Attachment: NSW application for certification of the water industry infrastructure access regime – National Competition Council request for additional information

1. NSW Government objective for third party access to water industry infrastructure services

While the object of Part 3 of the *Water Industry Competition Act 2006* ("Act") (in s21) is to establish a scheme to promote the economically efficient use and operation of, and investment in, significant water industry infrastructure, thereby promoting effective competition in upstream or downstream markets, the NSW Government has provided no statement in its Application regarding its support for appropriate access arrangements as a means of achieving competitive outcomes in the provision of water and sewerage services. While this support may be implicit, it would assist the Council's assessment of the effectiveness of the WICA Access Regime if the NSW Government provided a statement outlining its policy objectives regarding competitive service provision and how it sees the WICA Access Regime as contributing to the delivery of those objectives.

2. Determination of licensing applications

The arrangements for the licensing of network operators and retail suppliers under Part 2 of the Act appear to be integral to the effective operation of NSW's water access arrangements. To provide water and/or sewerage service(s), an access seeker must obtain the relevant licence and access to the infrastructure service provided by water industry infrastructure.

In the case of an application for a licence to supply water, the Minister must be satisfied (among other things) that 'sufficient quantities' of the water supplied by the licensee will be obtained from sources other than a public water utility (s10(4)(d) of the Act). A public water utility includes the State Water Corporation, the Sydney Catchment Authority, the Sydney Water Corporation, the Hunter Water Corporation, a water supply authority within the meaning of the *Water Management Act 2000*, and councils exercising water or sewerage functions.

The licensing provision in s10(4)(d) may constrain the scope of the access arrangements in the WICA Access Regime to promote effective competition in related markets. In particular, it could have the effect of precluding competitive options around more innovative/ better targeted/cheaper water supply retail services (for example in competition with Sydney Water or Hunter Water) where the (potential) competitor wishes to source water from public water utilities, including from the bulk water provider the Sydney Catchment Authority.

It would assist the Council's consideration of the Application if the NSW Government explained how it intends the licensing provisions under the WICA Regime (in particular s10(4)(d)) to operate.

3. Declaration of certain services in *Re Services Sydney Pty Ltd* [2005] ACompT 7

As the NSW Government is aware, certain services provided through Sydney Water's Bondi, Malabar and North Head Reticulation Networks, are the subject of a declaration for a period of 50 years pursuant to Part IIIA of the *Trade Practices Act 1974* (TPA) made by the Australian Competition Tribunal (*Re Services Sydney Pty Ltd).* The NSW Government has deemed these services (and other services in the area of operations of the Sydney Water Corporation and the Hunter Water Corporation) as covered under the WICA Access Regime (s22 and Schedule 4 Part 2 of the Act).

Though it is not explicitly stated in the Application, it may be the NSW Government's intention to seek revocation of the declaration under the *Re Services Sydney Pty Ltd* decision if the WICA Access Regime is certified. The NSW Government's intention in this regard is likely to be of interest to suppliers of water services for two reasons: first, if the declaration is revoked, suppliers will necessarily rely on the WICA Access Regime and second, if revocation is not sought, for certain infrastructure services there will potentially be two different arrangements for access regulation.

A statement outlining the NSW Government's intentions regarding the declared services is desirable to assist the consultation process in relation to the current Application.

4. Binding non-coverage declarations

Provisions for binding non-coverage declarations in relation to services provided by greenfields and other (non-commissioned or different purpose) investments in water industry infrastructure are contained under Division 4 of Part 3 of the Act.

The provisions in the Act have some similarity with arrangements for the regulation of gas pipelines under the National Gas Law. In the context of gas pipeline regulation, there was an argument that binding non-coverage declarations may be inconsistent with the certification criteria because if circumstances changed, such that services the subject of a binding non-coverage declaration would otherwise fall within clause 6(3) of the Competition Principles Agreement, the binding non-coverage declaration would effectively preclude the infrastructure services from being covered. To put the issue beyond doubt, the *Australian Energy Market Amendment (Gas Legislation) Act 2007 (Cth)* amended s44M(4A) of the TPA to provide that the Council must disregard Chapter 5 of a National Gas Law when considering the certification of a gas access regime.

The Council invites the NSW Government to comment further on how it sees the WICA Access Regime addressing the possibility that binding non-coverage declarations may be inconsistent with the certification criteria if they preclude declaration of services which would otherwise meet the declaration criteria. For example, the NSW Government might wish to expand on the rationale/interpretation underpinning s36 of the Act. This section provides that a binding non-coverage declaration does not have effect unless the infrastructure to which it relates when used for the storage, conveyance or reticulation of water or sewage has substantially the same capacity or serves substantially the same

geographic location as specified in the application for the declaration. The NSW Government might also wish to expand on the reasons for the assertion in the Application that the likelihood of significant changes in circumstances for water industry infrastructure services within a 10 year non-coverage period is low.

5. Review of decisions and determinations

Under the WICA Access Regime the Minister determines applications for coverage declarations, for revocation of coverage declarations, for binding non-coverage declarations, and for licences. The regime does not provide for merits review of the Minister's decisions. Nor does it provide for merits review of arbitration determinations by IPART. It would appear that dissatisfied parties are limited to seeking judicial review of coverage decisions in the NSW Supreme Court, while arbitration decisions are final and binding on the parties (subject to the judicial review procedure under s38 of the *Commercial Arbitration Act 1984*).

While it may be that merits review of decisions and/or determinations is not necessarily required for an access regime to operate effectively, it is important that there are adequate safeguards against what parties may perceive to be arbitrary or unreasonable decision making. If there is insufficient opportunity to test decisions relating to licensing, coverage and access disputes, then there may be a question about effectiveness. The Council seeks elaboration from the NSW Government on the processes available under the WICA Access Regime for the testing of the Minister's decisions and IPART's determinations.

In addition, the Council asks the NSW Government to elaborate on the operation of the *Commercial Arbitration Act* and how it sees this legislation providing for the timely determination and enforcement of the arbitrator's decisions.

6. Efficiency promoting terms and conditions of access

Section 41 of the Act sets out the pricing principles that IPART must have regard to when approving an access undertaking, and that an arbitrator must have regard to when determining a dispute in relation to the pricing of access to an infrastructure service that is the subject of a coverage declaration.

Section 41(3) the Act provides that the pricing principles must be implemented in a manner consistent with any relevant pricing determinations for the supply of water and the provision of sewerage services, including where applicable the maintenance of 'postage stamp pricing' (presumably in retail markets). The Council seeks further explanation on how the NSW Government sees these pricing arrangements operating, and in particular the interaction of efficient access terms and conditions and the requirement for consistency with (any) postage stamp pricing arrangements.

There may be a typographical error regarding the discussion of clause 6(5)(b) in the table attached to the schedule provided as part of the Application. The reference to section 47 of the Act may in fact be to section 41. If this is the case, would you please submit an amended pdf document for publishing on the Council's website.

7. Access undertakings

Section 42 of the Act provides that a service provider of infrastructure services the subject of a coverage declaration must keep separate accounts and submit a cost allocation manual to IPART. It would appear that this requirement does not apply in relation to access undertakings approved by IPART. It may assist interested parties if the NSW Government explained its views regarding separate accounts and cost allocation in the context of services the subject of access undertakings.