

**National Competition Council**

**DEVELOPING A REGISTRY SYSTEM  
OF WATER ENTITLEMENTS IN NEW  
SOUTH WALES**

**NCP SUPPLEMENTARY WATER REFORM  
ASSESSMENT**

JANUARY 2002

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Inquiries or comments on this report should be directed to:

Communications Officer  
National Competition Council  
12 / 2 Lonsdale Street  
MELBOURNE VIC 3000

Ph: (03) 9285 7474  
Fax: (03) 9285 7477  
Email: [info@ncc.gov.au](mailto:info@ncc.gov.au)

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### **The National Competition Council**

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# Abbreviations

<b>ABA</b>	<b>Australian Bankers Association</b>
<b>CoAG</b>	<b>Council of Australian Governments</b>
<b>CPA</b>	<b>Competition Principles Agreement</b>
<b>DLWC</b>	<b>Department of Land and Water Conservation</b>
<b>LPI NSW</b>	<b>Land and Property Information New South Wales</b>
<b>NCC</b>	<b>National Competition Council</b>
<b>NCP</b>	<b>National Competition Policy</b>
<b>NSW</b>	<b>New South Wales</b>
<b>NSWIC</b>	<b>New South Wales Irrigators Council</b>

# INTRODUCTION

Under Australia's National Competition Policy (NCP), the National Competition Council assesses the progress of governments against the reform obligations they have agreed to in the NCP Agreements<sup>1</sup>. Originally, the Council of Australian Governments (CoAG) scheduled three tranches of assessments: June 1997, June 1999 and June 2001. In November 2000, CoAG extended the NCP assessment process, resolving that there be ongoing annual assessments after the June 2001 assessment, until a review of NCP is conducted before September 2005 (CoAG 2000).

The Commonwealth makes payments to the States and Territories where they achieve satisfactory progress against their reform obligations. On 14 December 2001, the Federal Treasurer announced a decision on NCP payments for 2001-02, covering the matters addressed in the February 2001 and June 2001 assessments. The June 2001 assessment involved NCP payments of \$733.3 million for the 2001-02 financial year.

In relation to water reform, the Treasurer decided that all States and Territories should receive their full allocation of NCP payments with the exception of Queensland. For Queensland, some \$270 000 was deducted because of Townsville City Council's failure to objectively analyse the cost effectiveness of two-part tariffs in relation to water reform. The size of the penalty was set by the amount Townsville City Council would have received for implementing this aspect of water reform from the Queensland Government's financial incentives scheme for local authorities. The Treasurer also lifted the suspension of Queensland's 2000-01 competition payments for water reform (which had been based on the recommendations of the February 2001 assessment report) and approved the making of those payments.

The June 2001 assessment found that New South Wales had generally achieved sound progress. However, at the time of the assessment, there was insufficient information available to be certain that the water property rights obligations had been fully addressed. The Council considered that the best approach was to allow an additional period for New South Wales to implement a proposed program of water property rights reforms. The Council therefore recommended that the New South Wales Government's progress be considered in a supplementary assessment. In particular, the supplementary assessment was to consider one aspect of the property rights issue, namely the proposed form of the registry system of water entitlements.

The Council originally proposed that the supplementary assessment occur in December 2001, but the Treasurer agreed to a request from the Council that this be moved to January 2002. The Council received advice from New South

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<sup>1</sup> The three NCP Agreements are reproduced in NCC (1998).

Wales that further time was required to consult stakeholders on the proposed registry reforms. Also, given the June 2001 assessment was publicly released in mid-December 2001, key stakeholders in New South Wales were unaware that the Council was conducting a supplementary assessment on this issue. Delaying this assessment by one month allowed the Council time to inform key stakeholders and to invite comment on any potential concerns.

The details of the Council's earlier assessments of water reform<sup>2</sup>, including a standalone volume on each Government's progress against its commitments as at June 2001, are available on the Council's website at [www.ncc.gov.au](http://www.ncc.gov.au).

