



**Applications by Services Sydney for Declaration of Sewage  
Transmission and Interconnection Services**

**Further Submission to the National Competition Council**

**24 September 2004**

## 1. INTRODUCTION

This document contains the further submission of Services Sydney Pty Ltd (**Services Sydney**) to the National Competition Council (**Council**). This submission is in response to the Council's Draft Recommendation dated 12 August 2004 (**Draft Recommendation**) in relation to Services Sydney's Application for declaration of sewage transmission and interconnection services provided by Sydney Water dated 1 March 2004 (**Application**).

Services Sydney wishes to address a number of matters that are of importance to the declaration recommendation and to the implementation of Services Sydney's proposal. These matters concern:

- (a) the duration of declaration recommended by the Council; and
- (b) whether the Sydney Sewage Reticulation Network constitutes a facility for the purpose of Part IIIA of the *Trade Practices Act 1974* (Cth) (the **TPA**).

These matters are addressed separately below. Unless otherwise stated, this submission adopts the defined terms set out in the Application, Services Sydney's submissions on the Council's Issues Paper, dated 4 June 2004 (**Services Sydney's first submission**) and Services Sydney's further submission to the Council dated 19 July 2004 (**Services Sydney's second submission**).

## 2. DURATION OF DECLARATION

### 2.1 Factors relevant to duration of declaration

Section 44H(8) of the TPA requires that every declaration include an expiry date. Services Sydney has submitted to the Council that in the context of the Application it would be appropriate for the Council to recommend an expiry date for declaration of 50 years.<sup>1</sup> Services Sydney is not aware of Sydney Water having expressed a position in relation to the duration of declaration.

In the Draft Recommendation, the Council indicated that in consideration of the desirability of periodic review of access regulation governing services, an expiry date of 15 years is appropriate. The Council concluded that:<sup>2</sup>

*"[ ... ] the Council recognises that significant infrastructure developments such as that proposed by Services Sydney, require a long period of certainty in relation to any access*

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<sup>1</sup> Services Sydney Submission to the National Competition Council on Issues Paper dated 4 June 2004 – pp14-15.

<sup>2</sup> Draft Recommendation - pp72-73.

*rights. Smaller projects, such as sewer mining ventures, would have much shorter development and construction lead times. A shorter declaration period to that requested by Services Sydney would accommodate such projects. There would be nothing preventing Services Sydney from seeking further declaration under Part IIIA after the expiry of an initial period. Taking into account these factors, the Council considers on balance, that a declaration period of 15 years would be appropriate.”*

The Council’s Guide to Part IIIA of the TPA sets out the considerations relevant to determining the duration of a declaration as:<sup>3</sup>

- (a) the need for long term certainty for business;
- (b) the need for sufficient duration of declaration to have an impact in the relevant market; and
- (c) the desirability of periodic review of access declarations under Part IIIA of the TPA.

Part IIIA of the TPA also provides for a revocation process for access declarations. The revocation process enables the Council to recommend that an access declaration be revoked where it considers that, at that time, circumstances have changed to the point that the declaration criteria are no longer met. Examples of changes in circumstances given in the Council’s Guide to Part IIIA of the TPA include:<sup>4</sup>

- (a) changes in the level of demand and in supply conditions as they relate to whether the facility continues to possess natural monopoly characteristics;
- (b) changes in technology and market conditions that impact on the level of competition in the relevant market; and
- (c) reform initiatives, such as the implementation of an effective access regime by a State government.

However, in setting out factors relevant to the duration of declaration in the Draft Recommendation, the Council has combined considerations relevant to the current application of the declaration criteria (the declaration process) with considerations relevant to the future application of the declaration criteria (the revocation process). In doing so, the Council arrives at

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<sup>3</sup> National Competition Council – Guide to Part IIIA of the Trade Practices Act 1974 – Part B Declarations – December 2002 p16.

<sup>4</sup> National Competition Council – Guide to Part IIIA of the Trade Practices Act 1974 – Part B Declarations – December 2002 p16-17.

the concept of “*the policy objective of not over-declaring*”<sup>5</sup> which appears to require future changes in technology and regulatory structure to be taken into account in determining the duration of declaration.

Services Sydney considers that this approach is not in accordance with the structure of Part IIIA of the TPA. The revocation process has been included in Part IIIA of the TPA to enable the Council to make recommendations for declaration for a commercial timeframe. Accordingly, the policy objective of *not over-declaring* should be balanced by the equally important policy objective of *not under-declaring*. In this case, under-declaring by recommending an expiry date of only 15 years would undermine the objectives of declaration, namely, the promotion of competition.

While the Council notes in the Guide to Part IIIA of the TPA that declaration does not constrain the parties from negotiating access rights that continue beyond the period of the declaration, Sydney Water’s market power will only be constrained for the duration of declaration. It is very uncertain as to whether Services Sydney would be able to successfully negotiate access with Sydney Water for a commercial duration beyond the 15 years proposed by the Council.

