

Australian Capital Territory

# **Independent Competition and Regulatory Commission Act 1997**

**A1997-77**

**Republication No 5**

**Effective: 9 April 2004 – 12 April 2004**

Republication date: 9 April 2004

Last amendment made by A2004-15

Not all amendments are in force: see last endnote

Authorised by the ACT Parliamentary Counsel

## About this republication

### The republished law

This is a republication of the *Independent Competition and Regulatory Commission Act 1997* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 9 April 2004. It also includes any amendment, repeal or expiry affecting the republished law to 9 April 2004.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

### Kinds of republications

The Parliamentary Counsel's Office prepares 2 kinds of republications of ACT laws (see the ACT legislation register at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)):

- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

### Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

### Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

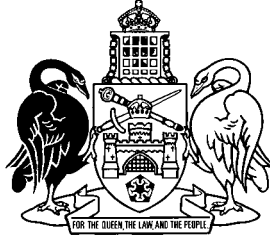
### Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

### Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



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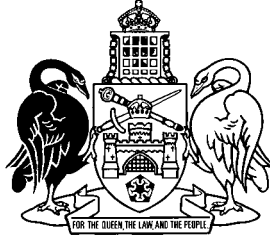
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Australian Capital Territory

# Independent Competition and Regulatory Commission Act 1997

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An Act to establish an independent commission to regulate pricing, access and other matters in relation to industries involving the provision of water, electricity and sewerage services, and other industries, and to investigate competitive neutrality complaints and government-regulated activities

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## Part 1 Preliminary

### 1 Name of Act

This Act is the *Independent Competition and Regulatory Commission Act 1997*.

### 3 Interpretation for Act

(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 ACT 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 Competition and Regulatory Commission for the Australian Capital Territory, established under section 5.

***commissioner***—see section 6.

**competition policy considerations** means the considerations mentioned in the competition principles agreement, clause 1 (3) (d) to (j), as set out in schedule 1A.

**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.

**competitive neutrality complaint** means a complaint that the conduct of a government business activity is not consistent with the competitive neutrality principles.

**competitive neutrality principles** means the competitive neutrality policy and principles under the competition principles agreement, clause 3 (1) and (4) to (7), as set out in schedule 1A.

**confidential information** means information given to the commission that was, when it was given—

- (a) stated by the person giving it to be confidential or commercially sensitive; or
- (b) contained in an exempt document within the meaning of the *Freedom of Information Act 1989*.

**current reset principles**—see section 20B (2).

**declared fee** means a fee declared under section 4C.

**determination** means an arbitration determination under section 35.

**eligible person**—see section 24J (Definitions for pt 4C).

**function** includes a power and a duty.

**future reset principles**—see section 20B (3).

**Gas Pipelines Access (A.C.T.) Law**—see the *Gas Pipelines Access Act 1998*, dictionary.

***Gas Pipelines Access (A.C.T.) Regulations***—see the *Gas Pipelines Access Act 1998*, dictionary.

***government activity*** means—

- (a) for a regulatory reference into a competitive neutrality complaint—the government business activity that is the subject of the complaint; or
- (b) for a regulatory reference into a government-regulated activity—that activity.

***government-regulated activity*** means an activity regulated under an Act or a subordinate law.

***industry*** includes—

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

***industry panel***—see section 24M (Industry panel).

***industry reference***—see section 14A.

***investigation*** means an investigation under part 3.

***law of the Territory*** includes—

- (a) the National Electricity (ACT) Law; and
- (b) the National Electricity (ACT) Regulations; and
- (c) the national electricity code; and
- (d) the Gas Pipelines Access (A.C.T.) Law; and
- (e) the Gas Pipelines Access (A.C.T.) Regulations; and
- (f) the national gas code.

**legislation review principles** means the principles under the competition principles agreement, clause 5 (1) and (9), as set out in schedule 1A.

**National Electricity (ACT) Law**—see the *Electricity (National Scheme) Act 1997*, section 5 (Application in the ACT of the National Electricity Law).

**National Electricity (ACT) Regulations**—see the *Electricity (National Scheme) Act 1997*, section 6 (Application of regulations under National Electricity Law).

**national electricity code** means the National Electricity Code approved under the National Electricity (ACT) Law, section 6 (National Electricity Code).

**national gas code**—means the National Third Party Access Code for Natural Gas Pipeline Systems, within the meaning of the Gas Pipelines Access (A.C.T.) Law.

*Note* The *Gas Pipelines Access Act 1998*, s 8 defines the code for the Gas Pipelines Access (A.C.T.) Law.

**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 under section 20 (Directions about prices) about prices for the provision of regulated services, as varied (if at all) under part 4B (Variation of price directions).

**price regulation** means the regulation of prices in relation to the provision of goods and services within a regulated industry, and includes the variation of a price direction for those prices.

**price variation trigger**—see section 20A (3) (c)).

**protected confidential information** means confidential information the commission does not have the power to disclose under section 46 or under any law of the Territory other than this Act.

**reference** means a reference to the commission under section 15.

**referring authority**—

- (a) for an industry reference—see section 3A (1); and
- (b) for a regulatory reference—see section 3A (2).

**regulated industry** means—

- (a) an industry engaged in the provision in the ACT of a utility service; or
- (b) any other industry declared to be a regulated industry under section 4.

**regulated services** means services provided in a regulated industry.

**regulatory reference**—see section 19A.

**reset principles**—see section 20B (1).

**responsible Minister**, for an industry or government activity, means the Minister with primary responsibility for regulating the industry or activity.

**revenue cap**—see section 20A (1) (b).

**sealed section**, of a final report or a special report of an investigation—see section 23 (1) (a).

**self-funding referring authority**, for a regulatory reference—see section 3A (3).

**unsealed section**, of a final report or a special report of an investigation—see section 23 (1) (b).

**utility**—see the *Utilities Act 2000*, dictionary.

**utility service**—see the *Utilities Act 2000*, dictionary.

**variation**, of a price direction, means—

- (a) a consent variation under division 4B.1; or
  - (b) a nonconsent variation under division 4B.2.
- (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.

### **3A Who is a referring authority?**

- (1) For an industry reference, the **referring authority** is as follows:
- (a) for an industry engaged in the provision in the Territory of electricity, water or sewerage services—the Minister;
  - (b) for an industry engaged in the provision in the Territory of gas services—the Minister;
  - (c) for any other regulated industry—the Minister who has, under section 4, declared that industry to be regulated;
  - (d) for regulated industries in general—the Minister;

- (e) for another industry, or industries in general—the Minister;
  - (f) for a reference provided for by another law of the Territory—the person authorised under that law to refer a matter to the commission.
- (2) For a regulatory reference, the *referring authority* may be any of the following:
- (a) the Minister responsible for the relevant government activity;
  - (b) a member of the Legislative Assembly;
  - (c) the commission;
  - (d) any other person.
- (3) For a regulatory reference, a *self-funding referring authority* may be either of the following:
- (a) a member of the Legislative Assembly whose reference is not sponsored by the Territory (under section 19K (4));
  - (b) any other person (other than a Minister or the commission).

#### **4 Regulated industries—declarations**

- (1) Any Minister may, in writing, declare an industry to be a regulated industry for 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; or
  - (b) the industry involves the provision of services in the ACT in whole or in part by or on behalf of the Territory or a Territory authority; or



- (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 ACT wholly or substantially by or on behalf of a single person.
- (3) A declaration under subsection (1) is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

#### **4A National electricity code—electricity distribution and transmission pricing**

- (1) On and after the day when ACT distribution service pricing becomes regulated under the national electricity code, no reference may be made under this Act for a price regulation investigation into that service.
- (2) However, a provision of a price direction for a matter related to ACT distribution service pricing that is in force on the day when prices for the service become regulated under the national electricity code continues in force (subject to the direction) after that day until the jurisdictional regulator makes a direction about that matter.
- (3) No reference may be made under this Act for a price regulation investigation into ACT transmission service pricing.
- (4) In this section:

***ACT distribution service*** means a distribution service within the meaning given by the national electricity code for distribution networks (within the meaning of the code) situated in the ACT.

***ACT transmission service*** means a transmission service within the meaning given by the national electricity code for transmission networks (within the meaning of the code) situated in the ACT.

***jurisdictional regulator*** means the commission in its capacity as jurisdictional regulator under the national electricity code.

*Note 1* The day when distribution service pricing will become regulated under the national electricity code is fixed at 31 December 2000 (by the ACT derogation under the code), but may be changed under the derogation.

*Note 2* The day when transmission service pricing became regulated under the national electricity code was fixed at 1 July 1999 (by the ACT derogation under the code).

#### **4B ACT gas transmission service pricing**

- (1) No reference may be made under this Act for a price regulation investigation into ACT gas transmission service pricing.
- (2) No reference may be made under this Act for a price regulation investigation into ACT gas distribution service pricing.
- (3) In this section:

***ACT gas distribution service*** means a distribution service provided by means of a natural gas distribution pipeline within the meaning of the Gas Pipelines Access (A.C.T.) Law.

***ACT gas transmission service*** means a transmission service provided by means of a natural gas transmission pipeline within the meaning of the Gas Pipelines Access (A.C.T.) Law.

#### **4C Declared fees to be passed on to consumers**

- (1) The Minister may declare, in writing, that—
  - (a) a statutory fee affects the cost of providing a utility service and may be passed on in full to consumers of the service; or
  - (b) a fee for a regulated service is to be passed on in full to consumers of the service.

