APPLICATION FOR CERTIFICATION OF THE NSW WATER INDUSTRY INFRASTRUCTURE ACCESS REGIME
RESPONSE TO DRAFT RECOMMENDATION

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1. Introduction:

1.1. I refer to the application by the NSW Government for certification of the access regime established by Part 3 of the *Water Industry Competition Act 2006* (NSW) (WICA Access Regime) and the Draft Recommendation released by the National Competition Council (Draft Recommendation) in response to that application.

1.2. In the Draft Recommendation, the National Competition Council (Council) has indicated its preliminary view that the WICA Access Regime meets the requirements for certification and that it should recommend that the Minister for Competition Policy and Consumer Affairs certify the regime. If the Council's final recommendation is in accord with this preliminary view then Council has stated it would also recommend the revocation of the declaration made in *Re Services Sydney*. (Draft Recommendation, [1.2])

1.3. Council states that its preliminary view relies significantly on the objectives of the NSW Government in regulating access to water infrastructure services stated in correspondence directed to the Council on 17 February 2009. (Draft Recommendation, [1.3])

1.4. The Council expresses concern that if, following certification, there is evidence that the stated purpose of the regime is not being given effect to and appropriate access outcomes are not being achieved then in certain circumstances the exemption from declaration under Part IIIA of the TPA arising from certification may cease to operate. (Draft Recommendation, [1.4])

1.5. To assist in making its final recommendation, the Council seeks additional information and opinions in relation to three aspects of the WICA Access Regime:

- the effectiveness of the safeguards in the regime (such as the processes for decision making and arrangements for reviewing decisions) regarding coverage, revocation of coverage and binding non-coverage declarations, given the broad discretions given to IPART and decision makers and the involvement of the NSW Government in the NSW water sector through ownership of Sydney Water Corporation and Hunter Water Corporation,
- the implications of the ability of the Premier to add geographic areas to Schedule 1, so having the effect of expanding the services that are subject to the WICA Access Regime, and
- the impact of requirements for water licences, and in particular whether the requirement that parties seeking a licence for retail water supply obtain sufficient quantities of water from non-public-utility sources would have the effect of unduly limiting the use that might be made of the WICA Access Regime. (Draft Recommendation, [1.5], [5.27])

1.6. This submission will address the above three matters recognising that, as Council has pointed out in the Draft Recommendation,

> [T]he process of certification does not involve assessment that the particular regime provides the most effective means of achieving efficient access outcomes. Rather it requires

> assessment only that the particular regime satisfactorily addresses the CPA clause 6 principles. These principles do not impose a high threshold for an access regime to be certified as effective. (Draft Recommendation, [4.7])

2. The effectiveness of the safeguards in the regime:

2.1. The Council's comparison of the provisions of Part IIIA of the *Trade Practices Act 1974* (Cth) (TPA) and the WICA Access Regime highlights the retention of the role of the NSW Premier as the decision maker in relation to coverage declarations under the WICA Access Regime. The comparison also points to the distinction between the two regimes with the introduction in the WICA Access Regime of provisions for IPART recommendations and the removal of the merits review provisions. (Draft Recommendation, [1.8]) This submission addresses the issue of merits review.

2.2. The NSW Government Submission on the Draft Recommendation (NSW Submission 2) emphasises that the Competition Principles Agreement does not mandate the inclusion of provision for merits review in an access regime and notes that the Government's decision not to include such provisions was taken after extensive public consultation.

2.3. The NSW Government explained its policy decision in the NSW Response dated 17 February 2009 to Council's Request for further information (NSW Response) offering support for this decision by reference to specific provisions of the WICA. (NSW Response, 6-7). The WICA provisions referred to do not add to the outcomes achieved by those contained in the TPA Part IIIA regime. Importantly, they are offered in the absence of the merits review procedures of the Part IIIA regime.

2.4. The safeguards in the access regime established under the TPA are comprehensive and cohesive. Merits review is an integral part of that scheme. In the absence of a requirement to include merits review procedures in an access regime to satisfy the requirements for certification under the TPA there is little that can be offered to further assist the Council in making its final recommendation. Perhaps it is the threshold for an access regime to be effective which should be addressed with respect to the role of merits review in infrastructure service access regimes.

2.5. The NSW Response refers to the distinction between judicial review and merits review. (NSW Response, 6) This submission will not explore the view taken in the NSW Response. There is an abundance of literature available on the subject.

2.6. More importantly, the 'merits' of merits review should be noted. Mitchell Landrigan explored the merits review provisions of access in the telecommunications industry.[1] Landrigan argued in favour of merits review:

- when broad discretion is conferred on a decision-maker,
- when significant personal or commercial rights are at stake, and
- where decisions are potentially politically contentious.

[1] See Mitchell Landrigan, *The Merits of Merits Review* (2002) Telecommunications Journal of Australia, Vol 52, No 2, 55- 61.

In those circumstances merits review provides a mechanism to:

- guard against regulatory error,
- enhance public confidence in administrative decision-making by promoting accountability, and
- enable access by all parties to merits review of a decision.

