

**Submission by State Water Corporation  
On the Lakes R Us application  
to the National Competition Council  
for declaration  
of a water storage and transport service**

**Dated June 2005**

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## **1. STATE WATER CORPORATION – LEGISLATIVE AND REGULATORY FRAMEWORK**

This submission:

- (a) is filed in response to the Issues Paper published by the National Competition Council (NCC) dated April 2005; and
- (b) concludes, amongst other matters, that if the NCC should make a declaration of the type sought by the applicant Lakes R Us (LRU), the legislative framework in which State Water Corporation (SWC) carries out its statutory functions would require considerable revision/amendment, without which it is not legally possible to implement such a declaration.

As at the date of this submission, neither Blowering nor Burrinjuck Dams (the Dams) are owned by SWC – both are managed under arrangement with the NSW Department of Infrastructure, Planning and Natural Resources pending any further action by the NSW government with respect to a vesting of those structures in SWC.

However, this submission is written as if SWC had been vested with the ownership of the Dams in anticipation, but without limiting any discretion of the NSW government, of an interest in the Dams being vested.

### ***1.1. Legislative Framework***

SWC is a State Owned Corporation established under the provisions of:

- the State Water Corporation Act 2004 (the Act); and
- the State Owned Corporations Act 1989.

It commenced business on 1 July 2004 principally to undertake the functions set out in Section 6 of the Act. The Treasurer of NSW and the Minister Assisting the Treasurer are the two shareholders of SWC.

On 1 July 2004, SWC was granted an Interim Operating Licence (Operating Licence) pursuant to the provisions of Clause 12 of Schedule 4 of the Act. On 1 July 2005, State Water will be issued a three-year Initial Operating Licence.

### **Objectives and functions of SWC**

Section 5 of the Act sets out objectives of SWC:

#### ***Section 5 - Objectives of Corporation***

- (1) *The principal objectives of the Corporation are to capture, store and release water in an efficient, effective, safe and financially responsible manner.*
- (2) *The other objectives of the Corporation are as follows:*

- (a) *to be a successful business and, to that end:*
  - (i) *to operate at least as efficiently as any comparable business; and*
  - (ii) *to maximise the net worth of the State's investment in the Corporation,*
- (b) *to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates,*
- (c) *where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in Section 6 (2) of the Protection of the Environment Administration Act 1991,*
- (d) *to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates.*
- (3) *The other objectives of the Corporation are of equal importance, but are not as important as the principal objectives of the Corporation.*
- (4) *Section 20E of the State Owned Corporations Act 1989 does not apply to the Corporation.*

Section 6 of the Act sets out the principal functions of SWC.

### **Section 6 Functions of Corporation**

- (1) *The principal functions of the Corporation are as follows:*
  - (a) *to capture and store water and to release water;*
    - (i) *to persons entitled to take the water, including release to regional towns;*
    - (ii) *for the purposes of flood management; and*
    - (iii) *for any other lawful purpose, including the release of environmental water.*
  - (b) *to construct, maintain and operate water management works; and*
  - (c) *any other functions conferred or imposed on it by the Operating Licence or by or under this or any other Act or law.*
- (2) *The Corporation may:*
  - (a) *provide facilities or services that are necessary, ancillary or incident to its principal functions; and*

- (b) *conduct any business or activity (whether or not related to its principal functions) that it considers will further its objectives.*
- (3) *The exercise by the Corporation of any of its functions is subject to the Operating Licence and any applicable requirements under the Water Management Act 2000 or the Water Act 1912.*
- (4) *This section does not limit the functions of the Corporation apart from this section, but is subject to the provisions of the State Owned Corporations Act 1989, this Act and any other Act or law.*

SWC may not exercise its functions in that part of the State in respect of which Snowy Hydro Limited conducts its water operations, sections 22, 23 and 32 of the Snowy Hydro Corporatisation Act, 1997.

SWC does not conduct water, or any, transport services. The implementation of the LRU concept is *ultra vires*:

- SWC's statutory powers; and
- its Operating Licence.

SWC's statutory function set out in section 6(1)(a) of the Act with respect to water stored in any of its dams is to *release* that water. The water released into a river system is then commanded by the State's water rights out section 392 of the Water Management Act 2000 (WM Act) and under gravity, flow downhill. The river systems that SWC releases water into are naturally occurring features of the landscape. If there is an interruption to the quantity of that flow, whether natural or artificial, SWC has neither liability nor powers of intervention.

As a creature of statute, SWC's legislative capacity and operation of its storages arises from its constituting legislation and its Operating Licence. In every respect, the exercise of SWC's functions is owed to the elements of compulsion set out in its regulating documents. SWC's asset management functions arise as a legal duty compellable only by its statutory regulators.

SWC has limited powers in respect of water flowing in rivers and cannot intermeddle in the exercise of the State's water rights. When the holder of an access licence under the WM Act takes water from a river, the right to do so is a right exercisable against the Minister for Natural Resources. SWC must enable the rights of the access licence holder to extract water, subject to operational rules and constraints.

Any references in the NCC issues paper referring to SWC's "transport services" and any underlying premises are therefore currently inconsistent with law and policy.

## **1.2. Regulatory Framework**

Section 6 (3) of the Act, makes the exercise of any of SWC's functions subject to the Operating Licence and any applicable requirements made under the WM Act and the Water Act 1912.

The three principal instruments which govern the exercise of powers and functions by SWC are:

- SWC's Operating Licence;
- SWC's Water Management Works Approval granted under the WM Act; and
- Various Water Sharing Plans made by the Minister for Natural Resources under section 51 of the WM Act.