## **BACKGROUND**

This supplementary assessment concerns an outstanding 2001 water reform commitment which was part of the 2001 water assessment framework, vis-à-vis the reform of water property rights arrangements in New South Wales.

The CoAG water reforms require the separation of water property rights from land title and for water entitlements to be clearly specified. Reform also recognises that benefits are maximised if people are able to invest in water rights, buy and sell rights, and plan their business activities on the basis of surety of their rights.

The specification of water entitlements needs to accommodate the environment's need for water. Determining appropriate levels of water allocations, including provision for the environment, is difficult. Currently, some rivers are over-allocated – that is, more water is allocated to water users than is physically available in the river, reducing supply reliability. The determination is further complicated by insufficient information on the environment's needs for water, which may result in the need for increased environmental allocations in the future. However, continuous improvements in the handling and use of water, combined with the ability of irrigators to trade water, can offset some of these difficulties.

The Council recognises irrigator concerns about water property rights. These concerns generally focus on the surety of rights to water, the effects on farm values, farm management and credit availability. In particular, the New South Wales Irrigators Council states that:

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<sup>2</sup> The primary water reform documents are the June 2001 assessment (NCC 2001a) and Volume 2 of the second tranche assessment report (NCC 1999a). The Council also conducted supplementary assessments on water reform in December 1999 (NCC 1999b), June 2000 (NCC 2000a), September 2000 (NCC 2000b), and February 2001 (NCC 2001c).

*'the collective view of irrigators is that ownership of water rights is necessary if irrigators are paying the full price of water, are competing for the resource in the marketplace and require certainty of their investment for future development'. (NSWIC 2002)*

A key means of addressing these concerns, particularly security of ownership and the willingness of financial institutions to lend to farmers, is the development of a registry system of water entitlements.

A registry system establishes a central database allowing public access to information on the details of water licences such as ownership, any conditions imposed, duration, applications, surrenders, suspensions and cancellations. The register also indicates how much water is available for additional allocation in a region and, therefore, helps the estimation of the value of licences.

A registry system of water entitlements allows the registration of a legal or equitable interest in a water licence. Such interests cover circumstances where a licence has been mortgaged, leased, conditions imposed or transferred. A party with an interest in a licence is protected because its consent must be obtained before any action is taken that may affect its interest. Also, a financier contemplating lending to a licence holder in return for an interest in the licence will be more confident about the security of the interest.

Each State and Territory is addressing the CoAG water reform objectives. While each approach shares common elements of tradeable water rights separated from land title and recognition of the environment's right to water, the mechanisms for achieving these outcomes differ.

The Council's role is to assess reform by governments against the water reform agreements, not against the reform approach of the other jurisdictions. The reforms, moreover, can be satisfied by different means. The reform framework is sufficiently flexible for governments to be able to undertake changes in a manner that best meets their economic, environmental and social objectives and to ensure that reforms implemented provide a net benefit to the community.

In undertaking this assessment the Council Secretariat held discussions with New South Wales Government officials. A number of irrigator, environmental, banking sector, legal and other community groups were also consulted. These groups have provided valuable information to assist the Council in conducting this assessment.

# ASSESSMENT

## REFORM COMMITMENT: ALLOCATIONS AND TRADING

Outstanding issue, June 2001

In June 2001, the Council found that without clear specification of property rights, allocation mechanisms and trade in rights are likely to be significantly impeded. Entitlement holders and prospective buyers of entitlements would have insufficient certainty to encourage participation in the market for water rights.

The Council viewed the introduction of a registry system as one of the key mechanisms for providing clearly specified property rights, and greater certainty for entitlement holders, prospective purchasers and financiers. It concluded that a registry system that provides evidence of, and security of, ownership and information on third party interests, including priority accorded to registered interests over non-registered interests, needed to be developed as a priority by New South Wales.

