

2016

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**INDEPENDENT COMPETITION AND REGULATORY COMMISSION
AMENDMENT BILL 2016**

EXPLANATORY STATEMENT

**Presented by
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Treasurer**

Independent Competition and Regulatory Commission Amendment Bill 2016

INTRODUCTION

This Explanatory Statement relates to the Independent Competition and Regulatory Commission Amendment Bill 2016 (the Bill), as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it.

The Statement should be read in conjunction with the Bill, and does not represent a comprehensive description of the Bill. In addition, the amendments contained within this Bill result in part from the ACT Government's formal response to the *Pricing of Regulated Water and Sewerage Services: Review of the Regulatory Framework - Final Report* (the Grant Review). A copy of the final report and the ACT Government's response is available at: www.act.gov.au/frameworkreview. These documents provide additional background information and context that may be helpful in understanding the provisions contained within this Bill.

The Explanatory Statement should not be considered to be an authoritative guide to the absolute meaning of the provisions of the Bill, but rather it represents a guide to the context and purpose of the proposed amendments contained within the Bill.

OVERVIEW OF THE BILL

The *Independent Competition and Regulatory Commission Act 1997* (the ICRC Act) provides the framework in which the Independent Competition and Regulatory Commission (the Commission) undertakes its regulatory activities. A primary task of the Commission is the provision of independent pricing services for regulated services in the Territory.

In 2014, the ACT Government commissioned Mr Peter Grant PSM to undertake a review of the water and sewerage pricing framework in the Territory (the Grant Review). This review actioned the Government's commitment to undertake such a review, made as part of its formal response to the Auditor-General's Report: *The Water and Sewerage Pricing Process, Report No. 2/2014*.

The Grant Review made a number of recommendations in relation to improvements to be made to the ICRC Act. The Government, on 29 October 2015, released its formal response to the Grant Review, in which it committed to implementing a number of the proposed legislative amendments. This Bill represents the mechanism for implementing these reforms to the legislative framework in which regulated pricing services are delivered by the Commission.

HUMAN RIGHTS IMPLICATIONS

The Bill is considered to be consistent with the *Human Rights Act 2004*. It does not engage or limit the human rights specified in that Act.

OUTLINE OF THE PROVISIONS

Clause 1 **Name of Act**

This clause sets out the name of the Act as the *Independent Competition and Regulatory Commission Amendment Act 2016*.

Clause 2 **Commencement**

This clause sets out the commencement date for the proposed amendments of the Bill, with all provisions to commence on 1 July 2016.

Clause 3 **Legislation amended**

This clause specifies that the Act being amended by this Bill is the *Independent Competition and Regulatory Commission Act 1997* (the ICRC Act).

Clause 4 **Nature of industry references – Section 15 (2)**

This amendment is required as a result of the changes included within clause 6 of this Bill. As a result of that change, the current Section 15 (2) of the ICRC Act is no longer necessary and this clause would remove it.

Clause 5 **New section 15 (3A) and (3B)**

This clause inserts new sections 15 (3A) and 15 (3B), which are designed to provide greater clarity within the ICRC Act in regards to the determination of the regulatory period to apply to a price direction made by the Commission for a regulated service.

The amendment made by the new section 15 (3A) would provide the referring authority for the ICRC Act (currently the Treasurer) with the ability to include within an industry reference for a pricing investigation, a specification of the regulatory period to apply to the price direction.

Alternatively, if the referring authority does not specify a regulatory period length within the industry reference, as outlined in the new section 15 (3B), the Commission would be required to determine the regulatory period to apply. In this circumstance, it would be a

decision of the Commission as to what process is utilised to determine the appropriate regulatory period.

During investigations in which there is significant uncertainty as to what represents the optimal regulatory period length, the Commission may seek to utilise the consultation processes associated with the investigation to solicit feedback and comment from interested stakeholders on this matter, before making a final decision in relation to the appropriate regulatory period.

Clause 6 New section 15A

This clause inserts a new Section 15A, which would require the referring authority, where a price direction is currently in force for a regulated service in the Territory, to issue an industry reference for a new pricing investigation no later than 12 months before the end of the regulatory period associated with the current price direction.

This would consequently create a minimum length for a pricing investigation of about 12 months, but does not preclude the referring authority from issuing the industry reference earlier than this deadline, if a longer pricing investigation process is considered appropriate. A longer pricing investigation may be desirable for more complex investigations, such as those related to determining prices for regulated water and sewerage services provided by Icon Water.

