



AUSTRALIAN CAPITAL TERRITORY

Independent Pricing and Regulatory Commission Act 1997

No. 77 of 1997

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AUSTRALIAN CAPITAL TERRITORY

Independent Pricing and Regulatory Commission Act 1997

No. 77 of 1997

An Act to establish an independent commission to regulate pricing, access and other matters in relation to industries involving the supply of water, electricity and sewerage services, and other industries

[Notified in ACT Gazette S360: 25 November 1997]

The Legislative Assembly for the Australian Capital Territory enacts as follows:

PART I—PRELIMINARY

Short title

1. This Act may be cited as the *Independent Pricing and Regulatory Commission Act 1997*.

Commencement

2. This Act commences on the day on which it is notified in the *Gazette*.

Interpretation

3. (1) In this Act—

“access agreement” means an agreement under an access regime for the granting of access to services provided by means of the infrastructure facilities to which the access regime relates;

“access regime” means a scheme (whether of a legislative or administrative nature, or any other nature) set up for the purpose of implementing the Competition Principles Agreement in respect of third-party access to services provided by means of infrastructure facilities wholly or partly located within the Territory that are wholly or substantially owned, controlled or operated by a single person, being services—

(a) including the use of an infrastructure facility (such as a road or railway), the handling or transporting of things (such as goods or people) or a communications service or similar service; and

(b) not including the supply of goods, the use of intellectual property or the use of a production process, except to the extent that that supply or use is an integral but subsidiary part of the service;

“Commission” means the Independent Pricing and Regulatory Commission of the Australian Capital Territory established under section 5;

“Commissioner” means the Commissioner appointed under clause 1 of Schedule 1;

“Competition Principles Agreement” means the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the Territories and the States, as in force for the time being;

“confidential information”, in relation to information, a document given to the Commission under section 41 or a proposed agreement or agreement a copy of which is given to the Commission under section 25 or 26, means such information, or information in such a document, proposed agreement or agreement that was, at the time that it was given, stated by the person giving it to be confidential or commercially sensitive;

“determination” means an arbitration determination under section 35;

“function” includes a power and a duty;

“industry” includes—

- (a) an industry of any kind (including a business or activity relating to goods and services);
- (b) a particular industry or part of an industry; and
- (c) a group or groups of particular industries;

“investigation” means an investigation under Part III;

“price” includes any rate, fee, levy and charge and any other valuable consideration (however described), but does not include a Territory tax;

“price direction” means a direction about prices for the supply of regulated services under section 20;

“price regulation” means the regulation of prices in relation to the supply and sale of goods and services within a regulated industry;

“reference” means a reference to the Commission under section 15;

“referring authority” means—

- (a) in relation to an industry engaged in the supply in the Territory of electricity, water or sewerage services—the Minister;
- (b) in relation to any other regulated industry—the Minister who has, under section 4, declared that industry to be regulated;
- (c) in relation to regulated industries in general—the Minister;
- (d) in relation to another industry, or to industries in general—the Minister; or
- (e) in relation to a reference provided for by another law of the Territory—the person authorised under that law to refer a matter to the Commission;

“regulated industry” means—

- (a) an industry engaged in the supply in the Territory of electricity, water or sewerage services; or
- (b) any other industry declared to be a regulated industry under section 4;

“regulated services” means services provided in a regulated industry.

(2) If 2 or more persons jointly own, control or operate infrastructure facilities—

- (a) a reference in this Act to the ownership, control or operation of infrastructure facilities includes a reference to the jointly owned, controlled or operated infrastructure facilities; and
- (b) a reference in this Act to a person (or a single person) who owns, controls or operates infrastructure facilities includes a reference to each joint owner, controller or operator.

(3) If 2 or more persons jointly provide services (whether those services are provided directly or on those persons' behalf)—

- (a) a reference in this Act to the provision of services includes a reference to the jointly provided services; and
- (b) a reference in this Act to a person (or a single person) who provides services (or on whose behalf services are provided) includes a reference to each joint provider.

Regulated industries—declarations

4. (1) Any Minister may, by instrument, declare an industry to be a regulated industry for the purposes of this Act.

(2) A Minister may make a declaration under subsection (1) if he or she certifies that—

- (a) the industry infrastructure facilities are in whole or in part owned, controlled or operated by the Territory or a Territory authority;
- (b) the industry involves the provision of services in the Territory in whole or in part by or on behalf of the Territory or a Territory authority;
- (c) the industry infrastructure facilities are wholly or substantially owned, controlled or operated by a single person; or
- (d) the industry involves the provision of services in the Territory wholly or substantially by or on behalf of a single person.

(3) An instrument made by the Minister under subsection (1) is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

PART II—INDEPENDENT PRICING AND REGULATORY COMMISSION

Establishment

5. (1) There shall be an Independent Pricing and Regulatory Commission for the Australian Capital Territory.

(2) The Commission—

- (a)** is a body corporate with perpetual succession;
- (b)** shall have a common seal;
- (c)** may acquire, hold and dispose of real and personal property; and
- (d)** may sue and be sued in its corporate name.