In its assessment, the Council found that there was insufficient information concerning a number of property rights issues to be certain that New South Wales had met the relevant requirements. To assure itself that goals and timeframes were in place to realise good quality property rights outcomes, the Council requested New South Wales to provide an action plan containing a timetable of when the various components of water property rights reform would be put in place.<sup>3</sup>

New South Wales had not made sufficient progress on water property rights, but the Council was of the view it had demonstrated a genuine commitment by providing the action plan and that the timetable provided a sufficient level of surety that reform would take place.

The Council accordingly recommended that it conduct a supplementary assessment. The Council indicated it would look at the form the register of water entitlements would take, how public consultation was managed, and how New South Wales had responded to the issues raised during consultation.

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<sup>3</sup> The action plan is published as an attachment in the New South Wales volume of the June 2001 assessment (NCC 2001b).



The action plan sets out the tasks and timeframes that needed to be undertaken prior to this assessment. The main tasks identified were:

- refine the contents and procedures of the register policy. The action plan proposed to finalise a position on the register's form by November 2001;
- consult key stakeholders concerning the form of the proposed register. New South Wales nominated the New South Wales Irrigators' Council, the Australian Bankers Association, the New South Wales Property Institute, the Law Society, the Water Advisory Council, the Australian Property Institute and the Nature Conservation Council as key stakeholders. These consultations were to occur between July and October 2001.
- consult the New South Wales Land Titles Office on linkages to property to ensure the best level of title was obtained;
- develop a database in accordance with the proposed water register; and
- establish a final policy position on the form of the register. In June 2001, New South Wales advised that, as a minimum, the register would provide information on ownership of property rights and on third party interests.

In the June 2001 assessment, the Council noted that there were no payment implications arising from this supplementary assessment. Should insufficient progress have been made, the Council would flag any outstanding issues and make any appropriate payment recommendations as part of the June 2002 assessment.

## **Developments since June 2001**

### **The form of the Register**

New South Wales is proposing to establish a water titles register administrated by its Land and Property Information Office (formerly the Land Titles Office), which administers the State's land title registry (a Torrens Title system).

There will be a number of similarities between the proposed water register and the land titles register. These include the ability to register third party interests, the requirement for consent of the third party interest prior to a transaction<sup>4</sup>, procedures for transactions, protection procedures, and the

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<sup>4</sup> There can be no deals involving title without the authorised consent of a third party interest. Furthermore, transfers by third party interests will require the consent of the water licence holder or a court order.

principle of user pays<sup>5</sup>. The goal of the new registry system is to develop rules and procedures in relation to water title that are as similar as possible to the land titles protocols.

Other elements of the proposed water register include:-

- the order of listing or registration of an interest will determine rights over the water property in accordance with the New South Wales *Real Property Act 1990*. The Act recognises registered interests over non-registered interests; and
- information will be included on the categories of entitlement provided for in a water licence (high security, general security, or supplementary), as well as any division between extraction and share components.<sup>6</sup>

New South Wales has advised that the register will be based on the Queensland model.<sup>7</sup> As with that model, there will be no provision for indemnity/indefeasibility (that is, the Government will not compensate any person for loss as a result of acting on incorrect information in the register).

## Next Steps

New South Wales will now begin to pass to the financial sector information on third party interests in existing licences. It will start with the 10 000 licences that are the subject of the first round of water sharing plans for stressed or high conservation areas that will be in place by July 2002.

An electronically-based interim register will be formally established in regulations. The database will come on line in July 2002. Drafting of the regulations and testing will occur in the first half of 2002. The draft regulations and explanatory documents are scheduled to be publicly released in the first half of 2002.

The register will be switched on for the initial group of water sources in December 2002 when the new licensing system conversions are finalised. Third party interests such as banks will then have a three month period to March 2003 to register interests in licences.

The registry system will be reviewed in five years.

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<sup>5</sup> Standard fees of \$60 to register a dealing and \$10 to inspect the register database are proposed.

<sup>6</sup> A full discussion of the requirements of the *NSW Water Management Act 2000* and the particulars of the new licensing system, including the ability to split a licence into extraction and share components, is provided in NCC (2001b).