Clause 7 Terms of Industry references New section 16 (2) (d)

This clause inserts a new section that would authorise the referring authority, after consultation with the Commission, to include within the Terms of Reference for a pricing investigation, a date by which the Commission must release a draft report and draft price direction.

If included within the Terms of Reference, such a date would represent the last date by which the Commission must release the draft report of the investigation. This clause would not preclude the Commission from releasing a draft report and price direction at an earlier time.

Clause 8 Procedure for industry reference investigations - New section 17 (4) (aa)

This clause would insert provisions in regards to any initial request for information made by the Commission to the entity providing the regulated service subject to a pricing investigation.

The clause would require the Commission, within one month of an industry reference being issued for a pricing investigation, to provide the relevant entity with a written notice of the information related to the investigation that it requires from the entity, and the date that the information must be provided to the Commission. The date the information is required can only be set after the Commission has consulted with the relevant entity.

This provision is designed to ensure that, during the initial stages of a price investigation process, appropriate clarity is established about what information is required to be provided to the Commission by the entity providing the regulated service being investigated.

Clause 9 New section 17 (4A) and (4B)

This clause is related to clause 8 of the Bill, and provides the Commission with the ability, at a later stage of a pricing investigation to the initial information request outlined in clause 8, to request additional information from the relevant entity that provides the regulated service subject to the pricing investigation.

Clause 10 New Section 17 (7)

This clause incorporates a definition of ‘relevant person’, for the purposes of the information request provisions outlined within clauses 8 and 9 of this Bill. The relevant person for the purposes of these clauses is the utility subject to the pricing investigation being undertaken.

In the case of a price investigation for regulated water and sewerages services in the Territory, the relevant person for the purposes of this section would be Icon Water Limited. For a price investigation into electricity prices for small retail customers, the relevant person for the purposes of this section would be ActewAGL Retail.

Clause 11 Draft reports - industry reference investigations Section 18 (5) (b)

This amendment is designed to clarify the material that must be included within a draft report of a pricing investigation undertaken by the Commission.

The Commission would be required, as part of the draft report of an investigation, to produce a statement outlining the extent to which the Commission has had regard to the key matters listed within Section 20 (2) of the ICRC Act. Currently, the Commission is only required to produce such a statement outlining how matters under this section of the ICRC Act have been considered within the final report of a price investigation.

This amendment would align the requirements of a draft report with those of a final report, thereby improving the consistency of the provisions of the ICRC Act and increasing clarity around the expected contents of a draft report of an investigation.

Clause 12 New section 19L

This clause would insert a new overarching objective for the Commission in relation to price directions, which would provide guidance as to the overarching objective that the Commission has when formulating a price direction for a regulated service in the Territory.

The clause outlines that when making a price direction, the Commission's objective is to promote the efficient investment in, operation and use of the regulated service, for the long term interests of consumers, in particular in relation to key matters such as the price, quality, safety, reliability and security of the regulated service.

Clause 13 Directions about prices - Section 20 (1)

This clause makes a technical amendment to Section 20 (1), as a result of the changes contained within clause 5 of the Bill.

The revised Section 20 (1) created by this amendment outlines that the Commission, once it has completed a pricing investigation, must:

- decide on the level of prices for the regulated service, in line with the period specified in the industry reference provided by the referring authority, or the regulatory period determined by the Commission (if the referring authority did not include a period in the reference); and
- provide a copy of the price direction to each entity that is providing the regulated service to which the price investigation applies.

Clause 14 Effective dates Section 20C (1) (a)

This clause would make a technical amendment to the ICRC Act, in order to create certainty in relation to the date that a price direction handed down by the Commission becomes effective. Under the current provisions of the ICRC Act, a price direction only comes into effect on the later of:

- the effective date (if any) specified within the price direction; or
- 14 days after the day the final report and price direction is presented to the Legislative Assembly.

Dependent upon the sitting calendar for the Legislative Assembly, this could create a significant delay between the date that the Commission releases a final report and price

direction, and the day the price direction becomes effective. If a final report and price direction are released relatively close to the end date of the price direction currently in force, this may create a situation in which the current price direction's regulatory period has ended, but the new price direction is not yet effective, as it has not yet been presented to the Legislative Assembly.

The proposed amendment would make a price direction effective in line with the date or dates specified within the price direction. If no dates are included within the price direction, then the price direction would become effective 14 days after the day the final report is presented to the Legislative Assembly.

Clause 15 New Section 20D

This clause would introduce a new section 20D, that would provide clarity around the prices to apply for a regulated service, in the event that the regulatory period for a current price direction has ended and a new price direction has not yet been handed down by the Commission, and/or a new price direction has not yet become effective.