(3) The common seal of the Commission shall be kept in such custody as the Commission directs and shall not be used except as authorised by the Commission.

(4) All courts, judges and persons acting judicially shall take judicial notice of the common seal of the Commission affixed to a document and shall presume that it was duly affixed.

Constitution

6. (1) The Commission is constituted by a Commissioner.

(2) Schedule 1 has effect in relation to the appointment and terms of office of the Commissioner.

Objectives

7. The Commission has the following objectives in relation to regulated industries and access regimes:

- (a)** to promote effective competition in the interests of consumers;
- (b)** to facilitate an appropriate balance between efficiency and environmental and social considerations;
- (c)** to ensure non-discriminatory access to monopoly and near-monopoly infrastructure.

Functions

8. The Commission has the following functions in relation to regulated industries:

- (a)** the provision of price directions;
- (b)** the provision of recommendations about price regulation;

- (c) the provision of advice to the Minister about proposed access agreements;
- (d) the maintenance of a register of access agreements;
- (e) the arbitration of disputes about access to services under access regimes;
- (f) investigation and reporting on matters referred by the Minister and other referring authorities;
- (g) any other function conferred by this or another law of the Territory.

Annual report

9. In its report under the *Annual Reports (Government Agencies) Act 1995*, the Commission shall include details of the following matters:

- (a) investigations;
- (b) final reports and special reports;
- (c) price directions;
- (d) advice about proposed access agreements;
- (e) the number of access agreements notified;
- (f) arbitration disputes;
- (g) determinations of arbitration disputes;
- (h) the number of notices issued under section 41;
- (i) the general use made by the Commission of information and documents obtained as a result of notices issued under section 41.

Independence from Ministerial control

10. Except as provided by this or any other law of the Territory, the Commission is not subject to the direction or control of the Minister or any other referring authority in relation to any investigation, price direction, report, access agreement or arbitration.

Staff

11. The staff of the Commission shall be employed under the *Public Sector Management Act 1994*.

Arrangements with other agencies, bodies and persons

12. (1) The Commission may enter into arrangements with any government agency or with any other body or person (whether in the public or private sector)—

- (a) for the agency, body or person to assist the Commission in connection with investigations or the performance of other functions of the Commission; or
- (b) for the Commission to assist the agency, body or person by providing services within the Commission's field of expertise and relevant to its functions.

(2) The Commission shall not enter into an arrangement to assist an agency, body or person without the Minister's written approval.

(3) In entering into an arrangement to assist an agency, body or person, the Commission shall ensure that the provision of such assistance does not interfere with the ability of the Commission to perform its functions.

(4) The Commission may engage consultants to assist it in performing its functions.

(5) The Commission may charge an agency, body or person for the provision of assistance by the Commission.

Delegation of Commission's functions

13. (1) The Commission may, by instrument, delegate its functions to any person or committee of persons, subject to subsection (2).

(2) The Commission shall not delegate its function of making price directions, reports or providing advice about proposed access agreements.

(3) If the Commission is conducting an arbitration, it shall not delegate its function of making a determination in relation to the arbitration.

Immunity from suit

14. (1) No action, suit or proceeding lies against a person who is or has been—

- (a) the Commissioner;
- (b) a delegate of the Commission, or a member of a committee that is a delegate of the Commission;
- (c) a member of staff of the Commission; or

- (d) a person that the Commission has entered into an arrangement with as referred to in section 12;

in relation to an act done or omitted to be done in good faith in the exercise or purported performance of a function under this Act.

(2) Subsection (1) does not affect any liability that the Territory would, but for that subsection, have in respect of an act or omission referred to in that subsection.

PART III—INVESTIGATIONS

References for investigation

15. (1) A referring authority may provide a reference to the Commission in relation to any of the following matters:

- (a) prices for regulated services;
- (b) competition within a regulated industry;
- (c) any other matter in relation to a regulated industry;
- (d) any matter in relation to regulated industries in general;
- (e) any other matter in relation to an industry, or industries in general;
- (f) any matter provided for by another law of the Territory.

(2) The fact that a price direction is in force in relation to a regulated industry does not preclude a further investigation of prices in the industry, or the making of a new price direction in relation to prices in the industry.

(3) A reference to the Commission may limit the scope of the investigation and report to a particular aspect of the regulated industry, or to a particular period during which the industry has been operating, or in any other matter.

(4) A reference to the Commission may relate to a number of goods or services supplied by the same or different suppliers.

(5) A reference to the Commission may be withdrawn or amended by the referring authority at any time before the Commission has delivered its report to the person.

(6) If a reference is withdrawn or amended, the referring authority shall—

- (a) give written reasons for the withdrawal or amendment to the Commission; and

- (b) cause a copy of those reasons to be published in the *Gazette* within 28 days after they are given to the Commission.

Terms of reference

16. (1) The referring authority may, by instrument, specify requirements in relation to the conduct of an investigation or a report on an investigation by the Commission.