- (2) A declaration is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (3) In this section:

***statutory fee*** means a fee or charge determined under a disallowable instrument.

## Part 2 Independent competition and regulatory commission

### 5 Establishment

- (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; and
  - (b) shall have a common seal; and
  - (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.

### 6 Constitution

- (1) The commission is constituted by 3 or more *commissioners*, as follows:
  - (a) a senior commissioner;
  - (b) 2 other standing commissioners;
  - (c) any associate commissioners appointed for particular purposes.

- (2) Schedule 1 has effect in relation to the following:
- (a) appointments of commissioners;
  - (b) the arrangement of business of the commission;
  - (c) decision-making and exercise of powers by the commission;
  - (d) related matters.

## **7 Objectives**

The commission has the following objectives in relation to regulated industries, access regimes, competitive neutrality complaints and government-regulated activity:

- (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.

## **8 Functions**

- (1) 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 or under any of the following:
    - (i) the *Utilities Act 2000*;
    - (ii) the National Electricity (ACT) Law;
    - (iii) the National Electricity (ACT) Regulations;
    - (iv) the national electricity code;
    - (v) the Gas Pipelines Access (A.C.T.) Law;
    - (vi) the Gas Pipelines Access (A.C.T.) Regulations;
    - (vii) the national gas code;
    - (viii) another law of the Territory;
  - (h) any function incidental to a function mentioned in this subsection.
- (2) The commission has the following additional functions:
- (a) investigating and reporting on competitive neutrality complaints;
  - (b) investigating and reporting on government-regulated activities;
  - (c) any function incidental to a function mentioned in this subsection.

**U 9 Annual report**

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;
- (j) any other functions performed by the commission.

## **10 Independence from Ministerial control**

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.

## **11 Staff**

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

## **12 Arrangements with other agencies, bodies and persons**

- (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.

**13 Delegation of commission's functions**

- (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.

**14 Immunity from suit**

- (1) No action, suit or proceeding lies against a person who is or has been—
  - (a) a commissioner; or
  - (b) a delegate of the commission, or a member of a committee that is a delegate of the commission; or



- (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.



- (4) An industry reference may relate to a number of goods or services supplied by the same or different suppliers.
- (5) An industry reference may be withdrawn or amended by the referring authority at any time before the commission has delivered its report to the person.
- (6) If an industry reference is amended or withdrawn, the referring authority must prepare a written notice setting out the reasons for the amendment or withdrawal.
- (7) The referring authority must give a copy of the notice to the commission.
- (8) The notice is a notifiable instrument.

*Note* A notifiable instrument must be notified under the *Legislation Act 2001*.

## **16 Terms of industry references**

- (1) The referring authority may, in writing, determine terms of reference for an investigation on an industry reference.
- (2) The terms of reference may include 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) A determination under subsection (1) is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

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

**17 Procedure for industry reference investigations**

- (1) Where the commission receives an industry 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) In a price regulation investigation, the commission—
- (a) must invite public submissions and conduct public hearings; and
  - (b) is not required to hear submissions from every person attending a public hearing.
- (5) On an industry reference, the commission is not to question the amount of a declared fee under section 4C (Declared fees to be passed on to consumers) or the basis on which the fee is worked out.
- (6) Subject to this Act, the commission may conduct an investigation in any manner the commission considers appropriate.

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**18 Draft reports—industry reference investigations**

- (1) Before giving the referring authority a final report into an investigation on an industry reference, the commission must prepare a notice—
  - (a) stating that copies of a draft report into the investigation are available for public inspection and purchase during a stated period of not less than 20 business days at a stated place or places; and
  - (b) inviting interested people to submit written comments about the draft report to the commission at a stated address and within a stated period of not less than 20 business days.
- (2) The notice is a notifiable instrument.

*Note* A notifiable instrument must be notified under the *Legislation Act 2001*.
- (3) The commission must also publish the notice in a daily newspaper published and circulating in the ACT.
- (4) The commission shall make copies of a draft report into an investigation available for public inspection and purchase during office hours during the period, and at the places, specified in the notice.
- (5) A draft report into a price regulation investigation must include all of the following:
  - (a) a proposed price direction (or variation);
  - (b) a proposed statement of reasons for the direction (or variation);
  - (c) any proposed report by a commissioner dissenting from proposed majority findings of the commission.
- (6) In preparing its final report of an investigation, the commission shall take into consideration any written comments submitted in accordance with the invitation in subsection (1) in relation to the draft report of the investigation.

## 19 Costs for industry reference investigations

- (1) The reasonable costs of an investigation on an industry reference into a regulated industry, as assessed by the commission and notified to the person who is (or the persons who are) 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; or
  - (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; or
  - (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 engaged in the provision in the ACT of a utility service—the utility or utilities responsible for the provision of the service; or
  - (e) if the industry is a regulated industry because of the provision of any other services wholly or substantially by or on behalf of a single person—the person who provides those services.
- (2) The costs of an investigation payable by a Territory authority or a person mentioned in subsection (1) (c) or (d) are a debt due to the Territory.
- (3) 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.

- (4) If more than 1 utility is liable to pay costs under subsection (1) (d), the commission must, by written notice to each utility, determine the proportion of those costs to be borne by each utility.

## **Division 3.2                      Regulatory references**

### **19A                      Application of div 3.2—regulatory references**

This division applies to a reference to the commission (a *regulatory reference*) for an investigation into a competitive neutrality complaint or a government-regulated activity.

### **19B                      Acceptance of regulatory references—competitive neutrality complaints**

- (1) On a written submission by a referring authority (other than the commission itself) setting out proposed terms of reference for an investigation into a competitive neutrality complaint, the commission may accept the reference in those terms (or in other terms agreed between the commission and the referring authority).
- (2) The commission may accept the reference only if—
- (a) it considers that there are legitimate grounds for the complaint; and
  - (b) it considers that the proposed investigation would be in the public interest, taking into account the competition policy considerations (as set out in schedule 1A); and
  - (c) if the reference is from a self-funding referring authority—the referring authority has the capacity to bear the cost of the investigation.
- (3) If the commission accepts the reference, it must prepare a written notice of acceptance that sets out the terms of reference for the investigation.

(4) The commission must give a copy of the notice to the referring authority.

(5) The notice is a notifiable instrument.

*Note* A notifiable instrument must be notified under the *Legislation Act 2001*.

(6) The commission may also publish information about the reference in any other appropriate way.

**19C Acceptance of regulatory references—government-regulated activities**

(1) On a written submission by a referring authority (other than the commission itself) setting out proposed terms of reference for an investigation into a government-regulated activity, the commission may accept the reference in those terms (or in other terms agreed between the commission and the referring authority).

(2) The commission may accept the reference only if—

(a) it considers that the proposed investigation would be in the public interest, taking into account the competition policy considerations (as set out in schedule 1A); and

(b) if the reference is from a self-funding referring authority—the referring authority has the capacity to bear the cost of the investigation.

(3) If the commission accepts the reference, it must prepare a written notice of acceptance that sets out the terms of reference for the investigation.

(4) The commission must give a copy of the notice to the referring authority.

(5) The notice is a notifiable instrument.

*Note* A notifiable instrument must be notified under the *Legislation Act 2001*.



- (6) The commission may also publish information about the reference in any other appropriate way.

**19D Regulatory references initiated by commission**

- (1) The commission may initiate a regulatory reference by preparing a written notice that sets out the terms of reference for the investigation.
- (2) The notice is a notifiable instrument.
- Note* A notifiable instrument must be notified under the *Legislation Act 2001*.
- (3) The commission may publish information about the reference in any appropriate way.
- (4) The commission may only initiate a regulatory reference if it considers that the proposed investigation would be in the public interest, taking into account the competition policy considerations set out in schedule 1A.

**19E Terms of regulatory references**

- (1) Terms of reference for a regulatory reference may include (but are not limited to) the following:
- (a) a specification of a period within which a final report (and any special report into a specified matter) is required to be given;
- (b) a requirement that the commission consider specified matters;
- (c) if the referring authority is a Minister—a requirement that the commission perform its functions subject to any subsequent written direction of the Minister.
- (2) The Minister mentioned in subsection (1) (c) must cause any direction mentioned in that paragraph to be laid before the Legislative Assembly within 6 sitting days after it is given.

**19F Amendment of terms of regulatory reference**

- (1) On application by the referring authority for a regulatory reference, the commission must, in writing, amend the terms of reference for the regulatory reference.
- (2) If the commission is the referring authority for a regulatory reference, it may, in writing, amend the terms of reference for the regulatory reference.
- (3) The commission must—
  - (a) if it makes an amendment under subsection (1)—give notice of the amendment to the referring authority and, if the referring authority is not a Minister, to the responsible Minister; or
  - (b) if it makes an amendment under subsection (2)—give notice of the amendment to the responsible Minister.
- (4) An amendment under subsection (1) or (2) is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

- (5) The commission may publish an amendment in any other appropriate way.
- (6) The commission may publish a special report into the investigation (based on the terms of reference applying immediately before the amendment) after notice of an amendment of the terms of reference has been given under subsection (3).

**19G Termination of investigations into regulatory references**

- (1) On application by the referring authority for regulatory reference, the commission must, in writing, terminate the investigation.
- (2) If the commission is the referring authority for regulatory reference, it may, in writing, terminate the investigation.