The exercise of powers and functions by SWC is also constrained by the provisions of Section 9 (2) of the WM Act, which provides:

***Section 9 - Act to be administered in accordance with water management principles and State Water Management Outcomes Plan***

- (1) *It is the duty of all persons exercising functions under this Act:*

  - (a) *to take all reasonable steps to do so in accordance with, and so as to promote, the water management principles of this Act, and*
  - (b) *as between the principles for water sharing set out in section 5 (3), to give priority to those principles in order in which they are set out in that subsection.*

- (2) *It is the duty of all persons involved in the administration of this Act to exercise their functions under this Act in a manner that gives effect to the State Water Management Outcomes Plan.*

## **Operating Licence**

The purpose of the Operating Licence is expressed at Clause 2.1.1 to be:

- (a) meet the objectives and other requirements imposed on it in the Act;
- (b) provide, construct, operate, manage and maintain efficient co-ordinated and commercially viable systems and services for capturing, storing and releasing water;
- (c) recognise the rights given to customers by this licence;
- (d) be subject to audits of compliance with its initial licence;
- (e) undertake any functions and powers of the Minister for Natural Resources under the WM Act, or the Water Act 1912 set out in the licence.

Other provisions of the Operating Licence require State Water to:

- (a) operate systems and services for delivering water in accordance with certain performance standards (Clause 5.1);
- (b) develop and implement a total asset management strategy (Clause 5.2);

- (c) endeavour to manage water, its water release functions and operations to ensure the timely availability of water taking into account physical supply constraints (Clause 6);
- (d) conduct its operations in compliance with the requirements of the WM Act, the State Water Management Outcomes Plan and the Water Sharing Plans established under the Act (Clause 7); and
- (e) develop a Customer Service Charter detailing the levels of service and mutual obligations of State Water and its customers (Clause 4.4).

### **Related legislation**

#### Snowy Hydro Corporatisation Act 1997

The Snowy Hydro shareholders are the Commonwealth, NSW and Victorian governments and there are complementary statutes.

Features of the Snowy Act are:

- (a) the Snowy Scheme is operated as an integrated system for hydro-electricity generation and water supply;
- (b) Crown dominion of the water;
- (c) Snowy Hydro's exclusive statutory rights to capture all waters within the defined Snowy Scheme catchment and to store, divert, release and use those waters for hydro-electricity generation as regulated by a NSW Snowy Licence;
- (d) an obligation for Snowy Hydro to release "Minimum Notification" annual quantities to the Murray and Murrumbidgee valleys for irrigation and water supply;
- (e) The electricity interests meet all the costs of the Scheme; and
- (f) Potential compensation, which will be triggered by any actions to modify Snowy Hydro's statutory rights.

The Act precludes others from conducting electricity or bulk water related businesses in Snowy Hydro's area of operation and water users from meeting any Snowy Hydro costs.

#### Independent Pricing and Regulatory Tribunal Act 1992

The IPART involvement in price determinations is a significant requirement on State Water as a "service provider" of rural water supply. IPART sets the maximum price limits and price paths on rural bulk water supply charges.

Approval of the proposal raises the question as to the role of IPART in setting charges for a third party "service provider" using the facilities of corporations now under its regulatory control.

The Government currently subsidises the costs of rural water supply due to following reasons:

- IPART apportions some costs to the government, as its share;
- revenue from water charges does not recover full costs; and
- Government requires non-commercial community services to be provided.

Introduction of any third party "service providers" will require a review of rural water supply charges. IPART's role in determination of water pricing from any changes to cost recovery policies by existing corporations to address third party involvements and any third party service providers' costs will need resolution.

In addition, IPART is the regulator appointed by the Portfolio Minister to oversee SWC's compliance with its Operating Licence.

### Dams Safety Act 1978

The NSW Dams Safety Act 1978 sets the standards and conditions for prescribed dams. The owners and operators of such dams are required to comply with these requirements to ensure safety of the structures and the community.

Changes to normal full supply levels of dams or operational regimes may have considerable effects on the level of risk of dams for various failure modes. This increased risk would have to be assessed and if necessary, such risk would require treatment to ensure adequate compliance.

Air space and flood mitigation zones are explicitly considered in the risk evaluation of large dams, as well as joint probability of upstream and downstream events impacting on the public, economy and the environment.

### **Agreements**

Two key Agreements to be considered are the Murray-Darling Basin Commission Agreement and Blowering Airspace Agreement.

#### Murray-Darling Basin Agreement

This Agreement is:

- the primary equity mechanism for water sharing between the three States;
- provides for cost apportionment between those States and the commonwealth governments; and
- regulates the exploitation levels of water use in the Murray-Darling Basin through its "Cap" policies.

There are carry-over policies in relation to State shares of Murray waters through a "Continuous Accounting" policy. This provides for accounting of the two upper States' use of Murray waters not just for one year as is the policy applying to individual water users but progressive carry-over for the long term, subject to

specified operational criteria. Irrigators in the Murray are well aware of the policy variation.

Whilst not an issue for the Murray-Darling Basin Agreement, in the 1980's when the Murray-Darling Basin Commission were contemplating introduction of the upper States' sharing on a continuous basis rather than on an annual basis, some water users opposed that policy, on the grounds that they would suffer loss of annual supplies.

They preferred the Annual Accounting, which gave NSW access to all unused allocation of both NSW and Victoria. Following Murray-Darling Basin Commission's approval of the policy, there has been little interest in Continuous Accounting for individual irrigators. High water users see an advantage of annual accounting with limited carry-over and more flexible market policies, as these lead to either any unused water at the end of a season being available for sharing among all irrigators and thus increasing the allocation levels or greater quantities of water available on the market. Smaller water users would favour higher carry over provisions.

### Blowering Airspace Agreement

Through a formal Agreement with Snowy Hydro, State water provides 190,000ML of air-space in Blowering Dam to enable short bursts of high releases from T3 Power Station on Talbingo Dam, thereby avoiding unnatural flooding of private property along the Tumut River.

In the Blowering Airspace Agreement there is provision for Snowy to reserve the Blowering Airspace account volume in the Scheme for release in drought times.

