatisation Act also provides for any person to bring proceedings in the Supreme Court for an order to restrain a breach of a customer contract, the instrument that contains the company's service commitment to its customers. The significance of this is that if consumers feel they are not being empowered in the marketplace, they have an alternative — the courts.

There are no surprises for consumers with the corporation's price setting. Prices cannot exceed the maximum prices set by the NSW Government Pricing Tribunal, an independent body that acts as a surrogate competitor on prices to public monopolies. The Tribunal must consider a number of factors in determining maximum prices, including the costs of providing the services, protection of consumers from abuses of monopoly power, the need for greater efficiency in supply so as to reduce costs for the benefit of consumers and taxpayers, and protection of the environment (s.15, *Government Pricing Tribunal Act 1992* (NSW)). The Tribunal has pursued a process of phasing in more cost-reflective pricing for water, removing cross-subsidies from business customers to domestic customers and increasing amounts for hardship relief in the transition period. This is unlikely to change.

Some aspects of this customer focus appear to be very general. Opportunities and mechanisms for information, consultation, complaints handling, redress and compensation will become more developed. Sydney Water has already shown its commitment to disclosure of the rights of its customers by placing full page ads in the Sydney metropolitan press and distributing printed copies of its Operating Licence and Customer Contract.

Final observations

Implementation of the package will require the dynamic interaction between the Corporation and environmental, consumer and welfare groups that produced the parliamentary settlement.

Implementation will also be affected by the NSW State election. The Labor Opposition foreshadowed that it would overhaul the model if elected to government in March 1995.

The 'New Zealand model' might be further subverted. There are some key differences in Labor's approach to corporatisation and the Government's. These differences were more marked over the Bill as first tabled by the Government. However if the Government's position is that reflected in the *Water Board (Corporatisation) Act* rather than the *State Owned Corporations Act*, the differences are fewer. Labor would establish state owned corporations as statutory corporations, not public companies, and maintain employee representation on boards.

No doubt they will also want to speed up the overhaul of pollution control laws and shake up the Environment Protection Authority.

Even with Labor's concerns there are key features of the outcome that have bipartisan support. Central to this is the modification of economic efficiency by consideration of environmental and social objectives.

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