<sup>7</sup> A full discussion of the form of the Queensland register is provided in NCC (2001a).

## Stakeholder consultation

New South Wales conducted a round of key stakeholder consultation in the lead up to Christmas and during January 2002.

The Department of Land and Water Conservation (DLWC) met with the Australian Bankers Association, Westpac and the Primary Industry Bank of Australia on 10 December 2001 to discuss the proposed licence register, including registration of third party interests. All parties were in agreement with the principles put forward for the register.

A peak stakeholder reference group has also been established as a consultative body for further work on the licence register and the conversion of existing water licences under the *Water Act 1912* to new licences and approvals under the *Water Management Act 2000*. The reference group includes the New South Wales Irrigators' Council, the New South Wales Farmers Association, the New South Wales Local Government and Shires Association, the Aboriginal Land Council, the Nature Conservation Council, the Law Society of NSW, the Australian Bankers Association, the NSW Minerals Council and the Urban Development Industry Association. The proposed policies and regulations will also be reviewed by the NSW Water Advisory Committee.

A meeting with the peak stakeholder reference group was held on 21 January 2002 and the form of the proposed register of access licences was discussed. There is to be further discussion on the register at subsequent meetings of the reference group, including separate meetings with group members, as required. The reference group will meet throughout 2002 on a monthly basis.

DLWC officers met with representatives of the Australian Property Institute and the Association of Consulting Surveyors on 25 January 2002 to discuss the proposal for an access licence register. New South Wales will also brief the office of the Privacy Commissioner on the register including transitional issues recently discussed, with a view to a meeting at a later date.

There will be ongoing discussions with the Land and Property Information NSW (LPI NSW) on implementation of the access licence register.

## Issues raised during consultation

New South Wales has advised that the following issues were raised during consultation with stakeholders.

### Guarantee of title

The Australian Property Institute expressed some concern that the proposed register would not include guarantee of title similar to land. New South Wales has advised that it is not appropriate to have guarantee of title for

water at this stage given that the register is yet to be implemented and fully tested. This issue may be reviewed after the first five years of operation of the register. The register will however provide significant protection in the form of a time based priority system of registration.

#### Spatial location of access licences

The Australian Property Institute and the Association of Consulting Surveyors suggested that it is important for the understanding of the market that the register indicate the spatial location of the access licence. In discussions, it was noted that the registered licence will identify the relevant water source and extraction area. New South Wales will consider requiring the register to make reference to a spatial map of these areas including the location of this map.

#### Dispute resolution process

The peak stakeholder reference group meeting suggested that the Queensland register model did not provide an adequate mechanism for the resolution of legal disputes over ownership and register content. New South Wales will consider this issue further in consultation with stakeholders and Queensland.

#### Approvals noted on the land titles register

The peak stakeholder reference group meeting suggested that the register of land titles incorporate a reference or flag on the land title to indicate if a Water Management Act approval exists in relation to the land (approvals are authorisations of land based activities). New South Wales indicated in principle support for this suggestion and will explore this issue further.

#### Volume of work on transition

The banking industry emphasised that the conversion of approximately 10 000 licences to the new licensing system in 2002 represents an enormous one-off workload for the banks. In summary, the transition will require the banks to assess each individual loan agreement affected and, where appropriate, consult with individuals in person and prepare new loan agreements. The banking representatives indicated that this task amounted to days rather than hours of work in each individual case. It was agreed that further meetings would be necessary to explore ways to address this issue.

#### Privacy

Banking industry representatives indicated that they would require from New South Wales discrete lists of current water licences linked to land that

are the subject of mortgage agreements in order to assess and revise their loan arrangements. For example, Westpac would require a list of licences linked to Westpac mortgages, but, for privacy and commercial in confidence reasons, has no interest in ANZ mortgages.