## **2.2 Appropriate duration of declaration**

The Council has previously adopted a flexible approach to determining the expiry date of declarations in accordance with s 44H(8) of the TPA. In the discussion paper for the *Western Power* application,<sup>6</sup> the Council has stated that:

*“The period of declaration will need to be considered on a case-by-case basis, and will vary according to the circumstances of each application.”*

Services Sydney submits that in the circumstances of the Application, an expiry date for declaration of 15 years does not provide a commercial timeframe for a return on investment on the new infrastructure to be developed as part of Services Sydney’s proposal. As set out in Services Sydney’s first submission, an expiry date of 50 years would be required to enable investors to obtain an appropriate return over the economic life of the relevant infrastructure.

The practical difficulty with projects of this kind is that without long term certainty in relation to access, it will not be possible to attract the significant investment required to develop the proposal. Major new infrastructure projects such as motorways, rail links and water filtration plants are commonly undertaken in connection with concessions of 30 to 50 years. Examples of

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<sup>5</sup> National Competition Council – Guide to Part IIIA of the Trade Practices Act 1974 – Part B Declarations – December 2002 p17.

<sup>6</sup> National Competition Council – Discussion Paper – *Application for Declaration of electricity transmission and distribution services by Western Power Corporation* – February 2001, p43.

concession periods for significant infrastructure projects are set out in Attachment A to this submission. The Council has acknowledged that Services Sydney's proposal is likely to promote competition. Given the lead time involved in Services Sydney's proposal, even a declaration of 30 years would be too short a period to ensure successful implementation.

A long duration of declaration in this case would be consistent with the flexible approach adopted by the Council in making recommendations with respect to the expiry date of declarations and certification of access regimes. In the *AustralAsia Railway* decision, the Council recommended that the relevant access regime be certified for 30 years, noting that a long duration of certification may be appropriate in certain circumstances.<sup>7</sup>

*"In this case, the Regime covers what is, in part, an entrepreneurial greenfields project. The Consortium intending to construct and upgrade this rail line will need to generate considerable demand if this project is to be profitable – it is taking a considerable risk [ ... ]. In a number of ways, this differs from an established infrastructure facility or a facility built to serve an established market."*

Services Sydney submits that in the context of a greenfields project such as 'Sustaining the City', a similar approach would be appropriate. Services Sydney acknowledges that in isolation, a long term declaration would not meet the Council's policy objective of ensuring periodic review of access regulation governing services under Part IIIA of the TPA. However, this could be remedied by the Council recommending an expiry date 50 years from the date of declaration of the transmission and interconnection services in conjunction with a process of periodic review at a minimum of 5 year intervals.

A periodic review process is open pursuant to s 44J of the TPA which enables the Council to make a recommendation with respect to revocation of an access declaration at any time prior to the expiry date. This review process could include such public consultation as the Council considers appropriate to be satisfied that the declaration criteria were no longer met.

The Council adopted a similar periodic review process in the *AustralAsia Railway* decision in the context of recommending the relevant access regime be certified for a period of 30 years. In considering the periodic review process the Council stated that:<sup>8</sup>

*"this early opportunity for public participation and scrutiny ... should alleviate concerns that the Regime will be inappropriately implemented and that such implementation will be maintained throughout the duration of the certification."*

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<sup>7</sup>

National Competition Council, *Final Recommendation – AustralAsia Railway*, February 2000, p2.

<sup>8</sup>

National Competition Council, *Final Recommendation – AustralAsia Railway*, February 2000, p97.

Services Sydney considers that this approach of adopting an expiry date for the Application of 50 years with reviews every 5 years will satisfy the competing objectives of long-term certainty for investors and ensuring access obligations do not continue to be imposed in circumstances where they are no longer necessary. This approach is consistent with other regulated industries such as gas and electricity. While access terms and conditions applying in these industries are subject to a process of periodic review, the applicable access regimes are in fact perpetual and provide long term certainty for business.

### **3. FACILITY V FACILITIES**

In the Application,<sup>9</sup> Services Sydney's first submission<sup>10</sup> and Services Sydney's second submission,<sup>11</sup> Services Sydney has submitted that the Sydney Sewage Reticulation Network comprising the NSOOS, BOOS and SWSOOS sewers should be treated as the relevant facility for the purpose of the Application on the basis that:

- (a) there is a sufficient degree of physical interconnection and operational integration between the NSOOS, BOOS and SWSOOS;
- (b) the degree of physical interconnection and operational integration between a set of assets should not be determinative of whether that set of assets may be considered a relevant facility for the purpose of Part IIIA of the TPA and it is open to the Council to consider the NSOOS, BOOS and SWSOOS a single facility in circumstances where the degree of physical interconnection and operational integration between them is marginal; and
- (c) in any event, it is open to the Council to treat a set of separate facilities as the relevant facility for the purpose of Part IIIA of the TPA.