Currently, the ICRC Act does not provide explicit guidance as to what prices would apply in such a circumstance. This amendment would make it explicit that, in the circumstance outlined above, the current prices for the regulated service would continue to apply, until such time that a new price direction for the regulated service becomes effective.

Clause 16 Consent Variations Section 24C (7)

This clause would amend the effective date provisions in relation to a consent variation of a price direction, made under Section 24C of the ICRC Act. This change would align the effective date provisions for consent variations with the revised effective date provisions for the release of a price direction outlined within clause 14 of this Bill.

Consent variations would be effective in line with the date or dates specified within the variation, or if no dates are included within the variation, 14 days after the day the variation is presented to the Legislative Assembly.

Clause 17 Effect of nonconsent price variations Section 24I

This clause would amend the effective date provisions in relation to a nonconsent variation of a price direction, made under Section 24H of the ICRC Act.

This change would align the effective date provisions for consent variations with the revised effective date provisions for the release of a price direction outlined within clause 14 of this

Bill. Nonconsent variations would be effective in line with the date or dates specified within the variation, or if no dates are included within the variation, 14 days after the day the variation is presented to the Legislative Assembly.

Clause 18 Definitions - Part 4C, Section 24J, definition of eligible person

This clause is associated with the definition of an eligible person, for the purposes of being able to apply for the review of a price direction handed down by the Commission.

Under the current provisions of the ICRC Act, only the referring authority and the utility providing the regulated service are eligible to apply for a review of a price direction. The Grant Review recommended this restriction be removed, so to allow an individual consumer or a group of consumers to make an application for a review of a price direction by an industry panel, with each party to the review to bear its own costs. The Government agreed to this proposal.

Under the revised framework, any of the following parties would be allowed to make an application or review of a price direction:

- the referring authority for the ICRC Act;
- the utility providing the regulated service subject to the price direction;
- anyone that made a submission to the Commission during the pricing investigation; and
- a group of people, of which at least one person made a submission to the Commission during the pricing investigation.

The only restriction placed upon a group of people applying for the review is that at least one member of the group must have made a submission to the Commission during the course of the pricing investigation related to the price direction. This is to ensure consistency with the current Section 24N (3) of the ICRC Act, which outlines that an industry panel can only consider matters raised in an application for review that were raised by an applicant in submissions made to the Commission during the investigation process.

An eligible person would be required, under the provisions introduced by clause 19 and clause 21 of this Bill, to:

- demonstrate that there is a serious issue to be heard, on the basis of one or more of the defined grounds for review; and
- provide significant evidence to support a conclusion that there is a strong case for review of the price direction.

Within the process to provide this evidence, the eligible person would indirectly need to demonstrate that the price direction handed down by the Commission had resulted in an

adverse impact on their interests. As a result, the condition within the current 24J(c) (ii) of the ICRC Act is no longer necessary, and this clause would remove that provision.

Clause 19 Right of review Section 24K (1)

This clause would introduce amendments to the parties eligible to apply for a review of a price direction handed down by the Commission, and also provides detail about the required contents of an application for review.

This clause would remove the restriction on who can apply for a review of a price direction, by outlining that any eligible person as defined in Section 24J of the ICRC Act (which would be amended by clause 18 of this Bill) would be eligible to apply for a review of a price direction made by the Commission.

This clause would also insert a new section 24K (1A), which would outline the required inclusions within an application for review under the revised review framework.

An application for a review of a price direction under this revised approach would be required to include:

- a list of the grounds for review (see clause 20 of this Bill) on which the applicant is making the application;
- the evidence relied upon to support each ground for review identified by the applicant; and
- a statement setting out how, having regard to the Commission's overall objective when making a price direction (see clause 12 of this Bill), the applicant considers that the handing down of a replacement price direction would lead to a 'materially better' outcome compared to the original price direction.

An application for review can only be lodged on the basis of issues previously raised by an applicant within their submissions to the Commission during the pricing investigation.

Clause 20 Section 24K (2) note

This is a technical amendment, as the note currently associated with Section 24K (2) would be moved to the new Section 24K (1) by clause 19 of the Bill.

Clause 21 New section 24KA

This clause would insert a new section outlining the grounds on which an application for review of a price direction can be lodged, under the new approach to reviews being implemented by this Bill.

The clause outlines that an application for review would only be able to be made on one of four potential grounds.