LPI NSW has indicated that it will be able to provide discrete lists of licences for each banking institution if required. The procedures for creating these lists and meeting requirements of privacy legislation are to be further assessed and discussed.

## **Discussion**

A reliable and efficient register of property rights is important to foster confidence in the allocation system and to encourage trading in water. For example, a registry system can be expected to:

- provide certainty and thereby encourage participation in the market for water rights. Without clear specification, a rights holder or potential purchaser could not properly determine the long term value of the right;
- provide more reliable information to financiers considering lending to water rights holders and allow third parties such as banks to enter into leasing arrangements to finance the acquisition of rights;
- make buyer checks possible to minimise risk for market participants; and
- reduce the time taken to conduct a trade by easier identification of existing users and persons with an interest in a water licence.

New South Wales has met with a range of stakeholders who have indicated they are generally happy with the proposed form of the register. Some issues were raised which will need to be addressed before the register comes on line. However, New South Wales has already agreed to a number of suggestions to address issues raised by stakeholders as shown in table 1.

**Table 1: Proposed form of the access licence register**

<i>Feature sought by banking and water irrigation industry stakeholders</i>	<i>DLWC response</i>
Access licence register run by LPI NSW (land titles)	√ Access licence register to be operated and maintained by LPI NSW
Priority system	√ The time based priority system that applies to land is to also to apply to registration of access licences. A licence or financial interest registered today will have priority in any legal dispute over a licence/interest registered tomorrow.
Third party financial interests to be protected	√ Any interest that can be registered against land will be able to be registered against access licences – except where this is not practicable eg easements.
Register to be readily accessible	√ Register is to be operated on the same user pays basis that applies to land and the register will be accessible remotely on the internet (for a standard fee) in the same way that the land titles register is.
Access licences should be subject to the same procedures as land under the <i>Real Property Act</i>	√ As far as practicable, the same procedures that apply to land are to apply to access licences including matters procedures on default in loan repayments and notice of sale.
Register should identify the nature of the access licence.	√ Register is to include details of the access licence including share and extraction components, expiry date, ownership.
Register should include links to the relevant water management plans	√ The register will incorporate links to plans or directions as to where these plans may be located.
Stakeholders to be further consulted on implementation issues	√ Stakeholders are invited to further meetings on detail issues at the monthly meetings of the peak stakeholder reference group during 2002.

*Source:* New South Wales (2002)

The Council also contacted a number of stakeholders, including the Australian Bankers Association (ABA), the Primary Industries Banking Association, the New South Wales Irrigator's Council (NSWIC), the Australian Property Institute, and the New South Wales Law Society.

Those who provided comments on the proposed register were broadly supportive of the model. For example, the NSWIC stated that:

*'the Queensland Water Allocations Register while it has limitations does appear to provide a relatively transparent system'*. (NSWIC 2002, p.2)

The ABA has also indicated in a meeting and in correspondence that it is strongly supportive of a register based on the Queensland model.

There were three issues raised with the Council concerning the register during the course of this assessment.

First, the ABA noted the need for the register to identify the water sharing plan relevant to the particular licence. This view was supported by the NSWIC:

*'In discussions with DLWC, NSWIC also identified the need to link the licence details on the register to the relevant water management plan as it is essentially this plan that provides security for the water users (in terms of allocation and duration). This should not be a difficult process and will provide a more comprehensive description of the nature of the 'right'. We ask that the NCC take this matter into consideration'. (NSWIC 2002, p.2)*

New South Wales has subsequently advised that the register will incorporate links to plans or directions as to where these plans may be located.

Second, there was a call for group authorities such as private co-operatives to be covered by the register to ensure the lack of registration does not impede access to finance. For completeness, the proposed register should include registration of the interests of members of irrigation corporations.