- (2) The specified requirements may be 1 or more of the following:
 - (a) a specification of a period within which a report is required to be submitted to the referring authority;
 - (b) a requirement that the Commission consider specified matters;
 - (c) except in relation to price regulation, the making of a price direction and any related investigation and report—a requirement that the Commission perform its functions subject to any subsequent written direction of the authority.

(3) An instrument under subsection (1) is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

(4) A referring authority shall cause a direction referred to in paragraph (2) (c) to be laid before the Legislative Assembly within 6 sitting days after it is given.

Procedure

17. (1) Where the Commission receives a reference, the Commission shall conduct an investigation as authorised by the terms of the reference.

(2) For the purpose of conducting an investigation, the Commission may—

- (a) request submissions from the public or any specified person or body; or
- (b) conduct hearings.

(3) Unless the Commission otherwise orders, hearings shall be open to the public.

(4) Subject to this Act, the Commission may conduct an investigation in any manner the Commission considers appropriate.

Draft reports

18. (1) Before giving the referring authority a final report into an investigation, the Commission shall cause to be published in the *Gazette*, and in a daily newspaper circulating in the Territory, a notice—

- (a) stating that copies of a draft report into the investigation are available for public inspection and purchase during a specified period of not less than 20 working days at specified places; and
- (b) inviting interested persons to submit written comments about the draft report to the Commission at a specified address and within a specified period of not less than 20 working days.

(2) The Commission shall make copies of a draft report into an investigation, including any draft price direction, available for public inspection and purchase during office hours during the period, and at the places, specified in the notice.

(3) In preparing its final report of an investigation, the Commission shall take into consideration any written comments submitted pursuant to the invitation in subsection (1) in relation to the draft report of the investigation.

(4) In this section—

“working day” means a day other than a Saturday, a Sunday or a public holiday.

Costs

19. (1) The reasonable costs of an investigation into a regulated industry, as assessed by the Commission and notified to the person who is to pay those costs, are payable to the Commission by—

- (a) if the industry is a regulated industry by virtue of its infrastructure facilities being owned, controlled or operated by the Territory or a Territory authority—the Territory or that authority, as the case may be;
- (b) if the industry is a regulated industry by virtue of the provision of services in the industry by or on behalf of the Territory or a Territory authority—the Territory or that authority, as the case may be;
- (c) if the industry is a regulated industry by virtue of the ownership, control or operation of its infrastructure facilities wholly or substantially by a single person—the person who owns, controls or operates the facilities; or

- (d) if the industry is a regulated industry by virtue of the provision of electricity, water or sewerage services or any other services wholly or substantially by or on behalf of a single person—the person who provides those services, or the person on whose behalf those services are provided, as the case may be.
- (2) Costs payable under subsection (1) include any costs incurred by the Commission in obtaining the assistance of any other person, body (whether incorporated or unincorporated) or government agency.

PART IV—PRICE DIRECTIONS AND REPORTS

Directions about prices

20. (1) At the conclusion of an investigation upon a reference authorising the Commission to make a price direction in a regulated industry, the Commission shall decide on the level of prices for services in respect of the period specified in the reference and give a price direction accordingly to each person providing regulated services.

(2) In making a decision under subsection (1), the Commission shall have regard to—

- (a) the protection of consumers from abuses of monopoly power in terms of prices, pricing policies (including policies relating to the level or structure of prices for services) and standard of regulated services;
- (b) standards of quality, reliability and safety of the regulated services;
- (c) the need for greater efficiency in the supply of regulated services to reduce costs to consumers and taxpayers;
- (d) an appropriate rate of return on any investment in the regulated industry;
- (e) the cost of providing the regulated services;
- (f) the principles of ecologically sustainable development referred to in subsection 7 (2) of the *Territory Owned Corporations Act 1990* as modified by virtue of subsection 4 (1) that Act, whether or not—
 - (i) the regulated industry is the electricity or water industry; or
 - (ii) the provider of the regulated services is ACTEW Corporation Ltd.;

- (g) the social impacts of the decision;
- (h) considerations of demand management and least cost planning;
- (i) the borrowing, capital and cash flow requirements of persons providing regulated services and the need to renew or increase relevant assets in the regulated industry;
- (j) the effect on general price inflation over the medium term; and
- (k) any arrangements that a person providing regulated services has entered into for the exercise of its functions by some other person.

(3) In a price direction, the Commission shall indicate to what extent it has had regard to the matters referred to in subsection (2).

(4) A price direction may specify, in relation to the supply of a regulated service, any or all of the following:

- (a) a price;
- (b) a maximum price;
- (c) a maximum price and a minimum price;
- (d) a formula for calculating a price referred to in paragraph (a), (b) or (c);
- (e) a method, by reference to price indices or otherwise, by which a price referred to in paragraph (a), (b) or (c) is to be ascertained;
- (f) a period or periods during which the direction, or any provision of the direction, is to apply.

(5) A price direction, or a provision of a price direction, shall come into effect on a day ascertained in accordance with the direction, or 14 days after the day on which the report including a copy of the direction is tabled in the Legislative Assembly under section 24, whichever is later.

(6) A price direction shall be accompanied by a statement of reasons for the direction.