Snowy Hydro provides a compensatory volume of water within the Scheme in accord with air-space account. There is no payment by Snowy Hydro for the air-space reservation. The air-space management is integrated with a program to maintain the carrying capacity of the Tumut River from Blowering Dam to the Murrumbidgee River Junction to an agreed level. Snowy Hydro pays \$120,000 per year towards that program. Releases from Blowering Dam pass primarily through the Blowering Power station augmented as required by releases from irrigation valves. Snowy Hydro pays a rental for the Power Station.

Introduction of a third party having rights to Snowy releases raises issues in relation to access to Blowering storage and definition of rights to access Blowering Power station. Contract provisions would be required including State Water's cost recovery policies.

In its submission LRU asserted that Snowy Hydro pays \$120,000 for Blowering Air-space and suggested that this charge established a precedent on air-space access and proposes a fee payable to Snowy Hydro of \$1 per megalitre of air-space occupied. The \$120,000 is for Snowy Hydro's share of the annual work to maintain the agreed Tumut River channel capacity. Snowy Hydro does not pay one dollar for the provision of airspace in Blowering Dam.

### **Water Sharing Plans**



State Water is obliged to operate its Water Management Works consistent with any licences or approvals granted by the Minister for Natural Resources and must only release water from these works consistent with any relevant Water Sharing Plan (WSP), section 6(3) of the Act.

The WSP that are relevant to the Lakes R Us Proposal are:

- (a) Murrumbidgee Regulated River Water Sources;
- (b) Murray and Lower Darling Regulated River Water Sources; and
- (c) Lowbidgee and other Unregulated Stream WSP.

These Water Sources do not include the water contained in Snowy Hydro's area of operations and water entitlements managed within the mandatory framework of the Plans cannot be dealt with in or transferred, notionally or actually, into an area in which the Plans do not operate.

These WSP do not differentiate between the individual sources of water within the valley for the purpose of annual water determination. Hence, the Murrumbidgee WSP identifies Burrinjuck and Blowering Dams as the one single source of water for the purpose of water sharing.

In respect of all these matters, State Water has no discretion to perform its functions outside of parameters set without breaching the terms of the Operating Licence or the provisions of Section 16 of the Act. SWC cannot exceed its legislative capacity in respect of the management of any works vested in it and cannot grant rights which diminish the performance of its statutory obligations.

SWC has no discretion in respect to the application for the declaration without the consent of the Governor in respect of the Operation Licence and the Minister for Natural Resources, and as further set out below, without amendments being made to various Acts and Statutory Instruments.

## 2. THE LAKES R US APPLICATION

SWC has had some difficulty understanding what the applicant seeks. It makes certain assumptions which are at odds with the nature and extent of current water rights and the regulatory provisions which underpin those rights.

There is already a level of complexity under existing asset and water management regulatory conditions. Any decision in respect of the application and the examination of market effectiveness would trigger a need to engage NSW, Victorian and South Australian governments.

Threshold issues which emerge from the LRU application are:

1. the application is based on concepts and principles with little review/ research/ factual data to support the viability risks of the proposal or the potential implications on others. In fact LRU states- "*It is extremely difficult to provide a business plan with so many variables in both income and the expenditure*". (The risks evaluations apparently have not been undertaken, or if they have they are not disclosed);
2. a number of the assertions and assumptions in the application are not valid;
3. the application does not demonstrate adequate understanding of the Water Sharing Plans, overall hydrologic behaviour of the river systems and their intrinsic characteristics;
4. the application, whilst recognising the need to access and use State Water's or MDBC's facilities, which would be essential, provides little detail of their scope their operational functions; the applicants are seeking access selectively to some storages to their advantage, while ignoring other storages that form part of the same integrated system;
5. there is a less than adequate understanding of how the existing service providers have to meet the needs of the environment and all water users including riparian, stock and domestic supplies;
6. recognition of the need to have water users of all three States participate in using LRU's services but little comment on the constraints, which exists and how LRU would address them;
7. there is no recognition of the NSW governments policy on allowing water users access to an "overdraw" (borrow) facilities in State Water's or MDBC's facilities;
8. there is a less than adequate understanding of the Snowy "borrow" policy. LRU has indicated it wants to have access to that service. That would NOT be possible unless LRU "owned" rights by buying downstream users' entitlements to water and hold those as LRU's rights in Snowy Hydro facilities. The release of such water would still be subject to Snowy Hydro requirements. Management of those rights would be through existing water market provisions;
9. there is a concentration on the Murrumbidgee valley with little comment on the Murray or MDBC's Water Business' role;

10. there is lack of appreciation of the complexity of the integrated management of the systems and of the statutory and regulatory aspects, which may impact on the financial profile of the company; in addition, the impacts of suspension of the WSP in extreme events has not been considered.
11. there is a lack of understanding of the water pricing policies in NSW. No mention is made of policies in the other States;
12. the policies in relation to assigning unused water as "commons" (shared by all users) in the following season are seen as not encouraging use efficiency. An alternate policy would be debit against share 'on order' rather than against actual extraction. Losses occur in both systems because of over ordering and those losses are commons;
13. a failure to have any indication of water users' attitudes to participation in the use of proposed services to a level which would allow the company to effectively compete in the water market;
14. the arrangements for accessing under-use of announced entitlements are dealt with in a cursory manner. The timing of assessments of under-use and arrangements necessary for authorisation of an under-use will need involvement of Snowy Hydro / LRU / water users / State Water / Murray-Darling Basin Commission / Department of Planning Infrastructure and Natural Resources/Victorian agencies and South Australian agencies, who are the drivers of policy. Greater clarity in these areas needs to be enunciated. There is also an issue of practicality as water users' decisions will not be contemporaneous and the protocols for handling assembly and approvals will be complex; and
15. compliance management arrangements are not traversed in any documents.

The LRU application infers that irrigators and other stakeholders who have water access licences could, if the application was granted, make use of the storage service and have the stored water released at a time which suits their requirements subject only to environmental constraints.