- (3) The commission must—
- (a) if it makes a termination under subsection (1)—give notice of the amendment to the authority and, if the referring authority is not a Minister, to the responsible Minister; or
  - (b) if it makes a termination under subsection (2)—give notice of the amendment to the responsible Minister.
- (4) A termination under subsection (1) or (2) is a disallowable instrument.
- Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.
- (5) The commission may publish a termination in any other appropriate way.
- (6) The commission may publish a special report into the investigation after notice of the termination of the investigation has been given under subsection (3).

## **19H Procedure for regulatory reference investigations**

- (1) The commission must conduct an investigation on a regulatory reference in accordance with the terms of reference.
- (2) For the purpose of conducting an investigation, the commission may do either or both of the following:
- (a) request submissions from the public or any specified person or body;
  - (b) conduct hearings.
- (3) Hearings must be open to the public, unless the commission orders otherwise.
- (4) Unless otherwise provided by this Act, the commission may conduct an investigation in any manner the commission considers appropriate.

### **19J Principles for regulatory reference investigations**

- (1) The commission must take into account the following matters in conducting a regulatory reference investigation:
  - (a) for any regulatory reference investigation—the competition policy considerations (set out in schedule 1A);
  - (b) for an investigation into a competitive neutrality complaint—the competitive neutrality principles (set out in schedule 1A);
  - (c) for an investigation into a government-regulated activity—the legislation review principles (set out in schedule 1A).
- (2) On a regulatory reference, the commission is not to question the amount of a declared fee under section 4C (Declared fees to be passed on to consumers) or the basis on which the fee is worked out.

### **19K Costs for regulatory reference investigations**

- (1) A self-funding referring authority must pay the reasonable costs of an investigation on a regulatory reference by the authority, as assessed by the commission and notified to the authority.
- (2) The costs of an investigation on a reference by a self-funding referring authority are a debt due to the Territory.
- (3) The Territory must pay the reasonable costs of an investigation on a regulatory reference, as assessed by the commission and notified to the referring authority, if the authority is—
  - (a) a Minister; or
  - (b) a member of the Legislative Assembly sponsored by the Minister under subsection (4).
- (4) On application by a member of the Legislative Assembly, the Minister may sponsor a reference by the member if the Minister considers that it is in the public interest to do so.

- (5) The costs of an investigation include any costs incurred by the commission in obtaining the assistance of any other person, body (whether incorporated or unincorporated) or government agency.

## Part 4 Price directions

### 20 Directions about prices

- (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; and
  - (b) standards of quality, reliability and safety of the regulated services; and
  - (c) the need for greater efficiency in the provision of regulated services to reduce costs to consumers and taxpayers; and
  - (d) an appropriate rate of return on any investment in the regulated industry; and
  - (e) the cost of providing the regulated services; and
  - (f) the principles of ecologically sustainable development mentioned in subsection (5);
  - (g) the social impacts of the decision; and
  - (h) considerations of demand management and least cost planning; and

- (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; and
  - (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) Also, in making a decision under subsection (1), the commission must allow a declared fee under section 4C (Declared fees to be passed on to consumers) to be passed on in full to consumers of the service.
- (4) In a price direction, the commission shall indicate to what extent it has had regard to the matters referred to in subsection (2).
- (5) For subsection (2) (f), ***ecologically sustainable development*** requires the effective integration of economic and environmental considerations in decision-making processes through the implementation of the following principles:
- (a) the precautionary principle—that if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
  - (b) the inter-generational equity principle—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
  - (c) conservation of biological diversity and ecological integrity;
  - (d) improved valuation and pricing of environmental resources.

## 20A Price regulation provisions

- (1) A price direction must include a direction about the pricing of regulated services in the form of either or both of the following:
  - (a) a price, a maximum price or both a minimum and maximum price for each regulated service;
  - (b) a maximum total amount (*revenue cap*) that may be earned by a person providing regulated services from the provision of those services.
- (2) A price direction must be made in accordance with the current reset principles for the regulated industry (see section 20B).
- (3) A price direction may include any or all of the following:
  - (a) a formula for calculating a price or amount mentioned in subsection (1);
  - (b) a method (for example, by reference to price indices) by which a price or amount mentioned in subsection (1) is to be ascertained;
  - (c) a reference to an event or events (*price variation triggers*) the occurrence of which would entitle the commission to initiate a reference for an investigation into a variation of the direction (under section 24F (Commission-initiated variation)).

## 20B Reset principles

- (1) *Reset principles* are principles governing the redetermination of prices or revenue caps in a regulated industry.
- (2) *Current reset principles* governing a price direction for a regulated industry are the reset principles currently in force in the industry (by virtue of a previous price direction).



- (3) ***Future reset principles*** are reset principles included in a price direction that are to take effect after the expiration of the current reset principles.
- (4) In a price direction, the commission may not—
  - (a) vary, omit or replace the current reset principles; or
  - (b) include any future reset principles that will have the effect of varying, omitting or replacing the current reset principles in their application at a future date.
- (5) The commission may fix a period of effect for a price regulation provision of a price direction for regulated services that expires before the day on which the current reset principles for the regulated services expire.
- (6) If the current reset principles governing a price direction (***the earlier direction***) will expire on or before the date on which any price regulation provisions in the earlier direction (***the earlier provision***) will expire, the earlier direction must include future reset principles governing any price regulation provision (in the next price direction for the industry) that will supersede the earlier provision.

## **20C Effective dates**

- (1) Each provision of a price direction—
  - (a) comes into effect on a day ascertained in accordance with the direction, or 14 days after the day on which the final report containing the direction is tabled in the Legislative Assembly, whichever is later; and
  - (b) remains in effect until a day ascertained in accordance with the direction.

**Part 4** Price directions

Section 20C

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- (2) Under subsection (1), the dates and periods of effect of different provisions of a price direction may be different.

*Note* The dates and periods of effect of the price regulation provisions of the direction and any future reset principles in the direction will necessarily be different (see s 20B (3)).

## Part 4A Reports of investigations

### 21 Final reports

- (1) Upon concluding an investigation, the commission shall give the referring authority a final report containing—
  - (a) particulars of the results of its investigations; and
  - (b) for an industry reference—particulars of any comments submitted in relation to the draft report of the investigation pursuant to the invitation in section 18 (1), and of the commission's response to those comments; and
  - (c) for a price direction or price variation investigation—
    - (i) a copy of the price direction; and
    - (ii) a statement of the reasons for the direction; and
    - (iii) a statement of the methodology used in determining the direction; and
    - (iv) a statement to the effect that review of the decision by an industry panel (except in the case of a price variation by consent) is available under part 4C (Review of price directions), subject to procedures explained in the statement;
  - (d) the commission's findings on any other matter required by the reference; and
  - (e) any report by a commissioner dissenting from majority findings of the commission; and
  - (f) any other matter arising from the investigation that the commission considers it desirable to include in the report.

- (2) If the referring authority is not a Minister, the commission must also give a copy of the final report to the responsible Minister.

## 22 Special reports

- (1) The commission may, at any stage of an investigation, give the referring authority and (if the referring authority is not a Minister) the responsible Minister a special report on any matter arising from the investigation.
- (2) A special report about a matter must include any report by a commissioner dissenting from majority findings of the commission about the matter.
- (3) If the referring authority is not a Minister, the commission must also give a copy of the special report to the responsible Minister.

## 23 Confidential material in reports

- (1) If a final report or a special report includes protected confidential information, the commission must divide the report into 2 documents, as follows:
  - (a) a document (the *sealed section*) containing the confidential information, or part of that information;
  - (b) a document (the *unsealed section*) containing the rest of the report.
- (2) If the commission divides a report, the commission must include in the unsealed section—
  - (a) a statement to the effect that there is a sealed section of the report including protected confidential information; and
  - (b) a general description of the contents of the sealed section.

**24 Tabling of reports in Legislative Assembly**

- (1) The referring authority, or the responsible Minister (if the referring authority is not a Minister), must cause a copy of a final report or a special report to be laid before the Legislative Assembly within 6 sitting days after the report is given to the referring authority or responsible Minister (as the case may be).
- (2) If a report is divided into a sealed section and an unsealed section, only the unsealed section is required to be tabled in the Legislative Assembly under subsection (1).

**24A Response by Minister to report on competitive neutrality complaint**

- (1) This section applies if a final report on an investigation into a competitive neutrality complaint is laid before the Legislative Assembly.
- (2) Within 3 months after the report is laid before the Legislative Assembly, the Minister who caused the report to be laid before the Assembly must cause a written response to be laid before the Assembly.

**24B Correction of errors in reports**

- (1) At any time after a final report or a special report on an investigation is given to the referring authority, the commission may, by a supplementary report, correct any error in the report arising from a clerical mistake or an accidental slip or omission.
- (2) The commission must give a supplementary report to the referring authority, and sections 23 and 24 apply to the supplementary report as if it were a final or special report.
- (3) If the referring authority is not a Minister, the commission must also give a copy of the supplementary report to the responsible Minister.

**Part 4A** Reports of investigations

Section 24B

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- (4) When a supplementary report is laid before the Legislative Assembly, the report has effect as corrected.