Final reports

21. Upon concluding an investigation, the Commission shall give the referring authority a final report containing—

- (a) particulars of the results of its investigations;
- (b) particulars of any comments submitted in relation to the draft report of the investigation pursuant to the invitation in subsection 18 (1), and of the Commission's response to those comments;

- (c) a copy of any price direction;
- (d) the Commission's findings on any other matter required by the reference; and
- (e) any other matter arising from the investigation that the Commission considers it desirable to include in the report.

Special reports

22. The Commission may, at any stage of an investigation, give the referring authority a special report on any matter arising from the investigation.

Confidential or commercially sensitive material in reports

23. (1) If, in the Commission's opinion, a final report or a special report contains confidential or commercially sensitive information, the Commission shall divide the report into 2 documents, as follows:

- (a) a document containing the confidential or commercially sensitive material;
- (b) a document containing the rest of the report.

(2) If a final report or a special report is divided under subsection (1), the Commission shall include in the document not containing the confidential or commercially sensitive material—

- (a) a statement to the effect that such material is included in another document; and
- (b) a description in general terms of the material in the other document.

Tabling of reports

24. (1) The referring authority shall cause a copy of a final report or a special report to be laid before the Legislative Assembly within 6 sitting days after the day on which the report is received.

(2) If a final report or a special report is divided into 2 documents under section 23, subsection (1) of this section only applies to the document referred to in paragraph 23 (1) (b).

PART V—ACCESS AGREEMENTS

Notice of access agreements

25. (1) A person that proposes to enter into an access agreement in relation to infrastructure facilities wholly or substantially owned, controlled or operated by the person, shall notify the Commission of the proposal at least 30 days before entering into the agreement.

(2) A person that notifies the Commission under subsection (1) shall, at the request of the Commission, give the Commission a copy of the proposed access agreement and any requested details of the proposal.

(3) The Commission may give advice about the proposal to—

- (a) the person that notified the proposal; and
- (b) the Minister.

Registration of access agreements

26. (1) A person that enters an access agreement in relation to infrastructure facilities wholly or substantially owned, controlled or operated by the person shall notify the Commission of that fact.

(2) A person that notifies the Commission under subsection (1) shall, at the request of the Commission, give the Commission a copy of the access agreement and any requested details of the agreement.

(3) The Commission shall register the access agreement under section 29, including in the record of registration the following details:

- (a) the names of the parties to the agreement;
- (b) the regulated industry, and the particular services, to which it relates;
- (c) the date on which it was made;
- (d) any other details prescribed by the regulations.

Investigations into access agreements

27. Nothing in this Part precludes the Commission from conducting an investigation under Part III into an access agreement or proposed access agreement.

Failure to notify proposals and agreements

28. (1) If a person fails to notify the Commission under section 25 of a proposal for an access agreement, or under section 26 of entering into an access agreement, the Commission may request the person to provide the Commission with written reasons for that failure.

(2) The Commission shall give a report to the Minister about a failure to notify a proposal for an access agreement or the entering into of an access agreement, and include in the report any reasons provided under subsection (1).

(3) A failure to comply with section 25 or 26, or a failure by the Commission to give advice under section 25, does not affect the validity of the agreement.

Register of agreements

29. (1) The Commission shall maintain a register of agreements for the purposes of this Part.

(2) The Commission shall make the register available for inspection by any person during the office hours of the Commission or such other hours as are prescribed by the regulations.

PART VI—ARBITRATION OF ACCESS REGIME DISPUTES

Interpretation

30. In this Part, in relation to an access regime for the provision of services—

“access provider” means the person that wholly or substantially owns, controls or operates the infrastructure facilities by means of which the services are provided;

“third party” means a person who wants access to the services, or wants a change to some aspect of access to the services, and who is in dispute with the access provider, being a dispute to which section 32 applies.

Application

31. This Part does not apply to the arbitration of a dispute in relation to an access regime if another law of the Territory (other than the *Commercial Arbitration Act 1986*) applies to the arbitration.

Access disputes

32. (1) If a dispute exists with respect to an access regime that provides for the application of this Part, a party to the dispute may refer the dispute to arbitration under this Part.

(2) A dispute is to be taken to exist with respect to such an access regime if—

- (a)** the third party and the access provider are unable to agree about any aspect of access to the services provided under that regime; or
- (b)** the third party and the access provider are unable to agree about a variation of an existing determination.
- (3)** The parties to a dispute are the third party and the access provider.

Arbitrator—appointment and functions

33. (1) The Commission, or a person appointed under subsection (2), may act as arbitrator to hear and determine a dispute referred to arbitration under this Part.

(2) The Commission may appoint 1 or more persons to act as arbitrators to hear and determine disputes referred to arbitration under this Part.

(3) In the case of a dispute involving a third party wanting, but not having, access to a service, the arbitrator shall give public notice of the dispute inviting public submissions to the arbitrator about the dispute, and specifying when and how submissions may be made.