For the reasons set out above, it is not clear how this position is tenable.

It further appears that the applicant, as a threshold, should have assured and been in a position to vouchsafe this assurance to the NCC, that all relevant jurisdictions had in place a legislative/statutory regime in which a declaration of the type sought, if made, could be implemented.

In the absence of those regimes, whose formation would require the exercise of non-commandable legislative and executive discretions, the application appears to invite a series of futile exercises.

## **2.1. Impact on Customers of State Water and their rights and dealings granted and effected under WM Act**

The terms "Customers" for the purposes of these comments means access licence holders i.e. access licences granted under the *WMA2000*.

The provisions of Chapter 3 of the WM Act grant a bundle of rights to holders of access licences. A holder of these rights is then entitled to exercise or enjoy a range of other rights or dealings dependent upon the continued existence of the provisions of the WM Act and those deriving from the exercise of a power or function by the Minister for Natural Resources.

Part 2 of Chapter 3, particularly Section 56, describes what an access licence entitles its holder to. The provisions of Section 56 are set out as follows:

### **"Access licences**

- (1) *An access licence entitles its holder:*
  - (a) *to specified shares in the available water within a specified water management area or from a specified water source (the **share component**),*
  - (b) *to take water:*
    - (i) *at specified times, at specified rates or in specified circumstances, or in any combination of these, and*
    - (ii) *in specified areas or from specified locations, (the **extraction component**).*
- (2) *Without limiting subsection (1) (a), the share component of an access licence may be expressed:*
  - (a) *as a specified maximum volume over a specified period, or*
  - (b) *as a specified proportion of the available water, or*
  - (c) *as a specified proportion of the storage capacity of a specified dam or other storage work and a specified proportion of the inflow to that dam or work.*
- (3) *Shares in available water may be assigned generally or to specified categories of access licence.*
- (4) *In the case of a local water utility licence, its share component is to be expressed as a specified volume per year.*
- (5),(6) *(Repealed)*

**Note:** *An access licence:*

- (a) *does not confer a right on any person to use water for any particular purpose (that right is conferred by a water use approval), and*

- (b) *does not confer a right on any person to construct or use a water supply work (that right is conferred by a water supply work approval)."*

The fulfilment of, and the exercise of, the entitlements is dependant on the Minister for Natural Resources relevantly making a Water Sharing Plan in terms which satisfy the requirements of Section 50 of the WM Act.

The relevant Water Sharing Plan (WSP):

- establishes environmental water rules;
- identifies the requirements for water of basic rights holders;
- sets out the requirements for water extraction;
- establishes access licence dealing rules; and
- provides for the establishment of a bulk access regime.

The Bulk Access Regime (BAR) identifies not only the water potentially available for abstraction by access licence holders but also establishes the rules:

- for granting such licences;
- for managing such licences when granted;
- for making available water determinations; and
- establishing priority rules when water allocations have to be adjusted;
- identifying any mandatory conditions which must be imposed on access licences; and

The rights of access licence holders are dependent upon the continued and lawful implementation of all of the relevant rules identified in the relevant WSP.

The variation of any feature of or any component of an access licence will have an impact on not only other access rights holders collectively but on the individual rights. For example, a proposal to temporarily transfer a water allocations to the holder of another access licence assumes that the characteristics of the water managed by the rules is homogeneous i.e. all the characteristics of the rights are the same.

If separate rights to store water allocation different from the ones contained in a WSP were granted, then a dealing may not be permitted for it would not conform with the requirements of or the rules of the WSP.

The creation of separate rights as regards storage/carry-over, necessarily changes the characteristics of existing rights of access licence holders.

Similarly, transfers of access licence must be affected and new transfer rules will have to be established if that is possible. Currently the lakes and rivers of the Snowy Hydro area of operations are not a water source for the purposes of the

Murray or Murrumbidgee Regulated Rivers Water Sharing Plans. Unless and until they become water sources, the management of water in them is outside of the ambit of the provisions of the WM Act in the same way as the requirement that Snowy Hydro holds a Water Management Works Licence.

The application also assumes that Blowering Dam may be operated and managed to provide the service proposed in a discrete way. In reality, the operation of Blowering Dam is inextricably connected with the operation of Burrinjuck Dam. The source of water for any Murrumbidgee customer is provided seamlessly from the two dams.

## *2.2. Impact on System Operations*

The operations of Blowering Dam cannot be considered in isolation from the operation of Burrinjuck Dam. There are also key links between the operation of the Murray and the Murrumbidgee Valleys.

Appendix 1 of the Murrumbidgee Regulated River WSP lists the various rivers and lakes which comprise the water source managed pursuant to that plan.

At item 22, the water source is expressed to include "Murrumbidgee River from the upper limit of the storage of Burrinjuck Dam down stream to the Murray River".

At item 27, the water source is expressed to include "Tumut River from the upper limit of the storage of Blowering Dam down stream to the Murrumbidgee River".

Clause 14 of Part 3 of the plan establishes a set of environmental health water rules.

The rules not only require an end of system quantum of flow, but require flow requirements to be met at various points along the rivers course.

In order to meet these flow requirements, water is sourced from the following:

- releases of water from Blowering Dam;
- release of water from Burrinjuck Dam; and
- tributary inflows from streams below these storages

Those water sources are carefully managed in order to meet the environmental flow requirements, customer requirements as well as riparian requirements imposed by the Water Sharing plan. Inflows, streamflows, evaporation, seepage, losses as well as outflows are all critical factors in managing flows for the entire system.

Fettering SWC's ability to manipulate and manage the available water resources by creating new rights to store water so as to require the release of stored water at times inconsistent with the rules of the WSP, may have potential environmental and economic impacts. Both the quantum and timing of flows down the system are important considerations in meeting requirements. The LRU

proposal appears to assume that the time value of water delivery is not assigned. In fact, due to system dimensions and rules as well as customer rights, time value is inherently assigned to Access Right holders. The LRU proposal would have to demonstrate that this value is not eroded for those who are not party to their scheme.

