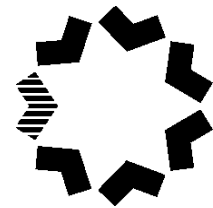


# National Competition Council

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**MEDIA RELEASE**

**9 January 2006**

## **National Competition Council releases final recommendation on application by Lakes R Us for declaration of water storage and transport services**

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The National Competition Council (NCC) today publicly released its final recommendation that the water storage and release services provided by Snowy Hydro Limited and State Water Corporation should not be declared under Part IIIA of the *Trade Practices Act 1974*.

The Council's final recommendation is unchanged from the draft recommendation it released on 8 September 2005.

Today's release of the Council's final recommendation follows the decision by the acting New South Wales Premier that the services should not be declared.

The acting Premier's decision, and the Council's final recommendation, is in response to an application by Lakes R Us Pty Ltd for water storage and transport services, provided by Snowy Hydro Limited and State Water Corporation, to be declared under Part IIIA of the *Trade Practices Act 1974*.

Where access to essential infrastructure is necessary to compete in markets that depend on the infrastructure, and it is uneconomical to duplicate the infrastructure, a person may apply to the Council to declare the service under Part IIIA of the *Trade Practices Act 1974*.

Part IIIA of the *Trade Practices Act 1974* recognises that failure to enable a third party to access privately or government owned essential infrastructure can pose a bottleneck that impacts adversely on competition in other markets.

Lakes R Us Pty Ltd's application for declaration related to the following Snowy Hydro and State Water services:

- A water storage and release service provided by Snowy Hydro using the Snowy Mountains Hydro-Electric Scheme
- A water storage and release service provided by State Water using the Blowering Dam and Burrinjuck Dam facility

Lakes R Us Pty Ltd's purpose in seeking declaration of these services was to provide a water management service for unused, annual irrigator and industrial water user allocations. It proposed to store water in the Snowy Scheme dams and release this water in future years.

Snowy Hydro and State Water opposed the Lakes R Us Pty Ltd application, along with the National Water Commission and the Murray-Darling Basin Commission.

In accordance with the procedures outlined in Part IIIA of the *Trade Practices Act* 1974, the Council provided its final recommendation to the Premier on 10 November 2005.

### **The Final Recommendation**

In making its final recommendation not to declare the services in question, the Council had to consider whether the services (in this case the water storage and transport services provided by Snowy Hydro Limited and State Water Corporation) met all of the following criteria in Part IIIA of the *Trade Practices Act* 1974:

- a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service
- b) That it would be uneconomical for anyone to develop another facility to provide the service
- c) That the facility is of national significance, having regard to:
  - i The size of the facility or
  - ii The importance of the facility to constitutional trade or commerce or
  - iii The importance of the facility to the national economy
- d) That access to the service can be provided without undue risk to human health or safety
- e) That access to the service is not already the subject of an effective access regime
- f) That access (or increased access) to the service would not be contrary to the public interest

The final recommendation – that the services not be declared – reflects the Council's view that the statutory criteria for declaration (a) and (f) are not met. The Council reached the following conclusions on each of the criteria.

**a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service**

The Council considers that declaration of the services would not have any practical impact on competition in other markets. For declaration to have any practical effect New South Wales would need to fundamentally change the nature and scope of property rights relating to water.

In addition, because declaration could alter water releases to the Murray River, governments would need to renegotiate intergovernmental agreements to clarify water sharing arrangements for the river. Therefore, even if the water storage and release services are declared, it is unlikely that competition would be promoted.

The Council considers that the Lakes R Us application in respect of water storage and release services of Snowy Hydro and State Water does not satisfy criterion (a).

**b) That it would be uneconomical for anyone to develop another facility to provide the service**

The Council considers that criterion (b) is satisfied because it would be uneconomical for anyone to develop another facility to provide the water storage and release service provided by the Snowy Scheme.

The Council considers that the Blowering and Burrinjuck dams facility also satisfies criterion (b) because of the high degree of interconnection between the Blowering and Burrinjuck dams facility and the Snowy Scheme.

**c) That the facility is of national significance**

The Council considers that, on the basis of the size, importance and interconnection of the Snowy Hydro facility and the State Water facility, the Lakes R Us application satisfies criterion (c).

**d) That access to the service can be provided without undue risk to human health or safety**

The Council is satisfied that access to the water storage and release services of Snowy Hydro and State Water can be provided without undue risk to human health and safety. Accordingly, the Council considers that the Lakes R Us application satisfies criterion (d).