(4) In the arbitration of a dispute referred under this Part, or in the variation of an existing determination, the arbitrator shall consider the following matters:

- (a)** the matters set out in paragraphs 6 (4) (i), (j) and (l) of the Competition Principles, in the form in which those matters are set out in Schedule 2;
- (b)** any guidelines for the access regime determined following an investigation;
- (c)** if subsection (3) applies—any public submissions made about the dispute;
- (d)** the value to the access provider of any extensions to the infrastructure facilities the cost of which is borne by someone else;
- (e)** any other matters the arbitrator considers relevant.

(5) Parts VII and VIII apply in relation to an arbitration as if references in those Parts to the Commission were references to the arbitrator.

(6) If paragraph 6 (4) (i), (j) or (l) of the Competition Principles is varied, the regulations may amend Schedule 2 accordingly with effect (retrospective if necessary) from the date of effect of the variation.

Draft determinations

34. Before making a determination in relation to a dispute, an arbitrator shall issue a draft determination to each party.

Arbitration determinations

35. (1) An arbitrator shall determine a dispute by making a written determination on access to the services by the third party.

(2) A determination may deal with any matter relating to access by the third party to the services, including matters that were not the basis for the notification of the dispute, and matters such as the following:

- (a) a requirement of the access provider to give access to specified services to the third party;
- (b) a requirement that the third party accept, and pay for, access to the services;
- (c) a determination of the terms and conditions of access to the services;
- (d) a requirement that the access provider extend the infrastructure facility;
- (e) a determination of the extent to which the determination is to override any earlier determination relating to access to the services by the third party.

(3) A determination shall not require the access provider to bear any of the costs of extending infrastructure facilities or of maintaining such extensions.

(4) A determination does not have to require the access provider to provide access to the services by the third party.

Effect of determinations

36. (1) The parties to an arbitration shall give effect to a determination in relation to the arbitration.

(2) If a determination is in favour of a third party's access to services, the access provider shall not engage in conduct for the purpose of preventing or hindering the third party's access to the services under the determination.

Termination of arbitration by parties

37. An arbitration may be terminated by the party that referred the dispute to arbitration at any time before the arbitrator makes a determination.

Termination of arbitration by arbitrator

38. An arbitrator may, without making a determination, terminate the arbitration at any time if the arbitrator thinks that any of the following grounds exists:

- (a) the notification of the dispute was vexatious;
- (b) the subject matter of the dispute was trivial, misconceived or lacking in substance;
- (c) the party who notified the dispute has not engaged in negotiations in good faith;
- (d) access to the services should continue to be governed by an existing contract between the access provider and the third party;
- (e) if the dispute is about varying an existing determination—there is no sufficient reason why the previous determination should not continue to have effect in its present form.

Variation of determinations

39. (1) An arbitrator may vary a determination on the application of any party.

(2) An arbitrator shall not vary a determination if the other party objects, but may deal with the matter by way of a dispute on referral by either party.

Arbitration procedure—*Commercial Arbitration Act 1986*

40. (1) The *Commercial Arbitration Act 1986* applies in relation to an arbitration, subject to this Part.

(2) Notwithstanding subsection 20 (1) of the *Commercial Arbitration Act 1986*, a party to a dispute may be represented by a legal practitioner in proceedings before the arbitrator only by leave granted by the arbitrator.

(3) An arbitrator shall only grant leave under subsection (2) if, in his or her opinion—

- (a) legal representation of the party is likely to shorten the arbitration or to reduce its costs; or
- (b) the party would be unfairly disadvantaged otherwise.

(4) An arbitration is to be heard in private, unless the arbitrator otherwise directs.

(5) For the purposes of subsection 34 (1) of the *Commercial Arbitration Act 1986*, without limiting the fees and expenses of the arbitrator as referred to in that subsection, such fees and expenses include all costs incurred by the arbitrator and by the Commission in relation to the arbitration, including the following:

- (a) administrative costs;
- (b) costs incurred in engaging consultants and expert witnesses;
- (c) witnesses' expenses.

PART VII—INFORMATION

Provision of information to Commission

41. (1) If the Commission has reason to believe that a person has information or a document that may assist it in performing its functions, it may, by written notice, require the person to give it the information or a copy of the document.

(2) A requirement shall—

- (a) identify the information or document;
- (b) specify the period within which the requirement is to be complied with;
- (c) specify the form in which the information or the copy of the document is to be given to the Commission;
- (d) state that it is made under this section; and
- (e) be accompanied by a copy of this Part.

(3) A person shall not, without reasonable excuse, fail to comply with a requirement under this section.

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(4) It is a reasonable excuse for the purposes of subsection (3) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

Restrictions on publication

42. (1) The Commission may, if satisfied that for any reason it is desirable to do so, give directions prohibiting or restricting the disclosure of—

- (a) evidence given before a hearing; or
- (b) matters contained in documents or information given to the Commission.

(2) A person shall not contravene a notice under subsection (1).

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

Inspection of documents

43. (1) Notwithstanding section 42, the Commission shall make a document (including any statement or document given to the Commission under section 41) available for inspection on request by a person unless—

- (a) the document contains confidential information, and its disclosure is not otherwise permitted by this Part;
- (b) the Commission considers that the disclosure of information in the document could reasonably be expected to damage the commercial or other interests of the Territory, of the person who supplied the document or of a person who provides regulated services; or
- (c) the document is an exempt document within the meaning of the *Freedom of Information Act 1989*.