Clause 46 establishes a set of supplementary environmental water rules.

Supplementary water is that water which is available for abstraction at the times it is declared to be available as such.

It is the lowest ranked category of licence (refer Section 58 of the WM Act). However, for those access licence holders who have access to supplementary water, it is an extremely valuable property right.

Access to supplementary water is conditional upon the making of an Available Water Determination (AWD) which then must be consistently with the long term extraction limit specified in Clause 32(4).

For the purposes of determining the long term extraction limit, regard must be had to these matters set out in Clause 32 (1) of the WSP.

One of those matters referred to in the plan is the cap on diversions referred to in Schedule F of the Murray-Darling Basin Agreement.

In short, if the water usage in the Murrumbidgee Valley exceeds the cap on diversions, then water usage has to be reduced in order to meet the cap requirement.

If State Water's ability to manage one or both of the storages is constrained, the State of New South Wales' capacity to comply with cap requirements is detrimentally affected.

### **3. REQUIREMENTS OF TRADE PRACTICES ACT 1974 - SECTION 44G**

#### **Section 44G (a)**

In respect of Blowering Dam, the applicant proposes that access licence holders could avail themselves of a service provided by the applicant by which those holders could store their water allocations granted in one year and call for the release of those water allocations in subsequent or subsequent years.

As set out above, access licence holders have entitlements to water which have been clearly defined by:

- the WM Act;
- the WSP's; and
- the conditions attaching to the access licence itself

The point of differentiation between the service presently provided by SWC and the proposed by the applicant is predicated upon the storage of water beyond the year of allocation and the carry over provision set out in the relevant WSP.

That is, the applicant proposes a storage service for a number of years.

It is submitted that granting the applicant access to the airspace within Blowering Dam will not, and cannot expand the rights of access licence holders.

No extant rights of water users may be serviced by the granting of the application without amending the WM Act, the relevant WSP and the conditions attaching to access licences.

Assuming that an access licence holders rights could be expanded as set out above, access to the service must promote competition in at least one market place.

Since many of the water storages under SWC's control are constrained by flood operation or flood mitigation rules contained in WSP's in various ways, it is difficult to understand how competition could be promoted as the TPA requires.

#### **Section 44G (d)**

It is submitted that providing access to the airspace of Blowering Dam will have an undue risk on safety.

Airspace must be provided in Blowering Dam in accordance with the rules set out in the WSP.



Maintaining airspace assists in mitigating the impacts of floods downstream of the Dam. The height of the water level in the Dam is maintained at a level that is sufficient for the storage to fill based on the minimum forecast recession inflows.

As well, airspace operation is undertaken in accordance with the Blowering Airspace Deed. This Deed requires an airspace of up to 190 Gigalitres for the purpose of emergency power generation.

Granting the applicant access to the airspace in Blowering Dam could have a serious impact on the capability of mitigating the downstream effects of flooding and could impact on Snowy Hydro's ability to generate power in emergency circumstances.

### **Section 44G (e)**

It has been determined that WSPs will provide for the sharing of water on an annual basis. That is, available water determinations will be made on an annual basis and allocations of water made available to holders of access licence could be used or traded during that year.

Unused water could be held in storage, subject to certain limitations, for use or trading in the subsequent year.

The Water Sharing rules, including the carry over rules, were negotiated over a long period of time and are the result of various compromises made by all of the various stakeholders.

The present access regime provided for in the WSP gives effect to a balance struck between the competing claims for the available water. The rules relating to the carrying over of water were agreed to by the peak stakeholder bodies representing the majority of irrigators and thus it is submitted that it is an effective regime.

### **Section 44G (f).**

The WSPs are the product and expression of an exhaustive and extensive consultative and collaborative process which engaged the various parts of the community. The access regime established by the provisions of the WM Act followed a very lengthy developmental process.

The process commenced in 1998 with the publication of a white paper setting out a proposal to effect reforms to the Water Sharing regime in NSW. A large number of public meetings were held around the State not only explaining the proposed reforms but also to receive feedback. That consultative process resulted in the drafting of an exposure draft of a water management reform bill.

That bill was circulated on another round of consultation with stakeholders and the community was undertaken.

The draft was amended to allow stakeholders and community concerns and to adopt changes agreed to. The bill when debated in Parliament has the distinction of being the longest debated bill in the history of the Parliament.

Substantial amendments were made to the bill in Committee to address the concerns of Members and of stakeholders. The provisions of the WM Act and the Water Sharing rules and regimes achieve an outcome which the vast majority of stakeholders and communities were satisfied with.

To upset the current Water Sharing arrangements would be contrary to the expression of public interest and would require the repeal of an access regime only recently and almost universally agreed to.

### *3.1. Additional Comments on the Rationale for Access.*

#### **Exploitation of Market Power**

State Water asserts that it is not in a position to exploit its position of a natural monopoly. It has been assumed that the applicant seeks to have access to Blowering Dam storage in order to pass water through that storage and through the Dam outlet works. It is assumed that the service to be provided is a service of storage and it will be necessary for the storage service to affect the Burrinjuck Storage as well.

In this regard, and upon that assumption, Blowering Storage will have to be operated to accommodate releases of water made by Snowy Hydro as well as releases by the applicant. In other words, State Water will be required to give up storage capacity of its own storages in order to accommodate the service proposed to be provided by the applicant.

Access could not be granted on reasonable terms and conditions.

In any event, the terms and conditions of current water entitlement holders are established by legislation and or by statutory instruments, State Water has no option but to comply with the provisions of the WM Act, the Murray Darling Basin Agreement and the relevant WSP.

As well, the Water Sharing arrangements particularly in the Murrumbidgee/Tumut Rivers system are predicated on the existence of and continued existence of statutory provisions and instruments arising from those provisions.