## **Part 4B**                      **Variation of price directions**

### **Division 4B.1**              **Consent variations**

#### **24C**              **Consent variations**

- (1) A referring authority for a regulated service, or a utility providing a regulated service, may apply in writing to the commission for consent to a variation of a price direction in force for the service.
- (2) The commission may consent to the variation applied for by giving the applicant a written report (a *consent report*) to that effect.
- (3) The commission may consent to a variation only if satisfied on reasonable grounds that the variation is—
  - (a) justified, having regard to the criteria listed at section 20 (2); and
  - (b) in accordance with the current reset principles for the regulated service.
- (4) However, in deciding whether to consent to a variation, the commission must allow a declared fee under section 4C (Declared fees to be passed on to consumers) to be passed on in full to consumers of the service.
- (5) The commission may not consent to a variation of a direction with the effect of—
  - (a) varying, omitting or replacing the current reset principles for the regulated service, or any future reset principles included in the direction; or
  - (b) including any future reset principles into the price direction.

- (6) The following sections apply to a consent report as if it were the final report into a price regulation investigation:
- section 21 (Final reports)
  - section 23 (Confidential material in reports)
  - section 24 (Tabling of reports in Legislative Assembly)
  - section 24B (Correction of errors in reports).
- (7) When laid before the Legislative Assembly under section 24, a consent report has the effect of varying the provisions of the price direction as indicated in the report with effect from a day (or days) ascertained in accordance with the report, or 14 days after the report is laid before the Assembly, whichever is later.

## **Division 4B.2 Nonconsent variations**

### **24D Reference by referring authority**

- (1) The referring authority for a regulated service may provide a reference for part 3 (Investigations) requiring the commission to investigate whether a price direction in force for the service should be varied.
- (2) The commission may accept the reference from the referring authority only if, in the opinion of the commission based on reasonable grounds, there has been a material change in the cost conditions for the provision of the regulated service.

### **24E Reference by utility**

- (1) A utility providing a regulated service may provide a reference for part 3 requiring the commission to investigate whether a price direction in force for the service should be varied.
- (2) The commission may accept the reference from the utility only if, in the opinion of the commission based on reasonable grounds—



- (a) there has been a material change in the cost conditions for the provision of the regulated service; and
  - (b) the change was brought about by external events beyond the control of the utility.
- (3) The external events mentioned in subsection (2) (b) include the following:
- (a) a Ministerial direction under section 19 (Ministerial directions) of the *Utilities Act 2000*;
  - (b) the approval or determination of an industry code or technical code (or a variation of such a code) under the *Utilities Act 2000*.
- (4) Terms of reference for the variation—
- (a) may be specified by the utility under section 16 (Terms of industry references); and
  - (b) are not a disallowable instrument.

**24F Commission-initiated variation**

- (1) The commission may initiate a reference for part 3 (Investigations) for the investigation of whether a price direction in force for regulated services should be varied.
- (2) The commission may only initiate a reference for the variation of a price direction if a price variation trigger stated in the price direction has occurred.
- (3) Terms of reference for the variation—
  - (a) may be specified by the commission under section 16 (Terms of industry references); and
  - (b) are not a disallowable instrument.

**24G Permissible nonconsent variations**

- (1) The commission may vary a price direction only if it is satisfied on reasonable grounds that the variation is—
  - (a) justified by the material change in cost conditions, or price variation trigger, that is the basis for the investigation, having regard to the criteria listed at section 20 (2); and
  - (b) in accordance with the current reset principles for the regulated service.
- (2) The commission may not vary a price direction so as to—
  - (a) vary, omit or replace the current reset principles for the regulated service; or
  - (b) include any future reset principles into the price direction that will have the effect of varying, omitting or replacing the current reset principles for the regulated service in their application at a future date.
- (3) Subject to subsections (1) and (2), the commission may vary a price direction to vary, omit or replace any future reset principles in the direction, or to include future reset principles into the direction.

**24H Procedure for nonconsent price variation investigation**

- (1) The commission must conduct a price variation investigation in the same way as a price direction investigation.
- (2) However, in deciding whether to vary a price direction under this division, the commission must allow a declared fee under section 4C (Declared fees to be passed on to consumers) to be passed on in full to consumers of the service.

**24I Effect of nonconsent price variations**

When laid before the Legislative Assembly under section 24 (Tabling of reports in Legislative Assembly), a report into a price

variation investigation has the effect of varying the provisions of the price direction as indicated in the report (if at all) with effect from a day (or days) ascertained in accordance with the report, or 14 days after the report is laid before the Assembly, whichever is later.

## Part 4C Review of price directions

### 24J Definitions for pt 4C

In this part:

*eligible person*, for a review of a price direction for regulated services, means any of the following persons:

- (a) the referring authority;
- (b) a utility providing any of those services;
- (c) any person—
  - (i) who made a submission to the commission in the course of the investigation into the price direction; and
  - (ii) whose interests are adversely affected by a decision of the commission arising out of the investigation.

*price direction* includes a variation of a price direction.

### 24K Right of review

- (1) Either of the following persons may apply for the review by an industry panel of a price direction for regulated services:
  - (a) the referring authority;
  - (b) a utility providing the services (or any of them).

- (2) An application for review must be lodged with the commission within 3 months after the final report into the price direction investigation is laid before the Legislative Assembly under section 24 (Tabling of reports in Legislative Assembly).

*Note* If a form is approved under s 57 (Approved forms) for an application, the form must be used.

- (3) After lodgment of an application for review, the commission must—
- (a) give all other eligible persons a copy of the application, inviting them to lodge written notice with the commission within 14 days if they intend to appear as a party; and
  - (b) publish notice of the application in a daily newspaper published and circulating in the ACT.

#### **24L Who are the parties to a review?**

- (1) The applicant and any eligible person who notifies the commission as invited under section 24K (3) are the parties to the review.
- (2) A party to a review may be represented by another person.

#### **24M Industry panel**

- (1) An application for review must be heard by a panel (an *industry panel*) of 3 members.
- (2) Provisions for the constitution of the panel and for the terms of office of the panel and panel members are set out in schedule 2A.
- (3) The *Legislation Act 2001*, division 19.3.3 (Appointments—Assembly consultation) does not apply in relation to an appointment to an industry panel.

#### **24N Nature of review**

- (1) On an application for review of a price direction, an industry panel may—

- (a) substitute a new price direction for the original price direction;  
or
  - (b) confirm the original direction.
- (2) An industry panel must make a decision on an application for review—
  - (a) on the merits of the case, having regard to the criteria listed at section 20 (2) for price directions; and
  - (c) as required by sections 20A, 20B and 20C for price directions.
- (3) Despite subsection (2), the panel may not consider any matter on an application for review that was not raised on behalf of the applicant in submissions to the commission for the purposes of the investigation of the price direction that is the subject of the review.

**24O Procedure for review**

- (1) In considering an application for review, an industry panel has the same powers as the commission in conducting a price regulation investigation.
- (2) Without limiting subsection (1), the following provisions apply to the panel on the hearing of the application for review as if it were the commission conducting a price regulation investigation:
  - section 17 (Procedure for industry reference investigations)
  - section 18 (Draft reports (industry reference investigations))
  - Part 7 (Information)
  - Part 8 (Cooperation with the commission).

**24P Referral of matters to commission**

- (1) An industry panel may, in writing, refer any matter raised in the course of a review to the commission for an advisory opinion.

- (2) The commission must consider any matter raised on a reference from the panel, and give the panel a report setting out its findings.
- (3) The panel must take into account the commission's findings on the reference in making a decision on the review.

#### **24Q Witnesses and evidence**

- (1) At the request of any party, an industry panel may exercise its powers under section 41 (Provision of information to commission) and section 49 (Attendance at hearing) (as applied by section 24O (Procedure for review)) to require the provision of information or a document, or to require a person to attend before the panel, for the purpose of hearing the application for review.
- (2) The party must pay all the expenses of any person in complying with a requirement on a request under subsection (1).

#### **24R Frivolous or vexatious applications**

If an industry panel considers that an application for review is frivolous or vexatious, it may, at any stage during the hearing—

- (a) by a written direction, dismiss the application; and
- (b) at the request of any party, make a written declaration preventing any subsequent application for the review of any price direction by the applicant from being heard without leave of an industry panel established for the purpose of the later application.

#### **24S Implementation of price direction under review**

- (1) A price direction has effect despite any application for its review, unless the industry panel, on an application by a party, declares in writing that the implementation of the price direction is suspended or altered until—

- (a) if the panel confirms the price direction under review—the day on which the report of the review is tabled in the Legislative Assembly (under section 24U (Functions of the commission)); or
  - (b) if the panel substitutes a new direction for the price direction under review—the day (or days) on which the substituted direction comes into effect.
- (2) The declaration of suspension or alteration is taken to be a variation of the price direction while the direction remains in force.
  - (3) The following sections apply to the declaration of suspension or alteration as if it were the final report of a price regulation investigation:
    - section 21 (Final reports)
    - section 23 (Confidential material in reports)
    - section 24 (Tabling of reports in Legislative Assembly)
    - section 24B (Correction of errors in reports).

#### **24T Effect of decision**

- (1) If, as a result of a review, an industry panel substitutes a new price direction for the original—
  - (a) each provision of the substituted direction comes into effect on a day ascertained in accordance with the direction, or 14 days after the day on which the final report of the direction is tabled in the Legislative Assembly, whichever is later; and
  - (b) each provision of the substituted direction remains in effect until a day ascertained in accordance with the direction; and
  - (c) the date and period of effect of different provisions of the substituted direction may be different; and



(d) this Act applies as if the substituted price direction were a price direction made by the commission (subject to subsection (2))—

**Example**

The substituted price direction may be varied under part 4B (Variation of price directions).