(2) In making a document available under subsection (1), the Commission may, if it considers that paragraph (1) (a), (b) or (c) applies to any information in the document, do either or both of the following:

- (a) make a part or parts only of the document available, or make the document available with a part or parts deleted, in order not to disclose that information;
- (b) impose conditions on the availability of part or all of the document (for example, conditions limiting the availability to certain classes of persons or requiring persons not to reveal the contents of the part or document).

(3) A person shall not contravene a condition imposed under paragraph (2) (b).

Penalty for contravention of subsection (3):

- (a) if the offender is a natural person—100 penalty units;
- (b) if the offender is a body corporate—500 penalty units.

Disclosure of confidential information

44. (1) A person shall not disclose any confidential information obtained in carrying out the person's functions in relation to this Act, except in accordance with subsection (3).

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(2) A person shall not use any confidential information obtained in carrying out the person's functions in relation to this Act to obtain, directly or indirectly, a pecuniary or other advantage for himself or herself or any other person, except in accordance with subsection (3).

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(3) A person may disclose or use confidential information if—

- (a) the disclosure or use is made in the performance of a function in relation to this Act or any other law of the Territory permitting such disclosure or use;

- (b) the disclosure or use is made with the consent of the person who supplied the information;
- (c) the disclosure or use is made in legal proceedings at the direction of a court; or
- (d) the information is in the public domain at the time that it is disclosed.

(4) For the avoidance of doubt, subsection (3) does not over-ride any rights another person may have with regard to the disclosure or use of the information.

Confidential information—notice to show cause

45. (1) If the Commission proposes to disclose confidential information under section 46, it shall first give any affected person written notice inviting the person to show cause within 28 days after the date the notice is given why the confidential information should not be disclosed.

(2) A notice under subsection (1) shall contain—

- (a) particulars of the proposed disclosure, including details of the person or persons to whom the confidential information is to be disclosed;
- (b) particulars of the facts and circumstances relied upon by the Commission to justify the disclosure; and
- (c) a statement to the effect that the affected person may, within 28 days after the day on which the notice is given, give the Commission particulars of the facts and circumstances relied on to show cause why the proposed disclosure ought not to be carried out.

(3) In this section—

“affected person” means—

- (a) the supplier of the confidential information to the Commission; or
- (b) any person who provided the confidential information to that supplier, if the Commission is aware of the identity and address of that person.

Confidential information—general disclosure

46. (1) Subject to section 47, the Commission shall only disclose confidential information if—

- (a) it is of the opinion—
 - (i) that the disclosure would not cause detriment to the person providing the information or document; or
 - (ii) that although the disclosure would cause such detriment, the public benefit in disclosure outweighs the detriment;
- (b) it is of the opinion, in relation to any other person who is aware of the information or the contents of the document—
 - (i) that the disclosure would not cause detriment to that person; or
 - (ii) that although the disclosure would cause detriment to the person, the public benefit in disclosure outweighs the detriment;
- (c) it gives a notice to show cause in relation to the information or document under section 45; and
- (d) 28 days have elapsed since the notice was given.

(2) In making a decision under subsection (1), the Commission shall take into account any representation made in accordance with the invitation in the notice under section 45.

(3) For the purposes of this section, the disclosure of anything that is in the public domain at the time the Commission proposes to disclose it is not to be taken to cause detriment to any person referred to in paragraph (1) (a) or (b).

Confidential information—disclosure within the Commission

47. (1) The Commission may disclose confidential information to any of the following persons for the purposes of the investigation in relation to which the information was obtained:

- (a) a delegate of the Commission, or a member of a committee that is a delegate of the Commission;
- (b) a member of staff of the Commission;
- (c) a person, body or consultant with which or whom the Commission has entered into an arrangement as referred to in section 12.

(2) A person to whom confidential information is disclosed under subsection (1) or under this section may disclose the information to another person referred to in subsection (1) for the purposes of the investigation in relation to which the information was obtained by the Commission.

(3) The Commission and any person to whom confidential information is disclosed under this section may use the information for the purposes of the investigation in relation to which the information was obtained.

Cabinet and Executive documents

48. Nothing in this Act shall be taken to entitle the Commission—

- (a) to require a person to give any statement of information or answer any question which relates to Cabinet proceedings or confidential proceedings of the Executive;
- (b) to require any person to produce an official record of Cabinet office or of the Executive; or
- (c) to inspect an official record of Cabinet or the Executive.

PART VIII—CO-OPERATION WITH THE COMMISSION

Attendance at hearing

49. For the purpose of performing its functions the Commission may, by notice in writing served on a person, require the person to attend a hearing of the Commission to give evidence.

Non-co-operation offences

50. (1) A person shall not, without reasonable excuse—

- (a) fail to comply with a notice served under section 49; or
- (b) fail to answer a question that the person is required to answer by the Commission at a hearing for the purposes of this Act.