In the Draft Recommendation, the Council treated the NSOOS, BOOS and SWSOOS sewers as separate facilities based on conclusions that:<sup>12</sup>

- (a) the degree of physical interconnection and operational integration appears to be marginal;
- (b) access to each of the NSOOS, BOOS and SWSOOS would be meaningful; and
- (c) there would be nothing preventing Services Sydney from seeking access to services provided by all three facilities.

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<sup>9</sup> Application, pp9-10.

<sup>10</sup> Services Sydney submission, pp2-7.

<sup>11</sup> Services Sydney further submission, pp13-15.

<sup>12</sup> Draft Recommendation, p18.

Services Sydney submits that the relevant facility in an application for declaration should be defined purposefully and acknowledges that there is no one correct facility for the purposes of Part IIIA of the TPA. Services Sydney has maintains that it is open to the Council to adopt Services Sydney's definition of the Sydney Sewage Reticulation Network as set out in the Application. The Council has not stated that this is not the case. In circumstances in which the Council intends to reject an applicant's definition of the relevant facility, the Council would be expected to provide reasons as to why its' definition of the relevant facility is preferred to that of the applicant. These reasons have not been provided in the Issues Paper nor in the Draft Recommendation.

Services Sydney submits that it would be very surprised if the degree of physical interconnection and operational integration between the NSOOS, BOOS and SWSOOS were as marginal as Sydney Water has claimed.<sup>13</sup> While Sydney Water asserts that these sewers are geographically distinct, Attachment 6 to the Application demonstrates that the boundaries of the NSOOS, BOOS and SWSOOS interlock over a single geographic footprint. Sydney Water's claim that the NSOOS, BOOS and SWSOOS are operated independently is most likely to be the case with respect to the North Head, Bondi and Malabar *sewage treatment plants* that do not form part of the relevant facility for the purpose of the Application. In terms of the Sydney Sewage Reticulation Network defined by Services Sydney in the Application, it is difficult to accept that the boundaries of the sewers comprising this facility would not be the subject of integrated operations, for example, common maintenance staff supervised by Sydney Water.

Services Sydney reiterates that there is no legal requirement or practical basis for the degree of physical interconnection and operational integration between the NSOOS, BOOS and SWSOOS to be determinative of their being considered one facility for the purposes of the Application. While the Council has cited interconnectivity as being an important factor in the *Sydney Airport* decision,<sup>14</sup> this term was used by the Tribunal in the context of the bundled nature of international freight and passenger handling services at the airport.<sup>15</sup> This is distinct from the degree of interconnection between the assets used to provide these services which, in the case of Sydney International Airport, did not have a significant level of physical interconnection.

Services Sydney considers that the most appropriate approach to defining the relevant facility in the context of the Application is to place less emphasis on the degree of physical interconnection and operational integration between the NSOOS, BOOS and SWSOOS in a similar manner to that adopted in the *Sydney Airport* decision.

The question of whether access to the services provided by any of the NSOOS, BOOS and SWSOOS would be 'meaningful' does little to clarify the Council's approach to defining the

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<sup>13</sup> Sydney Water submission, pp 11-13.

<sup>14</sup> Draft Recommendation, p 16.

<sup>15</sup> *Sydney Airport* decision, para 193.

relevant facility. Clearly it would not be appropriate to define the relevant facility so that it would be impossible for an access seeker to obtain meaningful access. However, this criteria can be applied to the Sydney Sewage Reticulation Network as defined by Services Sydney in the Application with the same result. Accordingly, the test of 'meaningful access' does not assist in determining whether treating the NSOOS, BOOS and SWSOOS as separate facilities is more appropriate than the approach put forward by Services Sydney or any other approach to defining the relevant facility for the purpose of the Application.

Finally, Services Sydney notes that Council has not addressed the issue of whether a number of facilities may be considered the relevant facility for the purpose of Part IIIA of the TPA.

## ATTACHMENT A – CONCESSION PERIODS

Major Infrastructure Asset	Operator	Period
Prospect Water Filtration	Australian Water Services	25
Sydney Harbour Tunnel	Tunnel Holdings Limited	30
Cross City Tunnel	B+B & Baulderstone Hornibrook	30
Spencer Street Station	Civic Nexus	30
M5 Motorway	Interlink Roads	31
Lane Cove Tunnel	Lane Cove Tunnel Company	33
City Link Melbourne	Transurban Limited	34
M7 Sydney Orbital	Westlink Motorway Limited	34
M2 Motorway	Hills Motorway Limited	45
Eastern Distributor Motorway	Airport Motorway Limited	48
Alice to Darwin Railway	Freightlink/Asia Pacific Transport	50
Channel Tunnel Rail Link	London/Continental Railway Ltd	90
407ETR Motorway Canada	Macquarie Infrastructure Group	99