- (2) A substituted direction may not be reviewed under this part.

## **24U Functions of commission**

- (1) The commission must give an industry panel any assistance the panel requires, including the provision of all the information available to the commission in the original investigation.
- (2) The following sections apply (with necessary changes) to the report of an industry panel's decision on an application for review as if it were a report by the commission into a price regulation investigation:
- section 21 (Final reports)
  - section 23 (Confidential material in reports)
  - section 24 (Tabling of reports in Legislative Assembly)
  - section 24B (Correction of errors in reports).
- (3) The commission must take any action necessary to implement a decision of an industry panel.

## **24V Costs**

- (1) The reasonable costs of the review of a price direction, as assessed by the industry panel and notified to the applicant, are payable as follows:
- (a) the costs of each party are payable by the party;

- (b) the costs of the industry panel are payable by the utilities to which the review relates in proportions determined by the commission.
- (2) The costs of the industry panel include any costs incurred by the panel in obtaining the assistance of the commission or any other person, body (whether incorporated or unincorporated) or government agency.

**24W            Legal protection of panel members, parties and representatives**

- (1) An action, suit or proceeding does not lie against someone who is or has been a member of an industry panel for any act done in good faith in the exercise or purported exercise of a function under this Act.
- (2) An action, suit or proceeding does not lie against someone who is or has been a party to an application or a representative of a party for any act done in good faith in that capacity.

## Part 5 Access agreements

### 25 Notice of access agreements

- (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.

### 26 Registration of access agreements

- (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.

**27 Investigations into access agreements**

Nothing in this part precludes the commission from conducting an investigation under part 3 into an access agreement or proposed access agreement.

**28 Failure to notify proposals and agreements**

- (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.

**29 Register of agreements**

- (1) The commission shall maintain a register of agreements for 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 6                      Arbitration of access regime disputes

### 30                      Definitions for pt 6

In this part:

*access provider*, in relation to an access regime for the provision of services, means the person that wholly or substantially owns, controls or operates the infrastructure facilities by means of which the services are provided.

*third party*, in relation to an access regime for the provision of services, 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.

### 31                      Application of pt 6

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.

### 32                      Access disputes

- (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.

### **33 Arbitrator—appointment and functions**

(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) If a dispute concerns the application of a price direction to an access regime, the senior commissioner must ensure—

(a) that no commissioner who took part in the price direction investigation takes any part in arbitrating the dispute; and

(b) that no agency, body or person who assisted in the price direction investigation under an arrangement mentioned in section 12 assists the commission in arbitrating the dispute.

(4) 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.

(5) 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 the competition principles agreement, clause 6 (4) (i), (j) and (l), 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 (4) 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.
- (6) Parts 7 and 8 apply in relation to an arbitration as if references in those parts to the commission were references to the arbitrator.
- (7) If the competition principles, clause 6 (4) (i), (j) or (l) is varied, the regulations may amend schedule 2 accordingly with effect (retrospective if necessary) from the date of effect of the variation.

#### **34 Draft determinations**

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

#### **35 Arbitration determinations**

- (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.
- (5) A determination may vary the effect of a price determination as it affects the parties to the dispute.

**36 Effect of determinations**

- (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.

**37 Termination of arbitration by parties**

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



**38 Termination of arbitration by arbitrator**

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.

**39 Variation of determinations**

- (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.

**40 Arbitration procedure—Commercial Arbitration Act**

- (1) The *Commercial Arbitration Act 1986* applies in relation to an arbitration, subject to this part.
- (2) Notwithstanding the *Commercial Arbitration Act 1986*, section 20 (1), 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) An arbitrator may direct that the costs of an arbitration are to be paid (in whole or in part) by the commission or the Territory.
- (6) For the *Commercial Arbitration Act 1986*, section 34 (1), 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 7 Information

### 41 Provision of information to commission

- (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; and
  - (b) specify the period within which the requirement is to be complied with; and
  - (c) specify the form in which the information or the copy of the document is to be given to the commission; and
  - (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.

Maximum penalty (subsection (3)): 100 penalty units, imprisonment for 1 year or both.

*Note* The *Legislation Act 2001*, s 170 and s 171 deal with the application of the privilege against selfincrimination and client legal privilege.

### 42 Restrictions on publication

- (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).

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

### **43 Inspection of documents**

- (1) This section applies if a person requests permission to inspect a document given to the commission in the course of the performance of its functions.

- (2) If the document does not contain confidential information, the commission must make it available to the person for inspection.

- (3) If the document contains confidential information—

(a) the commission may make the document available to the person for inspection in a form that does not disclose the confidential information; or

(b) the commission may make the document available to the person for inspection in a form that discloses so much of that information as the commission has the power to disclose under section 46.

### **44 Confidential information—disclosure by commissioners and staff**

- (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).

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (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).

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (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; or
  - (b) the disclosure or use is made with the consent of the person who supplied the information; or
  - (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 override any rights another person may have with regard to the disclosure or use of the information.

#### **45 Confidential information—notice of proposed disclosure**

- (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; and

- (b) particulars of the facts and circumstances relied upon by the commission to justify the disclosure; and
  - (c) a copy of the disclosure guidelines under section 46; and
  - (d) 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.

**46 Confidential information—general disclosure**

- (1) Subject to section 47, the commission shall only disclose confidential information if—
- (a) it considers that, taking into account the disclosure guidelines under subsection (4)—
    - (i) the disclosure would not cause detriment to any person; or
    - (ii) although the disclosure would cause detriment to a person, the public benefit in disclosure outweighs the detriment; and
  - (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 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 subsection (1) (a) or (b).
- (4) The commission may, in writing, determine disclosure guidelines for subsection (1) (a).
- (5) The commission must give a copy of a determination of disclosure guidelines to the Minister.
- (6) A determination of disclosure guidelines is a disallowable instrument.

*Note* A disallowable instrument must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

#### **47 Confidential information—disclosure within the commission**

- (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.

#### **48 Cabinet and Executive documents**

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; or
- (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 8 Cooperation with commission

### 49 Attendance at hearing

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.

### 50 Non-cooperation offences

- (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 this Act.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

*Note* The *Legislation Act 2001*, s 170 and 171 deal with the application of the privilege against selfincrimination and client legal privilege.

- (2) 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.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(3) 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.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(4) 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.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

(5) 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.



- (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 in accordance with the invitation in the notice under subsection (2).
- (5) An order served under subsection (1) is a notifiable instrument.
- Note* A notifiable instrument must be notified under the *Legislation Act 2001*.
- (6) A person shall not, without reasonable excuse, contravene an order served on the person under subsection (1).
- Maximum penalty: 200 penalty units.
- (7) Where a person is convicted of an offence against subsection (6) in relation to the contravention of an order, the person commits, in respect of each day after the service of the order during any part of which that contravention continued, an offence punishable, on conviction, by a fine not exceeding 20 penalty units.

## 54 Injunctions and declarations

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

## Part 10                      Miscellaneous

### 55                      Acts and omissions of representatives

- (1) In this section:

*person* means an individual.

*Note*        See the Criminal Code, pt 2.5 for provisions about corporate criminal responsibility.

*representative*, of a person, means an employee or agent of the person.

*state of mind*, of a person, includes—

- (a) the person's knowledge, intention, opinion, belief or purpose; and
  - (b) the person's reasons for the intention, opinion, belief or purpose.
- (2) This section applies to a prosecution for any offence against this Act.
- (3) If it is relevant to prove a person's state of mind about an act or omission, it is enough to show—
- (a) the act was done or omission made by a representative of the person within the scope of the representative's actual or apparent authority; and
  - (b) the representative had the state of mind.
- (4) An act done or omitted to be done on behalf of a person by a representative of the person within the scope of the representative's actual or apparent authority is also taken to have been done or omitted to be done by the person.

- (5) However, subsection (4) does not apply if the person establishes that reasonable precautions were taken and appropriate diligence was exercised to avoid the act or omission.
- (6) A person who is convicted of an offence cannot be punished by imprisonment for the offence if the person would not have been convicted of the offence without subsection (3) or (4).

**56 Service of documents**

A document may be served on the commission by leaving it at, or by sending it by post, telex, fax, email or similar facility to—

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

**57 Approved forms**

- (1) The commission may, in writing, approve forms for this Act.
- (2) If the commission approves a form for a particular purpose, the form must be used for that purpose.
- (3) An approved form is a notifiable instrument.

*Note* A notifiable instrument must be notified under the *Legislation Act 2001*.

**58 Regulation-making power**

The Executive may make regulations for this Act.

*Note* Regulations must be notified, and presented to the Legislative Assembly, under the *Legislation Act 2001*.

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## Schedule 1A Competition principles agreement extracts

(see s 19C, s 19D and s 19J)

### Competition policy considerations

#### Interpretation

#### [competition principles agreement cl 1 (3) (d)-(j)]

1

...

(3)

...

- (d) government legislation and policies relating to ecologically sustainable development;
- (e) social welfare and equity considerations, including community service obligations;
- (f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- (g) economic and regional development, including employment and investment growth;
- (h) the interests of consumers generally or of a class of consumers;
- (i) the competitiveness of Australian businesses;
- (j) the efficient allocation of resources.