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(2) It is a reasonable excuse for the purposes of subsection (1) that to comply with the notice or to answer the question might tend to incriminate the person or make the person liable to any forfeiture or penalty.

(3) A person shall not—

- (a) give to the Commission, whether orally or in writing, information that the person knows to be false or misleading in a material particular (unless the person informs the Commission of that fact); or
- (b) at a hearing before the Commission, give evidence that the person knows to be false or misleading in a material particular.

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(4) A person shall not hinder, obstruct or interfere with the Commission, a member of staff of the Commission or a person assisting the Commission in the performance of its functions.

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(5) A person shall not—

- (a) threaten, intimidate or coerce another person because the other person assisted, or intends to assist, the Commission in the performance of its functions; or
- (b) take or threaten to take, incite or be otherwise involved in an action that causes another person to suffer any loss, injury or disadvantage because the person assisted, or intends to assist, the Commission in the performance of its functions.

Penalty:

- (a) if the offender is a natural person—100 penalty units or imprisonment for 12 months, or both;
- (b) if the offender is a body corporate—500 penalty units.

(6) Civil proceedings do not lie against a person in respect of loss, damage or injury of any kind suffered by another person because of the making in good faith of a written or oral statement, or the giving in good faith of a document or information, to the Commission in the course of the performance (or purported performance) of its functions.

**PART IX—ENFORCEMENT OF PRICE DIRECTIONS AND
ARBITRATION DETERMINATIONS**

Interpretation

51. In this Part—

“direction” means—

- (a) a price direction of the Commission under Part IV; or
- (b) a determination of an arbitrator under Part VI.

Application

52. This Part applies if—

- (a) a person contravenes, or is, in the opinion of the Commission, likely to contravene, a direction; and
- (b) the Commission considers that the contravention or likely contravention is not trivial.

Orders

53. (1) If this Part applies in relation to a person, the Commission may serve an order on the person requiring the person to comply with the direction.

(2) If the Commission proposes to make an order in respect of a person, it shall first give the person written notice inviting the person to show cause within 28 days after the date of the notice why the order should not be made.

(3) A notice under subsection (2) shall contain—

- (a) particulars of the proposed order;
- (b) particulars of the facts and circumstances relied upon by the Commission to justify the order; and
- (c) a statement to the effect that the person may, within 28 days after the day on which the notice is given, give the Commission particulars of the facts and circumstances relied on to show cause why the proposed order should not be made.

(4) In considering whether to make an order in respect of a person, the Commission shall take into account any representation made by the person pursuant to the invitation in the notice under subsection (2).

(5) The Commission shall, as soon as possible after serving an order on a person, publish a copy of the order in the *Gazette*.

(6) A person shall not, without reasonable excuse, contravene an order served on the person under subsection (1).

Penalty:

- (a) in the case of a natural person—200 penalty units;
- (b) in the case of a body corporate—1,000 penalty units.

(7) Where a person is convicted of an offence against subsection (6) in relation to the contravention of an order, the person is, in respect of each day after the service of the order during any part of which that contravention continued, guilty of an offence punishable, on conviction, by a fine not exceeding—

- (a) in the case of a natural person—20 penalty units; or
- (b) in the case of a body corporate—100 penalty units.

Injunctions and declarations

54. The Commission may apply to the Supreme Court for an injunction or declaration (or both) in respect of an order served under subsection 53 (1).

PART X—MISCELLANEOUS

Conduct of directors, servants and agents

55. (1) Where, for the purposes of this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show—

- (a) that the conduct was engaged in by a director, servant or agent of the body within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body within the scope of his or her actual or apparent authority shall be taken, for the purposes of this Act, to have been engaged in also by the body unless the body establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

(3) Where, for the purposes of this Act, it is necessary to establish the state of mind of a natural person in relation to particular conduct, it is sufficient to show—

- (a) that the conduct was engaged in by a servant or agent of the person within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the state of mind.

(4) Any conduct engaged in on behalf of a natural person by a servant or agent of the person within the scope of his or her actual or apparent authority shall be taken, for the purposes of this Act, to have been engaged in also by the first-mentioned person unless the first-mentioned person establishes that the first-mentioned person took reasonable precautions and exercised due diligence to avoid the conduct.

(5) Where—

- (a) a natural person is convicted of an offence; and
- (b) the person would not have been convicted of the offence if subsections (3) and (4) had not been made;

the person is not liable to be punished by imprisonment for that offence.

(6) A reference in subsection (1) or (3) to the state of mind of a person shall be read as including a reference to—

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

(7) A reference in this section to engaging in conduct shall be read as including a reference to failing or refusing to engage in conduct.

Service of documents

56. A document may be served on the Commission by leaving it at, or by sending it by post, telex, facsimile, e-mail or similar facility to—

- (a) the office of the Commission; or
- (b) if it has more than 1 office, any of its offices.