It is those provisions which define the rights of water users and it is those provisions which regulate and control how SWC conducts its water delivery business.

There cannot be any suggestion that SWC is vertically integrated with upstream and downstream business interests, as it is not.

State Water's relationships with these interests are not voluntary nor are they contractual in nature. Obligations and duties are imposed on SWC.

In any event, the price which SWC charges for its water delivery services is determined by IPART. SWC seeks to influence the level of pricing by making submissions and representations to IPART but it does not set its own prices and charges for the services it provides.

#### **Effects of Access Regulation**

Since it is not known whether the application proposes that new rights be established or that additional features or characteristics be grafted onto existing rights the application remains obscure and incomplete. It is difficult to estimate the cost to State Water which will ensue if the application were granted.

Clearly if new rights are created, these will have to be granted and managed by the Minister for Natural Resources. That regime would entail:

- the amendment of existing legislation;
- the amendment of relevant Water Sharing plans;
- the amendment of the Murray-Darling Basin Agreement.

There would be an unquantifiable cost to State Water as well in that a system would have to be developed which could track which water users' water was passing through say Blowering dam at any time.

The matter of who exercises compliance powers also arises in that it is assumed that the relevant operator will ensure that its customers comply with the conditions attaching to that customer's water access rights. That scenario raises the issue of whether a commercial operator should have access to the regulatory powers of the regulator.

### **Promotion of Net Economic Benefit**

As has already been written, State Water does not seek to prevent third parties from accessing its infrastructure nor can it encourage access to any of its infrastructure.

It is prevented from doing so by the terms of the various instruments which regulate it in the discharge of its functions.

The applicant seeks to provide a water storage service in respect of rights to water which it does not own. However, in order to be able to provide that service, at least two matters need to be addressed.

The first is that the applicant will need to be granted an operating licence in order to undertake water storage functions.

The second is that the relevant Water Sharing Plans will have to be amended in order to create larger rights for access licence holders and to include the waters of the Snowy Scheme as water sources for the purposes of those plans.

Legislative amendments will be required in order to achieve both matters.

However the application ignores the present Water Sharing arrangements and the impacts the proposal will have on water users who do not seek to use the services of the applicant.

One significant difficulty which presents itself is how to sensibly amend a Water Sharing Plan to accommodate the expanded storage rights of the applicants'

customers and the unexpanded rights of those water users who do not join in the applicants' proposal.

The WM Act creates a hierarchy of rights to water pursuant to the provisions of Section 58.

Local water utilities, major water utilities and domestic and stock licence holders have priority over all other categories of licences. Storages are operated in such a way to ensure that 100% of share components can be maintained through a repeat of the worst period of low inflows to the water source.

Sufficient volumes of water must be set aside from assured flows into the water source and in reserves held in Burrinjuck Dam, Blowering Dam or other water storages to meet those requirements.

In the case of high security access licences, 95% of share components are maintained in storages through a repeat of the worse renewal of low inflows.

Water is not to be made available to any lower ranking access licences unless and until the water requirements of higher ranked access licences have been met. When inflows less than provided for in the Water Sharing Plan occurs, the Minister may impose water restrictions and suspend the operation of a Water Sharing Plan [Refer Section 323 of the WM Act].

## 4. NCC QUESTIONS

### 1. **Whether it is appropriate to distinguish an integrated water storage and transport services provided by State Water for the purpose of Part IIIA?**

SWC does not conduct transport services, as explained in the early part of this submission.

### 2. **The extent to which the definition of a water storage and transport service is generally understood and accepted within the water industry in commercial and regulatory contexts?**

Water delivery is well understood in the NSW urban water industry and water storage is well understood in the rural water industry. The concept of a water transport service in natural river systems, as opposed to the constructed channel systems of Irrigation Corporations, is diametrically opposed to environmental legislation as well as principles of environmental sustainability.

### 3. **What is the nature of the specific facilities and assets required to provide each water storage and transport services and ownership of these assets?**

SWC does not provide transport services as explained earlier.

In respect of asset management, it would appear the application does not contemplate structural separation of Snowy Hydro's or State Water or MDBC facilities but does seek operational separation.

If that is the correct interpretation then ownership of facilities would not change and the issue is not identification of facilities but how to create and assign the rights to a third party, and manage compliance.

Decisions on creating, assigning, protection and compliance oversight of a third party rights will involve changes to Statutes and Agreements in multiple jurisdictions, modifications to Water Businesses Operating Licenses or other regulatory mechanisms and to individual access and extraction licences.

### 4. **Whether there are any 'other associated facilities' that are needed to store and transport water from the Snowy Scheme to water users along the Murray and Murrumbidgee River systems?**

There will need to be commercial arrangements between any third party "service-provider," having access to Snowy Hydro's facilities, and the organisations (State Water, Goulburn-Murray Water and the MDBC and potentially works of the private Irrigation Corporations, local government agencies, businesses, trusts etc in each state) responsible for management of water conservation and flow regulation works along those systems.

The decisions on the latter will depend on whether LRU further specification of its application.

It is neither clear nor accepted that a feature of the natural landscape such as a river system can be a "facility" for the purposes of section 44B of the Trade Practices Act.

**5. What is the current degree of physical interconnection and operational integration and coordination between Burrinjuck and Blowering Dams?**

The only physical connection between the two dams is the natural river system, as Blowering Dam is on the Tumut River, which is a tributary of the Murrumbidgee entering the system down stream of Burrinjuck Dam.

Blowering and Burrinjuck Dams are operated in a seamless, integrated manner with the operation policies developed to have regard to limits in the river channel capacities below each dam and to draw the dams down so as to provide adequate storage access to meet allocated demands. Airspace operation of Blowering Dam, to accommodate Snowy releases and downstream demands often dictates release decisions from Burrinjuck Dam.

Coordination in management of the two Dams to meet extraction orders, environmental, end-of river flows needs and losses from the river, involves State Water establishing flow targets and thus releases from its works to meet users' orders.