## Competitive neutrality principles

### Competitive neutrality policy and principles

#### [competition principles agreement cl 3 (1) & (4)-(7)]

- 3 (1) The objective of competitive neutrality policy is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities: Government businesses should not enjoy any net competitive advantage simply as a result of their public sector ownership. These principles only apply to the business activities of publicly owned entities, not to the non-business, non-profit activities of these entities.
- (4) Subject to subclause (6), for significant Government business enterprises which are classified as “Public Trading Enterprises” and “Public Financial Enterprises” under the Government Financial Statistics Classification:
- (a) the Parties<sup>†</sup> will, where appropriate, adopt a corporatisation model for these Government business enterprises (noting that a possible approach to corporatisation is the model developed by the intergovernmental committee responsible for GTE National Performance Monitoring); and
  - (b) the Parties<sup>†</sup> will impose on the Government business enterprise:
    - (i) full Commonwealth, State and Territory taxes or tax equivalent systems;
    - (ii) debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees; and
    - (iii) those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors.



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- (5) Subject to subclause (6), where an agency (other than an agency covered by subclause (4)) undertakes significant business activities as part of a broader range of functions, the Parties<sup>†</sup> will, in respect of the business activities:
- (a) where appropriate, implement the principles outlined in subclause (4); or
  - (b) ensure that the prices charged for goods and services will take account, where appropriate, of the items listed in subclause (4) (b), and reflect full cost attribution for these activities.
- (6) Subclauses (4) and (5) only require the Parties<sup>†</sup> to implement the principles specified in those subclauses to the extent that the benefits to be realised from implementation outweigh the costs.
- (7) Subclause (4) (b) (iii) shall not be interpreted to require the removal of regulation which applies to a Government business enterprise or agency (but which does not apply to the private sector) where the Party<sup>†</sup> responsible for the regulation considers the regulation to be appropriate.

...

*Note* [not included in the agreement]:

<sup>†</sup> **Party** is defined in the agreement (cl 1 (1)) to mean the Commonwealth, a State, the Australian Capital Territory or the Northern Territory of Australia, if the jurisdiction concerned has signed the agreement and has not withdrawn. The Australian Capital Territory has signed the agreement and has not withdrawn from it; thus it is a party.

## Legislation review principles

### Legislation review

#### [competition principles agreement cl 5 (1) & (9)]

- 5 (1) The guiding principle is that legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:
- (a) the benefits of the restriction to the community as a whole outweigh the costs; and
  - (b) the objectives of the legislation can only be achieved by restricting competition.

...

- (9) Without limiting the terms of reference of a review, a review should:
- (a) clarify the objectives of the legislation;
  - (b) identify the nature of the restriction on competition;
  - (c) analyse the likely effect of the restriction on competition and on the economy generally;
  - (d) assess and balance the costs and benefits of the restriction; and
  - (e) consider alternative means for achieving the same result including non-legislative approaches.

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## Schedule 1 Commission appointments and working arrangements

(see s 6 (2))

### 1 Standing commissioners

- (1) The Executive must (by instrument) appoint 3 commissioners (*standing commissioners*), 1 of whom is nominated in the instrument as the senior commissioner, and 2 of whom are nominated in the instrument as assistant commissioners.
- (2) A standing commissioner holds office (subject to this Act) for a term of up to 5 years, specified in the instrument of appointment, and is eligible for reappointment.
- (3) If the senior commissioner ceases to hold office or is suspended from office (under clause 4 or 5), the Minister must (by instrument) nominate another standing commissioner as senior commissioner.
- (4) If a suspended senior commissioner resumes office as a commissioner, he or she also resumes office in the capacity of senior commissioner (and the nominated replacement ceases to hold office in that capacity).

### 1A Associate commissioners

- (1) The Executive may appoint 1 or more commissioners (*associate commissioners*) for a particular investigation, in consideration of advice received from the commission about the need for such an appointment (or appointments).
- (2) An associate commissioner holds office (subject to this Act) until the conclusion of the investigation for which he or she is appointed.

**1B Qualifications**

The Executive may only appoint as commissioner a person who has knowledge or experience in 1 or more of the following fields:

- (a) commerce;
- (b) economics;
- (c) industry;
- (d) law;
- (e) public administration.

**1C Terms of office**

- (1) A commissioner is appointed on terms (not inconsistent with this Act) decided by the Executive.
- (2) A commissioner may be appointed on a full-time or part-time basis.
- (3) A full-time commissioner may engage in paid employment outside the functions of the office only with the earlier written approval of the Minister.

**1D Appointment defects and vacancies**

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 an office of commissioner.

**1E Arrangement of business**

- (1) The senior commissioner—
  - (a) is responsible for ensuring the orderly and expeditious discharge of the functions of the commission; and
  - (b) presides over those investigations that he or she sits on.

- 
- (2) The senior commissioner may give directions for any of the following:
- (a) the arrangement of business;
  - (b) the commissioner or commissioners who will constitute the commission for particular purposes;
  - (c) the procedure of the commission generally.
- (3) If the senior commissioner does not sit on an investigation, or ceases to sit on an investigation, the senior commissioner must—
- (a) nominate a commissioner to preside over the investigation; and
  - (b) if a nominated presiding commissioner later ceases to sit on the investigation—nominate another commissioner to preside over the investigation.
- (4) If a commissioner sitting on an investigation is directed to cease doing so (under clause 2), ceases to hold office (under clause 4 or 5), or is suspended from office (under clause 5), the senior commissioner may—
- (a) direct that the investigation continue under the remaining commissioners constituting the commission for the investigation; or
  - (b) direct that the investigation continue with another commissioner replacing the commissioner who has ceased to hold office, or been suspended from office; or
  - (c) dissolve the commission (as constituted for the investigation), reconstitute the commission for the investigation under the same or different commissioners, and direct that the investigation be started again under the reconstituted commission; or

- (d) if a commissioner sitting on the investigation is suspended from office—direct that the investigation is suspended, or issue another direction under this subclause.

**1F Exercise of powers**

The commission's powers may be exercised for particular purposes by—

- (a) the senior commissioner, or a person authorised by the senior commissioner for those purposes; or
- (b) if a direction has been given under clause 1E (2) (b)—by the commissioner or commissioners who constitute the commission for those purposes.

**1G Decision-making**

When the commission is constituted by more than 1 person, a decision of the commission must be made—

- (a) in accordance with the unanimous or majority opinion of the commissioners constituting the commission; or
- (b) if the commissioners are equally divided in opinion—in accordance with the opinion of the presiding commissioner (see clause 1E (1) and (3)).

**2 Disclosure of interests**

- (1) Before a commissioner performs a function, he or she must give written notice to the Minister of any direct or indirect pecuniary interests that he or she has in relation to the performance of that function.
- (2) On receiving notice of a commissioner's interests, the Minister may, by written notice—

- 
- (a) direct the senior commissioner to give notice of the interests to any person whose interests are significantly affected by the performance of the function; or
  - (b) direct the commissioner to cease performing the function.
- (3) A commissioner must comply with a direction of the Minister under subsection (2).

### **3 Remuneration and allowances**

A commissioner is entitled to such remuneration, allowances and other entitlements—

- (a) as are determined by the remuneration tribunal in respect of the commissioner; or
- (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*.

### **4 Resignation**

A commissioner may resign by giving a signed notice of resignation to the Minister.

### **5 Removal from office**

- (1) The Executive may, by written notice to a 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) A 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.

## **6 Acting commissioner**

- (1) The Executive may, in writing, appoint a person to act as a commissioner—
  - (a) during a vacancy in the commissioner's office, whether or not an appointment has previously been made to the office; or
  - (b) during any period, or during all periods, when the person appointed as that commissioner is for any reason unable to perform the functions of the office.
- (2) A person appointed to act as a commissioner during a vacancy in a commissioner's office 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.



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## Schedule 2A Industry panels constitution and procedure

(see s 24M)

### 1 Appointment of members of industry panels

- (1) The referring authority must appoint an industry panel of 3 members (1 of whom is declared in the appointment as the president) to hear an application for the review of a price direction.
- (2) The following are not eligible to be members of an industry panel established for the review of a price direction:
  - (a) a commissioner;
  - (b) a member of the staff of the commission;
  - (c) a party to the review.
- (3) A member holds office (subject to this Act) until the conclusion of the review for which he or she is appointed.
- (4) A member is otherwise appointed on terms, not inconsistent with this Act, determined by the referring authority.

### 2 Qualifications

A member of an industry panel must have knowledge or experience in 1 of the following fields:

- (a) commerce;
- (b) economics;
- (c) industry;
- (d) law;
- (e) public administration.

**3 Appointment defects and vacancies**

An act or decision of an industry panel is not invalid merely because of a defect or irregularity in the appointment of a member of the panel, or a vacancy in the office of a member.

**4 Remuneration and allowances**

A member of a panel is entitled to such remuneration, allowances and other entitlements—

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

**5 Presiding member**

- (1) The president presides over the hearing of an application.
- (2) If the president resigns or is removed from office, the referring authority must declare another member to be the presiding member.
- (3) A declaration must be in writing.
- (4) A copy of a declaration must be given to the other members of the panel and the parties to the review.

**6 Decision-making**

The panel's decision on a review must be reached as follows:

- (a) if all, or a majority, of the panel are of a particular opinion—the decision is to be made according to that opinion;
- (b) if no 2 members agree—in accordance with the opinion of the president or, if the president has resigned or been removed from office, the presiding member.