Regulations

57. The Executive may make regulations for the purposes of this Act.

SCHEDULE 1

Subsection 6 (2)

APPOINTMENT AND TERMS OF OFFICE OF COMMISSIONER

Appointment

- 1. (1)** The Executive shall appoint a person to be the Commissioner.
- (2)** The Executive shall only appoint as Commissioner a person who has knowledge or experience in 1 or more of the following fields:
 - (a)** industry;
 - (b)** commerce;
 - (c)** economics;
 - (d)** law;
 - (e)** public administration.
- (3)** The Commissioner is to be appointed on such terms and conditions, not inconsistent with this Act, as the Executive determines.
- (4)** The Commissioner may be appointed on a full-time or part-time basis.
- (5)** A person appointed as Commissioner on a full-time basis shall only engage in paid employment outside the functions of the office with the prior written approval of the Minister.
- (6)** The Commissioner holds office for 5 years and is eligible for reappointment, subject to this Act.
- (7)** An act or decision of the Commission is not invalid merely because of a defect or irregularity in, or in connection with, the appointment of the Commissioner or a vacancy in the office of Commissioner.

Disclosure of interests

2. Before proceeding to conduct an investigation, the Commissioner shall give written notice to the Minister of any direct or indirect pecuniary interests that he or she has in relation to the matter referred for investigation.

Remuneration and allowances

- 3.** The Commissioner is entitled to such remuneration, allowances and other entitlements—
 - (a)** as are determined by the Remuneration Tribunal in respect of the Commissioner; or

SCHEDULE 1—continued

- (b) if there is no such determination—as are determined by the Chief Minister in respect of the Commissioner by an interim determination under the *Remuneration Tribunal Act 1995*.

Resignation

4. The Commissioner may resign by giving a signed notice of resignation to the Minister.

Removal from office

5. (1) The Executive may, by written notice to the Commissioner, suspend the Commissioner from office for mental or physical incapacity or incompetence.

(2) A notice of suspension shall include a full statement of the grounds for suspension.

(3) A notice of suspension shall be tabled in the Legislative Assembly within 7 sitting days after it is given to the Commissioner.

(4) The Executive shall remove the Commissioner from office if, within 15 sitting days after the notice of suspension was tabled in the Legislative Assembly, the Assembly by resolution declares that the Commissioner ought to be removed from office.

(5) The Commissioner shall resume office if, after 15 sitting days have elapsed since the notice of suspension was tabled in the Legislative Assembly, the Legislative Assembly has not passed a resolution declaring that the Commissioner ought to be removed from office.

(6) The Commissioner ceases to hold office if he or she becomes bankrupt, applies to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounds with creditors or makes an assignment of remuneration for the benefit of creditors.

Acting Commissioner

6. (1) The Executive may, in writing, appoint a person to act as Commissioner—

- (a) during a vacancy in the office of Commissioner, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the Commissioner is for any reason unable to perform the functions of the office.

SCHEDULE 1—continued

(2) A person appointed to act as Commissioner during a vacancy in the office of Commissioner shall not so act continuously for more than 12 months.

(3) Anything done by or in relation to a person purporting to act pursuant to an appointment under subclause (1) is not invalid on the ground that—

- (a) the appointment was ineffective or had ceased to have effect; or
 - (b) the occasion to act had not arisen or had ceased.
-

SCHEDULE 2

Paragraph 33 (4) (a)

ARBITRATION GUIDELINES

(COMPETITION PRINCIPLES cl. 6 (4) (i), (j) and (l))

Terms and conditions for access

(Competition Principles cl. 6 (4) (i))

1. The arbitrator shall take into account the following considerations in determining terms and conditions for access by the third party:

- (a) the access provider's legitimate business interests and investment in the infrastructure facilities;
- (b) the costs to the access provider of providing access—
 - (i) including any costs of extending the infrastructure facilities; and
 - (ii) not including any costs associated with losses from increased competition in upstream or downstream markets;
- (c) the economic value to the access provider of any additional investment that the third party or the access provider has agreed to undertake;
- (d) the interests of all persons holding contracts for use of the infrastructure facilities;
- (e) the firm and binding contractual obligations of the access provider and any other persons using the infrastructure facilities;
- (f) the operational and technical requirements necessary for the safe and reliable operation of the infrastructure facilities;
- (g) the economically efficient operation of the infrastructure facilities;
- (h) the benefit to the public from having competitive markets.

Extension of infrastructure

(Competition Principles cl. 6 (4) (j))

2. The arbitrator shall only make a determination requiring an access provider to extend the infrastructure facilities, or to permit the extension of the facilities, if the following conditions are met:

- (a) the extension should be technically and economically feasible and consistent with the safe and reliable operation of the facilities;

SCHEDULE 2—continued

- (b) the access provider's legitimate business interests in the facilities should be protected;
- (c) the terms of access for the third party should take account of the costs borne by each party for the extension and the economic benefits to each party resulting from the extension.

Impeding of existing rights

(Competition Principles cl. 6 (4) (1))

3. In making a determination that impedes an existing right of a person to use an infrastructure facility, the arbitrator—

- (a) shall consider whether there is a case for compensation of that person; and
- (b) if appropriate, include in the determination provision for that person to be compensated.

NOTE

Penalty units

See section 33AA of the *Interpretation Act 1967*.

[Presentation speech made in Assembly on 25 September 1997]