**e) That access to the service is not already the subject of an effective access regime**

The water storage and release services provided by Snowy Hydro and State Water are not the subject of an effective access regime. Accordingly, the Council considers that the Lakes R Us application satisfies criterion (e).

**f) That access (or increased access) to the service would not be contrary to the public interest**

The Lakes R Us proposal would substantially alter existing water allocation arrangements and this has the potential to impose significant costs on a range of parties, including state governments, water users and the environment.

The Council therefore considers that the Lakes R Us application does not satisfy criterion (f).

A full copy of the Council's final recommendation can be downloaded from [www.ncc.gov.au](http://www.ncc.gov.au).

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**See also:**

Fact sheet: Regulation of Access to Infrastructure

Diagram: Process for declaration of a service

**For further information:**

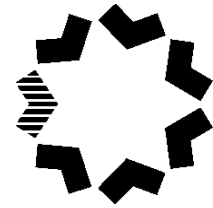
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## FACT SHEET

# Regulation of Access to Infrastructure

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### Rationale

In some circumstances, businesses require the use of major infrastructure to compete in a particular industry. Where access to that infrastructure is not readily available, and the infrastructure is costly to duplicate, it may pose a 'bottleneck' that can impact adversely on competition in other markets.

Such bottlenecks contribute to inefficiencies in the Australian economy, especially in the often unnecessary and uneconomical duplication of essential infrastructure.

For example, an energy retailer may require access to gas pipeline services to move gas from a production base to customers. By gaining access to pipeline services, the business is able to compete in the energy retail market.

By opening up markets to new entrants, access helps to promote competition in those markets and reduce prices.

### National Competition Policy and the National Access Regime

Under the 1995 National Competition Policy (NCP) agreements, all Australian governments agreed to a regime for third party access to services provided by nationally significant infrastructure where:

- Access to the service is necessary to permit effective competition in other markets
- It would not be economically feasible to duplicate the facility
- The facility is of national significance, having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy
- The safe use of the facility by the person seeking access can be assured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist

These criteria are reflected in Part IIIA of the *Trade Practices Act 1974*, which also includes a criterion that access to a service would not be contrary to the public interest.

The National Access Regime, established through amendments to the *Trade Practices Act 1974*, provides a mechanism for determining the merits of access requests when commercial negotiations fail.

The National Access Regime gives businesses (or individuals or other organisations) a legal avenue through which to negotiate sharing the use of infrastructure services owned by another business.

The rationale for access regulation is that the owners of major infrastructure often have substantial market power that they can exploit to prevent competition in other markets.

### **Part IIIA of the Trade Practices Act 1974**

Part IIIA of the *Trade Practices Act 1974* provides a regulatory framework for National Access Regime negotiations supported by credible dispute resolution procedures. The three pathways for access to infrastructure services are:

#### ***Declaration (and arbitration)***

A business seeking access to a particular infrastructure service can apply for the relevant government minister to 'declare' a service.

The National Competition Council considers the matter against the criteria outlined in the *Trade Practices Act 1974* and recommends to the minister whether the service sought by the applicant should be declared.

The minister's declaration of the service, or a decision not to declare the service, may be reviewed by the Australian Competition Tribunal, at the request of either the access applicant or the provider of the service. A review by the Australian Competition Tribunal involves a complete reconsideration of the application.

If declaration occurs, access seekers acquire a legal right to negotiate access with the provider. If necessary, the Australian Competition and Consumer Commission (ACCC) arbitrates to determine fair commercial terms for access to the service. The ACCC has the power to impose access terms or refuse access if it finds that the provider cannot be appropriately compensated for the costs associated with providing access to its facility.

#### ***Certified Regimes***

Where an effective access regime already exists, a business seeking access must use that regime.

Under Part IIIA, following a recommendation from the National Competition Council, the designated federal minister can certify an access regime as being effective. The criteria for assessing whether an access regime is effective focus on whether the regime has an appropriate framework to promote competitive outcomes.

#### ***Undertakings***

Infrastructure operators can make a formal undertaking to the ACCC, setting out the terms and conditions on which they will provide access to their service. If accepted, these undertakings are legally binding, so other businesses can use them to gain access. Once undertakings are accepted, the infrastructure is immune from the declaration process under Part IIIA of the *Trade Practices Act 1974*.

### **Role of the National Competition Council**

The Council makes recommendations to the relevant minister on the merits of declaration applications and certification of effective access regimes as they pertain to the criteria established in Part IIIA of the *Trade Practices Act 1974*.

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#### **For further information:**

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