In responding to this issue, New South Wales advised that co-operatives such as Murray Irrigation (a private company), would be registered as a single licence on the register. New South Wales is of the view that it is not appropriate or feasible for the access licence register to include the interests of shareholder members of irrigation corporations because:

- It is the corporation that holds the access licence, and not the shareholder members. The register will not record the shareholder members of the irrigation corporation because they do not own the access licence.
- Irrigation corporations are private entities that would have their own constitution and rules of administration that determine issues of record keeping and disclosure of members' interests.
- Irrigation corporations may elect not to allow such disclosure of members' interests for reasons of privacy and the ongoing cost involved in maintaining such records.

New South Wales has however advised that the above factors would not preclude the irrigation corporations and the banking industry from establishing a privately run database of members of the corporations and that further discussion of options such as this and possible links to the access licence register may be worthwhile.

Third, there was a question whether the register should cover temporary transfers.

In New South Wales, temporary transfers of allocation water occur through the use of water accounts. All access licences are required to have a water account. Water may be moved from one account to another subject to the transfer rules of a water management plan. If a water user wishes to obtain the right to water on an ongoing basis, the user must either purchase or lease an access licence which is then recorded on the public register. The *Water Management Act 2000* requires the Minister to maintain a record of volumes

held in water accounts and movements of water between accounts. However, the Act does not require these records to be incorporated into the register.

The NSWIC view is that temporary trades should not be recorded on the register. It argued that as a temporary trade is a transfer of an irrigator's allocation, not of the entitlement, a financial institution's interest in an entitlement would not be diminished or affected. It would be affected only by a permanent trade.

There would be administrative gains from not registering temporary trades given their high volume, and such trading could be deterred by the time taken to register the trades. On the other hand, a temporary trade could restrict a financial institution from acting on its security. Under the *Queensland Water Act 2000*, temporary transfers (known as seasonal water assignments) are not registered unless the transfer is for more than one season, in which case it would be subject to a lease and registered.

The position of New South Wales, consistent with the approach in Queensland, is that it would not be appropriate to have the details of water accounts recorded on the register because:

- To require public registration of water held in accounts would add considerable complexity to the register for little net benefit given that account water is of much less financial value and market interest relative to the access licence itself.
- A public record of the water held in accounts would be an unwarranted public intrusion into the private day to day operational practices of water users.
- This approach is already reflected in the *Water Management Act 2000* which does not require account water to be recorded on the public register.

New South Wales does, however, note that it may be possible for the access licence register to include general information about water accounts and where licence holders can obtain information about this. This type of connection between the DLWC records and the register will be considered further in discussion with stakeholders.

These issues will need to be progressed in finalising the registry system and are best dealt with through continued consultation with the key stakeholders. The need for further consultation to address transitional issues was also raised in submissions to the Council. For example, the ABA cited the need for consultation with a view to allowing registration to be phased-in to facilitate financial institutions checking mortgage details (ABA 2002, p.1). The NSWIC also concluded that:

*'...efficient management and administration will be paramount given the pivotal nature of the register...(particularly given that an access licence is created or transferred when it is registered). Feedback from*



*stakeholders on the practical applications will also be very important in the development of the NSW register'. (NSWIC 2002, p.2)*

These issues and any others that emerge should be able to be progressed through the peak stakeholder reference group who will advise the Director General of DLWC on licence approval and register issues.

Finally, the Council notes that New South Wales is behind the timeframe envisaged in the property rights action plan in developing some aspects of the business protocols for the water register. New South Wales has advised that it expects to make up some time in the upcoming months and that the July 2002 target for launching the interim register is still expected to be met.

## **Assessment**

Establishing a well-defined water property rights system allows water users to get the most certainty they can about the nature of the rights, and provides better security with regard to ownership.

What constitutes an effective water property right is important for water allocation and trading mechanisms. Ill-defined rights lead to uncertainty, potentially discouraging desirable investment, and limiting water trading.

The Council is of the view that New South Wales is developing a sound model for its register and considers that the reforms to be implemented by New South Wales and the consultation it is undertaking meet the concern raised in the June 2001 assessment.

The Council will examine property rights developments in New South Wales, including progress with the register, against the timetable set in its action plan when conducting the June 2002 assessment.

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