Coordination with water users on operational policies is through State Water's Customer Service Committee. Actual coordination day to day coordination is through an established water ordering system.

**6. Whether it is appropriate to distinguish water storage and transport services in Blowering Dam in isolation of Burrinjuck Dam or other natural waterways that form part of the Murrumbidgee regulated river managed and controlled by State Water?**

The security levels of current users' entitlements were designed for integrated management of the two dams and Snowy Scheme operations. Competition for service performance could result in imbalances in stored waters held in Blowering and Burrinjuck Dams. This is a real issue and could lead to supply failures to water users.

**7. What is the reasonable foreseeable demand for water in the Murray, Murrumbidgee and Snowy River Systems over the medium to long term?**

The demand for extractive water and environmental flow are not fixed. They vary season by season depending on climate and water availability. In NSW embargoes were applied under its volumetric allocation scheme to issuing new licenses in both valleys in the 1980's. This policy fixed the total authorised rights to access water. Water markets were introduced to allow existing and potential new water users to be able to buy and sell existing licenses or access to water. The level of total development demand was set

by the embargo but at that time 100% development levels had not been reached. Growth in demand continued.

The Murray Darling Basin Council's Cap applied in 1995 limits diversion in each valley to the volume of water equivalent to that which would have been diverted under 1993-94 levels of development. Audits of compliance with the Cap are undertaken at regular intervals.

Under the National Water Initiative access rights of extractive water users will be modified with some re-assignment of water for environmental needs to improve river health.

The actual statistics over the period from 1996 illustrates demand variability and reflects how demands for extractions will vary. Under the National Water Initiative, the diversion levels may decrease as extraction shares will be lowered.

**8. Is it cheaper for one facility to meet foreseeable demand for long term water storage and transport in the Snowy catchment than two or more facilities?**

Water management is a spatially and temporally distributed process. Two small dams cannot be replaced with one large dam, unless the hydrology, the topography, the geology, and the economy all support such an option. This is a difficult question to answer without extensive investigations, details and facts in each of these areas. This information is not available.

**9. Whether the water lending market, as defined by LRU application is a dependent market for the purposes of criterion (a)?**

Water lending (or swapping) is a type of temporary transfer with contractual arrangements between users involving decrees of payback in the future. As a service, it is not specifically identified as water lending in current policies. LRU appears to be confused in assuming that the market is restricted by the operation of systems.

**10. Whether access would promote competition in water lending, trading in agricultural and electricity markets that depend on water storage and transport services from the Snowy?**

Agricultural experts' inputs to this question on agriculture markets would seem necessary.

It appears that LRU assert that the services its seeks to offer would overcome perceived problems in the water market to improve agricultural productivity as costs of permanent transfers are outside of the financial capabilities of young but progressive framers.

It is not understood how the LRU services overcome that financial issue as any new user still has to have an authorised right which is subject to both cost and environmental assessment.

There is no constraint under current policies to seek approval for a use right to cover a full development situation and then have the user progressively build up access and extraction rights, initially through a temporary transfer leading eventually to purchases of permanent rights.

**11. Whether access would promote competition in other dependent markets? If so exercise the nature of these markets and the prospects for competition?**

The threshold issue is legislative, policy and regulatory frameworks.

**12. Are there other facilities that provide the water storage and transport services?**

The SWC businesses and MDBC facilities could provide similar services but their availability may be less as the availability of air space may be less and would need policy changes at government level in relation to overall water management strategies in NSW, Victoria and South Australia.

There are currently constructed on-farm storages in the Lower Murrumbidgee system enabling farmers to carry-over water between seasons in works they manage. Murrumbidgee Irrigation uses Barren Box Swamp to store water and there is often carry-over, but the storage is limited and its commandability of users is limited, as it is located in the downstream sections of its business.

It is not the practice in the Murray valley. However, there are sites within the Murray Irrigation's supply areas where re-regulating storages could be constructed.

**13. Are there other mechanisms, such as water dealing, swaps and other financial instruments that affect the ability or incentive for Snowy Hydro and State Water to use market power to effect competition in dependent markets?**

The services made available by SWC for carry-over facilities are provided at minimal cost, only an administrative fee, to recover costs. At the moment it does not apply "capacity sharing" but manages the arrangements through accounts adjustments. The constraints that the market faces at present are all natural, such as rainfall, runoff, and environmental needs.

**14. If access were granted, are there any regulatory matters that will prevent increasing competition in dependent markets?**

The existing regulatory framework for SWC has been given above.

NSW has applied policy intervention in water market applications (now contained in the WSPs) specifically to address equity risks and operational constraints which exist in the systems.

**15. Whether access would affect property rights to water.**



Yes. How LRU intends to exercise its rights will certainly affect property rights of every other right holder in the system to some extent or the other. Physical laws such as conservation of mass determine the level of these impacts.

There are the legal aspects as to ownership of stored waters within any facilities under a "capacity sharing" policy.

- the nature access rights under a "capacity share" policy would need to be assessed from a legal ownership viewpoint when specified;
- the aggregate property right of individual water users for access share and extraction rights would not be changed;
- individual's rights would need to identify the divisions between rights to be serviced by each service provider and under the arrangements proposed, these would be regularly being modified; and
- water users' security equity could be changed.

In the LRU application, ownership rights could lead to retention of revenue from electricity generation when power station facilities are available. If ownership of generation rights were to go to the third party in then Snowy Scheme, it could trigger the compensation provisions in the Snowy Corporatisation Act. It would also set precedents elsewhere.

If there were to be big up-take by irrigators of access to "carry-over" storage using under usage, equity issues arise as there are prospects of loss of security to those irrigators not using the service, for several reasons:

- at present under usage water not held in State Water facilities under the NSW policies would become "commons" and thus part of the allocation to all users in the following season; and
- large carry-over amounts could require additional releases to be made to meet environmental needs with prospects of lower water availability in the following season.