**7 Disclosure of interests**

- (1) Before a panel begins to hear an application for review, the members of the panel must give written notice to the referring authority of any direct or indirect pecuniary interests that they have in relation to the review.
- (2) On receiving notice of the interests of a member of a panel, the referring authority may—
  - (a) give written notice of the interests to the other members and to the parties to the review; or
  - (b) by written notice to the member, remove the member from office.
- (3) The referring authority must give a copy of a notice of the removal of a member from office to the other members and to the parties to the review.
- (4) If a member of a panel is removed from office—
  - (a) the review may proceed under the remaining members, if the parties agree; or
  - (b) failing agreement—the referring authority must dissolve the panel and constitute a new panel (under this schedule) with the remaining members and a new member.

**8 Resignation**

- (1) A member of a panel may resign from office by written notice to the referring authority.
- (2) A member of a panel must give written notice of absence to the referring authority if he or she becomes unavailable to consider the application at any stage of the review.
- (3) After a notice of absence is given, the member must resign from the panel if so directed in writing by the referring authority.

- (4) If a member of the panel resigns—
  - (a) the review may proceed under the remaining members, if the parties agree; or
  - (b) failing agreement, the referring authority must dissolve the panel and constitute a new panel (under this schedule) with the remaining members and a new member.

**9 Removal from office**

- (1) The Executive may, by written notice to a member of a panel, suspend the member from office for mental or physical incapacity or incompetence.
- (2) A notice of suspension must include a full statement of the grounds for suspension.
- (3) The notice of suspension must be tabled in the Legislative Assembly within 7 sitting days after it is given to the member.
- (4) The Executive must remove the member 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 member ought to be removed from office.
- (5) The member resumes 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 member ought to be removed from office.
- (6) A member of a panel 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.

## **Schedule 2      Arbitration guidelines— competition principles agreement, cl 6 (4) (i), (j) and (l)**

(see s 33 (5) (a))

### **1      Terms and conditions for access—competition principles agreement, cl 6 (4) (i)**

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.

**2 Extension of infrastructure—competition principles agreement, cl 6 (4) (j)**

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;
- (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.

**3 Impeding of existing rights—competition principles agreement, cl 6 (4) (l)**

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.

## Endnotes

### 1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

### 2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
cl = clause	pres = present
def = definition	prev = previous
dict = dictionary	(prev...) = previously
disallowed = disallowed by the Legislative Assembly	pt = part
div = division	r = rule/subrule
exp = expires/expired	reg = regulation/subregulation
Gaz = Gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

## Endnotes

3 Legislation history

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### 3 Legislation history

The *Independent Competition and Regulatory Commission Act 1997* was originally the *Independent Pricing and Regulatory Commission Act 1997*. It was renamed by the *Independent Competition and Regulatory Commission Amendment Act 2000* A2000-8 s 5.

#### **Independent Competition and Regulatory Commission Act 1997 No 77**

notified 25 November 1997 (Gaz 1997 No S360)  
commenced 25 November 1997 (s 2)

as amended by

#### **Independent Competition and Regulatory Commission Amendment Act 2000 No 8**

notified 23 March 2000 (Gaz 2000 No 12)  
commenced 23 March 2000 (s 2)

#### **Utilities (Consequential Provisions) Act 2000 No 66 sch 1 pt 7**

notified 20 December 2000 (Gaz 2000 No S68)  
s 1, s 2 commenced 20 December 2000 (IA s 10B)  
sch 1 pt 7 commenced 1 January 2001 (Gaz 2000 No S69)

#### **Legislation (Consequential Amendments) Act 2001 No 44 pt 188**

notified 26 July 2001 (Gaz 2001 No 30)  
s 1, s 2 commenced 26 July 2001 (IA s 10B)  
pt 188 commenced 12 September 2001 (s 2 and see Gaz 2001  
No S65)

#### **Legislation Amendment Act 2002 No 11 pt 2.28**

notified LR 27 May 2002  
s 1, s 2 commenced 27 May 2002 (LA s 75)  
pt 2.28 commenced 28 May 2002 (s 2 (1))

#### **Independent Competition and Regulatory Commission Amendment Act 2003 A2003-50**

notified LR 25 November 2003  
s 1, s 2 commenced 25 November 2003 (LA s 75 (1))  
remainder commenced 26 November 2003 (s 2)



### Annual Reports Legislation Amendment Act 2004 A2004-9 sch 1 pt 1.20

notified LR 19 March 2004  
 s 1, s 2 commenced 19 March 2004 (LA s 75 (1))  
sch 1 pt 1.20 awaiting commencement (s 2 and see Annual Reports (Government Agencies) Act 2004 A2004-8 s 2)

*Note* default commencement under LA s 79: 19 September 2004

### Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Act 2004 A2004-15 sch 1 pt 1.23

notified LR 26 March 2004  
 s 1, s 2 commenced 26 March 2004 (LA s 75 (1))  
 sch 1 pt 1.23 commenced 9 April 2004 (s 2 (1))

## 4 Amendment history

### Title

title am 2000 No 8 s 4; 2000 No 66 sch 1 pt 7

### Name of Act

s 1 sub 2000 No 8 s 5

### Commencement

s 2 om 2001 No 44 amdt 1.2131

### Interpretation for Act

s 3 def **commission** sub 2000 No 8 s 6  
 def **commissioner** sub 2000 No 8 s 6  
 def **competition policy considerations** ins 2000 No 8 s 6  
 def **competitive neutrality complaint** ins 2000 No 8 s 6  
 def **competitive neutrality principles** ins 2000 No 8 s 6  
 def **confidential information** sub 2000 No 8 s 6  
 def **current reset principles** ins 2000 No 66 sch 1 pt 7  
 def **declared fee** ins A2003-50 s 4  
 def **eligible person** ins 2000 No 66 sch 1 pt 7  
 def **future reset principles** ins 2000 No 66 sch 1 pt 7  
 def **Gas Pipelines Access (A.C.T.) Law** ins 2000 No 66 sch 1 pt 7  
 def **Gas Pipelines Access (A.C.T.) Regulations** ins 2000 No 66 sch 1 pt 7  
 def **government activity** ins 2000 No 8 s 6  
 def **government-regulated activity** ins 2000 No 8 s 6  
 def **industry panel** ins 2000 No 66 sch 1 pt 7  
 def **industry reference** ins 2000 No 8 s 6  
 def **law of the Territory** ins 2000 No 66 sch 1 pt 7

## Endnotes

### 4 Amendment history

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def **legislation review principles** ins 2000 No 8 s 6  
def **National Electricity (ACT) Law** ins 2000 No 66 sch 1 pt 7  
def **National Electricity (ACT) Regulations** ins 2000 No 66 sch 1 pt 7  
def **National Electricity Code** ins 2000 No 66 sch 1 pt 7  
def **National Gas Code** ins 2000 No 66 sch 1 pt 7  
def **price direction** sub 2000 No 66 sch 1 pt 7  
def **price regulation** sub 2000 No 66 sch 1 pt 7  
def **price variation trigger** ins 2000 No 66 sch 1 pt 7  
def **protected confidential information** ins 2000 No 8 s 6  
def **referring authority** sub 2000 No 8 s 6  
def **regulated industry** am 2000 No 66 sch 1 pt 7  
def **regulatory reference** ins 2000 No 8 s 6  
def **reset principles** ins 2000 No 66 sch 1 pt 7  
def **responsible Minister** ins 2000 No 8 s 6  
def **revenue cap** ins 2000 No 66 sch 1 pt 7  
def **sealed section** ins 2000 No 8 s 6  
def **self-funding referring authority** ins 2000 No 8 s 6  
def **unsealed section** ins 2000 No 8 s 6  
def **utility** ins 2000 No 66 sch 1 pt 7  
def **utility service** ins 2000 No 66 sch 1 pt 7  
def **variation** ins 2000 No 66 sch 1 pt 7

#### **Who is referring authority?**

s 3A ins 2000 No 8 s 7  
am 2000 No 66 sch 1 pt 7; pars renum R2 LA

#### **Regulated industries—declarations**

s 4 am 2001 No 44 amdt 1.2132, amdt 1.2133

#### **National electricity code—electricity distribution and transmission pricing**

s 4A ins 2000 No 66 sch 1 pt 7

#### **ACT gas transmission**

s 4B ins 2000 No 66 sch 1 pt 7

#### **Declared fees to be passed on to consumers**

s 4C ins A2003-50 s 5

#### **Independent competition and regulatory commission**

pt 2 hdg sub 2000 No 8 sch 2

#### **Constitution**

s 6 sub 2000 No 8 s 8

#### **Objectives**

s 7 am 2000 No 8 s 9

#### **Functions**

s 8 am 2000 No 8 s 10; 2000 No 66 sch 1 pt 7

**Commission's annual report**

s 9 am 2000 No 66 sch 1 pt 7  
sub A2004-9 amdt 1.28

**Independence from Ministerial control**

s 10 am 2000 No 66 sch 1 pt 7

**Immunity from suit**

s 14 am 2000 No 8 sch 2

**Industry references**

div 3.1 hdg (prev pt 3 div 1 hdg) ins 2000 No 8 s 11  
renum R2 LA

**Application of div 3.1—industry references**

s 14A ins 2000 No 8 s 11

**Nature of industry references**

s 15 hdg sub 2000 No 8 sch 2  
s 15 am 2000 No 8 sch 2; 2001 No 44 amdt 1.2134

**Terms of industry references**

s 16 hdg sub 2000 No 8 sch 2  
s 16 am 2000 No 8 sch 2; 2001 No 44 amdt 1.2135, amdt 1.2136