2.7. The legal framework governing the water industry in Australia is an emerging paradigm. It is a mixture of acts, regulations and rules made by parliaments and soft law made by governments and non-government bodies (policies, guidelines, industry codes of practice, plans and other non-statutory instruments). The primary driver of water reform in Australia is the National Water Initiative – an 'agreement' between governments. In NSW, urban water initiatives in the Sydney Region are embodied in the Metropolitan Water Plan 2006 (MWP). The MWP is not a statutory plan but rather a statement of policy. Guidelines are playing a significant part in fleshing out the details of the WICA Access Regime. This paradigm provides an adaptable, responsive form of regulation to meet the challenges of new knowledge in the water industry. However, that flexibility must be balanced by an appropriate level of openness, transparency and accountability at all levels of decision making and enforcement. It is to be hoped that the policy decision to omit a merits review mechanism from the WICA Access Regime will not tip that balance in the wrong direction.

3. Addition of geographic areas to Schedule 1:

3.1. The WICA Access Regime is to apply only to water industry infrastructure that is "situated in, on or over land referred to in Schedule 1". (WICA s 22(1)) Schedule 1 can be amended by order of the Minister under section 22(2).

3.2. Additions to Schedule 1 will expand the geographic application of Part 3 of the WICA but will not result in any new water infrastructure services being covered by the regime unless the procedures of Part 3 are invoked for example to seek a coverage or non-coverage declaration.

3.3. The NSW Government Submission on the Draft Recommendation (NSW Submission 2) notes that if the WICA had been silent as to geographical coverage, it would automatically have applied throughout NSW and further:

> 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. (NSW Submission 2, 3)

3.4. Schedule 1 is concerned with the geographic application of Part 3 of the WICA which embodies the WICA Access Regime. By virtue of Schedule 1, the WICA Access Regime is currently only available to access seekers in relation to water industry infrastructure situated in, on or over land within the areas of operation of Sydney Water Corporation (SWC) and Hunter Water Corporation (HWC). Consequently, two avenues are open to operators seeking access to infrastructure in other areas of NSW:

3.4.1. to seek expansion of the Schedule 1 areas to extend the application of the legislation to the relevant geographical location and then seek access under the WICA Access Regime, or

3.4.2. to seek access under the provisions of Part IIIA of the TPA.

3.5. Amendment of Schedule 1 is at the discretion of the Minister and there is no procedure set out in the WICA to be followed in the exercise of this discretion. There is no provision in the WICA for public consultation on, or independent review of, section 22(2) decisions.[2] In this legislative context it is not clear how an access seeker could secure the expansion of Schedule 1.

3.6. If an access seeker chose to pursue access under the Part IIIA provisions it would remain open to the Minister to expand Schedule 1 of the WICA to include the relevant geographical location subject to the Part IIIA application.

3.7. Although the scenario explored in the previous paragraphs is hypothetical, it is not unrealistic. The issues raised highlight an unnecessary uncertainty for the industry in the WICA Access Regime. Further, in failing to provide a rigorous and independent process for assessing proposals for changes to Schedule 1, the WICA Access Regime may not satisfactorily address the requirements of the Clause 6(3)(a) of the Clause 6 Principles.[3]

3.8. The objectives of the NSW Government in introducing the WICA Access Regime as set out in section 21 of the WICA, and further amplified in the NSW Response dated 17 February 2009 to Council's Request for further information (NSW Response), do not reflect any intention to restrict the application of the regime. However, the emphasis on "the development of new water sources, particularly recycling" in the explanation of the objectives offered in the NSW Response may have the practical effect of limiting the geographic impact of the WICA Access Regime to those areas which provide sufficient sources of wastewater for development.

4. Impact on access regime of requirements attached to water licences

4.1. In its Final Report relating to the Investigation into Water and Wastewater Service Provision in the Greater Sydney Region (IPART Report), IPART considered 'who' should be entitled to seek access and 'when' rights to access should be considered.

4.2. In relation to 'who', IPART suggested that "the regulatory mechanism enabling access should be flexible enough to allow any person to seek access, so long as such applications are not spurious". (IPART Report, 33). However, the final recommendation was that the regulatory mechanism should enable 'designated people' to seek access. (IPART Report, Recommendation 6) The WICA Access Regime adopted the 'designated people' approach, as for example in section 24 in relation to coverage declarations.

4.3. With regard to the 'when', IPART suggested that a logical sequence of decisions would be:

- to first secure an 'in principle' decision on access

[2] See discussion in Ambler sub 1 at [6.3]-[6.10].
[3] See Certification Guide [3.4].

- then undertake detailed engineering, feasibility, design studies
- then do detailed planning and environmental analysis, seek approvals, etc. (IPART Report, 33).

4.4. The licensing provisions of the WICA apply specifically to corporations. (WICA section 8). To ensure that applications for access are not 'spurious' it would have been logical to include licensing considerations in the decision sequence suggested by IPART to ensure that the designated access seeker, if successful, would qualify to apply for, and perhaps be capable of obtaining, any licence necessary to carry out the activities requiring access.

5. Conclusions:

5.1. Council notes in the Draft Recommendation that:

> [A] state or territory access regime that merely replicates the negotiate/arbitrate approach already available under the general provisions of Part IIIA would appear to offer little benefit while arguably adding to cost and uncertainty.[4]

5.2. Where a state or territory access regime essentially replicates the general provisions of Part IIIA and, in its attempts to adapt to specific industry circumstances, introduces new elements of uncertainty and cost, there is a strong case to delay certification of that regime.

[4] Draft Recommendation [1.9].