**16. Are there any impediments to competition that will prevent third party access to the Snowy Hydro's services from increasing competition in dependent markets?**

This question is not clear and assumes that a form of unspecified access to Snowy Hydro's services will increase competition in unspecified markets.

**17. Is the facility of Blowering Dam Power Station an integral part of the Snowy Scheme or separate from the Scheme?**

The ownership of Blowering Power Station was vested in Snowy Hydro Ltd in the corporatisation process. However, it is located on State Water land and Snowy Hydro meets rental costs.

Blowering Power Station's operation is coordinated with State Water's releases to meet downstream needs. Total releases, as determined by State

Water, can be a combination of releases through the power station and irrigation valves, with the power station having priority. Snowy Hydro receives the generation revenue from the power station.

**18. Are there any reasons why the State Water's facility of Blowering Dam should not be considered of national significance in satisfaction of Criterion (c)?**

Blowering Dam is at least regionally significant. It is an integral facility in the provision of water supply in the Murrumbidgee valley's irrigation and regional water supply.

**19. What is the nature of the health and safety regulatory regime within which State Water provides a water storage and transport services? To what extent would a party seeking access to access to its water storage and transport service be subject to such a regime?**

State Water operates within the provisions of specific statutes, the *State Water Corporatisation Act 2004*, *State Owned Corporations Act 1989* and the *Water Management Act 200*, the *Murray-Darling Basin Act 1992*, the *Dams Safety Act 1978*, the State's suite of environmental legislation, and an Interim Operating Licence. It also has to meet regulatory provisions in relation to:

- common law responsibilities in respect of the protection of property and life;
- IPART determinations on charges;
- structural, geophysical and hydrologic integrity specifications; and
- quality of the waters released from the Scheme;

**20. How much airspace in the Snowy Hydro's storage facilities needs to be reserved to provide appropriate safety margins? Could access to the services of the storage and transport facilities be provided without adversely affecting safety?**

This is a matter for Snowy Hydro to address, but it is noted that the question ignores the basic issue of hydrologic risks associated with the spillways capacities. There are limits in the Murray valley which can limit release rates from the Scheme. These are imposed to prevent over-bank flows and flooding of private lands.

**21. How much airspace in Blowering Dam needs to be reserved to provide appropriate safety margins? Could access to the services of the storage and transport facilities be provided without adversely affecting safety?**

The current Blowering Dam Air Space Agreement with Snowy Hydro provides for 190,000ML of airspace. The operational protocols for managing the airspace are based on a forecast and pre-release policy, which has the objective of maximising the Blowering storage available for water supply and at least 190,000ML airspace at the start of the water year.

Snowy Hydro provides release forecasts and SWC integrates Blowering Dam's operation to that objective with releases at rates into the Tumut River to not exceed channel capacity.

Spillway flows from Blowering Dam are infrequent but air space releases occur in most years. Holding greater carry-over in Blowering adds to potentially greater releases to accommodate the airspace objective.

Additional storage in Blowering Dam from a need to store any third party may not significantly impact on safety, but it does add to the risk of spill and potentially greater airspace releases. In the absence of any detailed specification in the application, those impacts cannot be stated.

Under the current carry-over policy in any year when water users hold carry-over in their accounts if releases are made from Blowering Dam for air space management and Burrinjuck Dam spills, carry over accounts are adjusted.

If greater carry-over were to be provided by SWC, in the Murrumbidgee it is likely this water would be held in Burrinjuck Dam and not Blowering. Burrinjuck's spill occurrences are more frequent. The level of carry-over would influence spills but these have two potential outcomes:

- reduced security levels for water users in future; and improved restoration of downstream flows towards natural events which from solely an environmental viewpoint is more acceptable; and
- The Burrinjuck situation would also be reflected in Hume Dam in the Murray.

**22. Is there any reason why health and safety matters cannot be dealt with through appropriate terms and conditions of access to each of the services so as to satisfy Criterion (d?)**

- There are no real health issues involved. The terms and conditions referred to should be specified for this question to be addressed.

**23. To what extent (if any) does the regulatory regime including the water allocation mechanisms, the licensing regime and the statutory instruments conferring rights and obligations on State Water provide an enforceable right of access to the water storage and transport services of State Water?**

These issues have been dealt with above.

**24. Would competition in the water lending and trading market or any other dependent market resulting from third party access (not just the specific LRU business proposal to water storage and transport services) deliver beneficial efficiency, resources use and/or environmental outcomes or impose efficiency costs or cause environmental damage?**

The proposal could lead to either beneficial or detrimental environmental outcomes. Such outcomes would depend on the ability to tailor operational rules. In principle, holding more water in storages can lead to more spills. Full

usage of announced allocations by either reducing releases from upstream storages under a carry-over policy or by users extracting water for on farm storage will reduce river flows. This could lead to a need to increase releases from dams to compensate for the reduced flows. Until assessments are undertaken, it is not possible to quantify such outcomes.

The introduction of the third party access and use rights adds complexity and costs to operations; rights management; and cost sharing. It would transfer potential public revenue to private profit if the third party was a private company.

**25. What amendments to the current regulatory regime would be needed if the water storage and transport facilities were declared and what would be the likely costs of such amendments?**

This has been dealt with above. Direct and indirect costs cannot be quantified. There would be a need to modify the existing Statutes, Corporations' and water users' licenses and Agreements. This would involve four jurisdictions, (New South Wales, Victoria, South Australia and the Commonwealth).

**26. Are there any reasonably foreseeable issues that could materially affect the Council's assessment of the duration of any declaration in line with LRU application? If so when and how are the issues likely to arise?**

Private access to public infrastructure requires the demonstration of the technical, financial and management competence of the person seeking that access.

**CONCLUSION**

If the NCC should make a declaration of the type sought by the applicant LRU, it is not legally possible to implement it, unless all necessary legislative amendments are made and relevant planning approvals are obtained.