**Procedure for industry reference investigations**

s 17 hdg sub 2000 No 8 sch 2  
s 17 am 2000 No 8 sch 2; 2000 No 66 sch 1 pt 7; ss renum R2 LA;  
A2003-50 s 6; ss renum R4 LA (see A2003-50 s 7)

**Draft reports—industry reference investigations**

s 18 hdg sub 2000 No 8 sch 2  
s 18 am 2000 No 8 sch 2; 2000 No 66 sch 1 pt 7; 2001 No 44 amdt  
1.2137; ss renum R2 LA (see 2001 No 44 amdt 1.2138)

**Costs for industry reference investigations**

s 19 hdg sub 2000 No 8 sch 2  
s 19 am 2000 No 8 sch 2; 2000 No 66 sch 1 pt 7; ss renum R2 LA

**Regulatory references**

div 3.2 hdg (prev pt 3 div 2 hdg) ins 2000 No 8 s 12  
renum R2 LA

**Application of div 3.2—regulatory references**

s 19A ins 2000 No 8 s 12

**Acceptance of regulatory references—competitive neutrality complaints**

s 19B ins 2000 No 8 s 12  
am 2001 No 44 amdt 1.2139

## Endnotes

### 4 Amendment history

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#### **Acceptance of regulatory references—government-regulated activities**

s 19C ins 2000 No 8 s 12  
am 2001 No 44 amdt 1.2140

#### **Regulatory references initiated by commission**

s 19D ins 2000 No 8 s 12  
sub 2001 No 44 amdt 1.2141

#### **Terms of regulatory references**

s 19E ins 2000 No 8 s 12

#### **Amendment of terms of regulatory reference**

s 19F ins 2000 No 8 s 12  
sub 2001 No 44 amdt 1.2142

#### **Termination of investigations into regulatory references**

s 19G ins 2000 No 8 s 12  
sub 2001 No 44 amdt 1.2142

#### **Procedure for regulatory reference investigations**

s 19H ins 2000 No 8 s 12

#### **Principles for regulatory reference investigations**

s 19J ins 2000 No 8 s 12  
am A2003-50 s 8, s9

#### **Costs for regulatory reference investigations**

s 19K ins 2000 No 8 s 12

#### **Price directions**

pt 4 hdg sub 2000 No 8 sch 2

#### **Directions about prices**

s 20 am 2000 No 66 sch 1 pt 7; A2003-50 s 10; ss renum R4 LA  
(see A2003-50 s 11)

#### **Price regulation provisions**

s 20A ins 2000 No 66 sch 1 pt 7

#### **Reset principles**

s 20B ins 2000 No 66 sch 1 pt 7

#### **Effective dates**

s 20C ins 2000 No 66 sch 1 pt 7

#### **Reports of investigations**

pt 4A hdg ins 2000 No 8 sch 2

#### **Final reports**

s 21 am 2000 No 8 s 13; 2000 No 66 sch 1 pt 7; pars renum R2 LA

#### **Special reports**

s 22 am 2000 No 8 s 14

**Confidential material in reports**

s 23 sub 2000 No 8 s 15

**Tabling of reports in Legislative Assembly**

s 24 sub 2000 No 8 s 15

**Response by Minister to report on competitive neutrality complaint**

s 24A ins 2000 No 8 s 15

**Correction of errors in reports**

s 24B ins 2000 No 8 s 15

**Variation of price directions**

pt 4B hdg ins 2000 No 66 sch 1 pt 7

**Consent variations**div 4B.1 hdg (prev pt 4B div 1 hdg) ins 2000 No 66 sch 1 pt 7  
renum R2 LA**Consent variations**s 24C ins 2000 No 66 sch 1 pt 7  
am A2003-50 s 12; ss renum R4 LA (see A2003-50 s 13)**Nonconsent variations**div 4B.2 hdg (prev pt 4B div 2 hdg) ins 2000 No 66 sch 1 pt 7  
renum R2 LA**Reference by referring authority**

s 24D ins 2000 No 66 sch 1 pt 7

**Reference by utility**s 24E ins 2000 No 66 sch 1 pt 7  
am 2001 No 44 amdt 1.2143**Commission-initiated variation**s 24F ins 2000 No 66 sch 1 pt 7  
am 2001 No 44 amdt 1.2143**Permissible nonconsent variations**

s 24G ins 2000 No 66 sch 1 pt 7

**Procedure for nonconsent price variation investigation**s 24H ins 2000 No 66 sch 1 pt 7  
am A2003-50 s 14, s 15**Effect of nonconsent price variations**

s 24I ins 2000 No 66 sch 1 pt 7

**Review of price directions**

pt 4C hdg ins 2000 No 66 sch 1 pt 7

**Definitions for pt 4C**

s 24J ins 2000 No 66 sch 1 pt 7

## Endnotes

4 Amendment history

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### **Right of review**

s 24K ins 2000 No 66 sch 1 pt 7  
am 2001 No 44 amdt 1.2144, amdt 1.2145

### **Who are the parties to a review?**

s 24L ins 2000 No 66 sch 1 pt 7

### **Industry panel**

s 24M ins 2000 No 66 sch 1 pt 7  
am 2002 No 11 amdt 2.56

### **Nature of review**

s 24N ins 2000 No 66 sch 1 pt 7

### **Procedure for review**

s 24O ins 2000 No 66 sch 1 pt 7

### **Referral of matters to commission**

s 24P ins 2000 No 66 sch 1 pt 7

### **Witnesses and evidence**

s 24Q ins 2000 No 66 sch 1 pt 7

### **Frivolous or vexatious applications**

s 24R ins 2000 No 66 sch 1 pt 7

### **Implementation of price direction under review**

s 24S ins 2000 No 66 sch 1 pt 7

### **Effect of decision**

s 24T ins 2000 No 66 sch 1 pt 7

### **Functions of commission**

s 24U ins 2000 No 66 sch 1 pt 7

### **Costs**

s 24V ins 2000 No 66 sch 1 pt 7

### **Legal protection of panel members, parties and representatives**

s 24W ins 2000 No 66 sch 1 pt 7

### **Arbitrator—appointment and functions**

s 33 am 2000 No 8 s 16, sch 2; ss renum R2 LA

### **Arbitration determinations**

s 35 am 2000 No 8 s 17

### **Arbitration procedure—Commercial Arbitration Act**

s 40 am 2000 No 8 s 18; ss renum R2 LA

### **Provision of information to commission**

s 41 am 2002 No 11 amdts 2.57-2.59

**Inspection of documents**

s 43 sub 2000 No 8 s 19

**Confidential information—disclosure by commissioners and staff**

s 44 hdg sub 2000 No 8 sch 2

**Confidential information—notice of proposed disclosure**

s 45 am 2000 No 8 s 20; paras renum R2 LA

**Confidential information—general disclosure**

s 46 am 2000 No 8 s 21; 2001 No 44 amdt 1.2146, amdt 1.2147

**Non-cooperation offences**

s 50 am 2002 No 11 amdt 2.60, amdt 2.61; ss renum R3 LA (see 2002 No 11 amdt 2.62)

**Orders**

s 53 am 2001 No 44 amdt 1.2148

**Acts and omissions of representatives**

s 55 sub A2004-15 amdt 1.27

**Approved forms**

s 57 sub 2001 No 44 amdt 1.2149

**Regulation-making power**

s 58 ins 2001 No 44 amdt 1.2149

**Competition principles agreement extracts**

sch 1A ins 2000 No 8 sch 1

**Commission appointments and working arrangements**

sch 1 hdg am 2000 No 8 s 23

sch 1 am 2000 No 8 s 23, sch 2

**Industry panels constitution and procedure**

sch 2A ins 2000 No 66 sch 1 pt 7

**Arbitration guidelines—competition principles agreement, cl 6 (4) (i), (j) and (l)**

sch 2 hdg am 2000 No 8 sch 2

sch 2 am 2000 No 8 sch 2

## Endnotes

5 Earlier republications

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### 5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (\*) in column 1. Except for the footer, electronic and printed versions of an authorised republication are identical.

Republication No	Amendments to	Republication date
1	Act 2000 No 8	10 April 2000
2	Act 2001 No 44	21 January 2002
3	A2002-11	30 May 2002
4	A2003-50	26 November 2003

### 6 Uncommenced amendments

The following amendments have not been included in this republication because they were uncommenced at the republication date:

<b>Annual Reports Legislation Amendment Act 2004 A2004-9 sch 1 pt 1.20</b>
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## Part 1.20 Independent Competition and Regulatory Commission Act 1997

### [1.28] Section 9

*substitute*



## 9 Commission's annual report

A report prepared by the commission under the *Annual Reports (Government Agencies) Act 2004* for a financial year must include details of the following during the year:

- (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 (Provision of information to commission);
- (i) the general use made by the commission of information and documents obtained as a result of notices issued under section 41;
- (j) any other functions exercised by the commission.

*Note* **Financial year** has an extended meaning in the *Annual Reports (Government Agencies) Act 2004*.

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