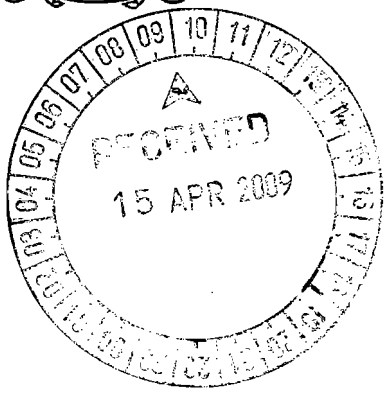
New South Wales Government
Department of Premier and Cabinet

TCO/19310 - LB



- 7 APR 2009

Mr David Crawford
President
National Competition Council
Level 9, 128 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Crawford

I am writing in relation to the National Competition Council's draft recommendation dated 2 April 2009 concerning the application for certification of the NSW water industry infrastructure services access regime established under the *Water Industry Competition Act 2006* (the "WICA").

The NSW Government welcomes the proposed recommendation to certify the NSW water industry infrastructure services access regime.

I note, however, that the draft recommendation also includes discussion of a number of matters which are not relevant to the Council's statutory role of assessing whether the access regime is consistent with the relevant principles in the Competition Principles Agreement.

I am concerned that this may lead some industry stakeholders to misunderstand the nature and purpose of the certification process, and the Council's role in it. For example, it is possible that some sections of the draft recommendation may be read as suggesting that the Council will take into account subjective views as to whether there might have been "a better approach" to the one that has been adopted by the NSW Government (see ¶1.6 - ¶1.9).

I think it is important that stakeholders understand that the assessment of whether an access regime is an "effective access regime" is directed solely toward assessing the regime's compliance with the principles under the Competition Principles Agreement, and that it does not involve any further assessment of the merits of the regime, as to which, of course, reasonable minds may well differ.

In order to ensure that stakeholders are properly informed, I would be grateful, therefore, if you could please also make this letter publicly available when you publish the draft recommendation.

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I see that the Council is seeking public submissions particularly in relation to three matters (¶1.5). As you know, the NSW Government has already provided information in relation to these matters in my previous letter of 17 February 2009.

In light of specific statements made by the Council in its draft recommendation, and for the benefit of stakeholders, I make the following additional comments.

Decision making processes and reviews

The Council has described the absence of a merits review process as a "shortcoming" of the regime (¶11.9). As the Council elsewhere recognises, however, the Competition Principles Agreement does not mandate merits review and the Parliament of New South Wales has chosen to enact legislation which does not provide for merits review. This decision was taken following extensive public consultation by the NSW Government in developing the access regime, and the reasons for the decision have already been explained in my letter to you of 17 February 2009.

It appears that the Council's concerns regarding the absence of merits review may in part reflect a broader concern about the NSW Government having an ownership interest in Sydney Water and Hunter Water (see eg., ¶5.37; ¶10.12).

Any concerns in relation to this issue are unfounded. The NSW Government is committed to promoting greater efficiency in the water industry through facilitating competitive service provision, and supports appropriate access arrangements as a means of achieving these objectives.

Additions to Schedule 1

The Council has also stated that it considers a "shortcoming" of the regime to be the "relative ease" with which the Premier can add more land to the areas in Schedule 1 of the WICA (¶11.9). It appears, however, that there has been a misunderstanding as to the effect of Schedule 1.

The Council has stated that adding geographic areas to Schedule 1 has "the effect of expanding the services that are subject to the WICA Access Regime" (¶1.5). This is not the case. Schedule 1 does not, of itself, result in any new infrastructure services being covered by the access regime. All it does is to expand the geographical application of the legislation. Infrastructure in any area to which the Act applies will only be covered if, following an assessment against the declaration criteria in accordance with the procedures set out in the Act, a declaration is made in relation to those services.

It is therefore incorrect to say that expanding the areas in Schedule 1 "means in essence that services become subject to the regime without the coverage questions having been addressed" (¶5.42). No services can become covered by the WICA Access Regime unless they have been declared (or unless the service provider has voluntarily provided an access undertaking).

I am particularly concerned by the Council's suggestion that future expansion of the areas in Schedule 1 might constitute a "substantial modification" of the WICA Access Regime (¶5.43).

Had the WICA been silent as to geographical coverage, it would automatically have applied throughout New South Wales. It is difficult to understand why the Council has any concerns that the Act has initially been given a narrower geographical application. The jurisdictional coverage of the Act, either now or in the future, has no bearing on whether or not the access regime is an effective access regime in respect of whatever areas it has effect over.

There appears, therefore, to be no reason why any amendment to Schedule 1 could be considered to constitute a "substantial modification", and I am concerned that the suggestion in the draft recommendation that it could may cause unnecessary uncertainty for industry.

In relation to concerns about the possible future application of the WICA Access Regime to Commonwealth-owned land located in New South Wales, I can confirm that the NSW Government will not add any such land to Schedule 1 without the agreement of the other affected jurisdiction(s).

Licensing arrangements in Part 2 of the WICA

In relation to the Council's comments concerning the licensing arrangements in Part 2 of the WICA, I refer the Council and stakeholders to the information previously provided in my letter of 17 February 2009.

As a final matter, I note that the Council states in paragraph 9.12 that it would have concerns "were it in the future to receive evidence that IPART...had departed from the pricing principles in s41(2) of the Act". Any suggestion that IPART might act in breach of its statutory obligations is without foundation. In any event, if that were to happen it would be of serious concern not only to the Council but also to the Government. I also note that avenues such as judicial review are available in the event of non-compliance with the law.

I am more concerned, however, by the broader suggestion that there could potentially be a "substantial modification" of the access regime depending upon the actual outcomes that are achieved in its implementation (see eg., ¶1.4).

As the Council has rightly observed, the NSW Government has broken new ground in introducing a water and wastewater access regime and in seeking actively to promote direct head-to-head competition in the provision of water and wastewater services.

The Government will be closely monitoring the outcomes of these reforms, and the extent to which its objectives are achieved will obviously be

something which the Government will consider in any future proposals for legislative amendment, including in the context of the statutory review required to be undertaken pursuant to section 104 of the WICA.

I appreciate that, if the NSW Government does enact any amendments to the access regime, then to the extent that those changes constitute a "substantial modification" to the regime the certification may cease to operate.

Of course, even if the Government were in the future to substantially modify the regime, any such modification would be directed toward the furtherance of the Government's objectives. Accordingly, even if the certification were to fall away in those circumstances, this would not mean that the access regime has ceased to be an "effective access regime".

Should you have any further questions about this matter, the contact officer is Mr Paul Miller, Senior Principal Legal Officer, Legal Branch (02 9228 4393).

Yours sincerely

Leigh Sanderson
Deputy Director General (General Counsel)