- The first ground under 24KA(a) would allow an application to be lodged on the basis that the Commission had made an error of fact within its final price direction, and the error was material to the decisions made by the Commission within the price direction.
- The second ground under 24KA(b) would allow an application to be lodged on the basis that more than one error of fact was made by the Commission within its final price direction, and in combination, these errors were material to the decisions made by the Commission within the price direction.
- The third ground under 24KA(c) would allow for an application to be lodged on the basis that the applicant considers, having regard to all the circumstances associated with the price direction, that the Commission incorrectly exercised its discretion within the process of making the price direction.
- The fourth ground of review under 24KA(d) would allow for an application to be lodged on the basis that the applicant considers, having regard to all the circumstances associated with the price direction, the price direction handed down by the Commission was unreasonable.

An application for review under the revised approach could be made on the basis of one, a combination of, or all of the grounds of review listed above. An application for review must be accompanied by sufficient evidence to establish the equivalent of a *prima facie* case. The applicant must provide sufficient supporting evidence to allow an industry panel to conclude that there is a serious matter to be heard and there is a strong case for review.

Clause 22 Industry Panel Section 24M (3)

This clause would omit the current section 24M (3), which exempts the appointment of an industry panel from being required to undergo scrutiny by the relevant Committee of the Legislative Assembly, as per the requirements of Division 19.3.3 of the *Legislation Act 2001*.

The Grant Review recommended that this exemption from scrutiny should be removed, and the Government agreed in its formal response to the Grant Review that any appointment to a future industry panel should be subject to scrutiny by the Legislative Assembly.

Clause 23 New Section 24MA

This clause would require an industry panel, when considering an application for review to undertake a preliminary assessment of the application. Within this process, an industry panel would be required to consider the grounds for review claimed by the applicant, as

well as consider the evidence presented and the significance of the impact of the issues outlined within the application.

As a first step within the preliminary assessment, an industry panel would be required to consider each ground for review claimed by an applicant separately. In considering whether to accept or reject a ground for review, an industry panel would be required to consider whether the ground for review raises a serious issue, and whether the applicant has provided a strong case for review, based on the evidence provided. An industry panel would only be able to accept a ground for review if it is satisfied that the applicant has established the equivalent of a *prima facie* case for review in relation to that matter and demonstrated that it represents a serious issue that needs further examination during a full review.

If an industry panel rejects all grounds for reviews, then it would be required to dismiss the application. If an industry panel accepts at least one ground of review, then the second stage of the preliminary assessment would require the Panel to consider the importance and materiality of the issues raised by the applicant, taking into account the overarching objective of the Commission when making a price direction.

The industry panel would be required to consider, on the basis of the accepted grounds for review and taking into account the evidence provided by the applicant and the Commission's objective for price directions, whether a new price direction is likely to represent a materially better outcome compared to the price direction handed down by the Commission. An industry panel must be satisfied in regards to this criteria before it can accept an application for review and progress to a full investigation of the application.

This amendment would also require any decision made within a preliminary assessment by an industry panel to be accompanied by a statement of reasons.

Clause 24 Nature of review Section 24N (1)

This clause would provide an industry panel with an additional option and flexibility in regards to the final decision it can hand down about an application for review.

Under the current provisions of the ICRC Act, an industry panel can only decide to confirm the original price direction or substitute a new price direction for the original price direction. This clause would introduce a third potential option for an industry panel, by allowing it to set aside the original price direction of the Commission, and remit back the matter to the Commission, who would be required to formulate a new price direction, in line with any directions provided by the panel.

Any directions made by an industry panel would be required to be directly related to the matters and issues it was required to consider within its review. Such directions would also need to take into account the statutory functions and obligations of the Commission, and be consistent with any Terms of Reference originally provided by the referring authority to the Commission.

Clause 25 Section 24N (2) (a)

This clause would amend Section 24N (2), which outlines the basis on which an industry panel must make a decision on an application for review.

This amendment outlines that, under the revised approach to reviews created by this Bill, an industry panel would be required to make a decision on the basis of the merits of the case, having regard to the overarching objective related to price directions (introduced by clause 12 of this Bill). This would align the key criteria upon which an industry panel makes a final decision in relation to a review with the criteria used to consider the issues raised by an applicant within the preliminary assessment of the application for review.

Clause 26 Section 24O (2)

This clause makes a consequential amendment to the ICRC Act, as a result of the changes made by clause 31 of this Bill.

This change would amend Section 24O - Procedure for Review, to make clear that the provisions of Section 24X (Information to be given to the Commission following price direction review) are a required part of the process to be followed by an industry panel in the event of the review of a price direction.

Clause 27 New section 24OA

This clause would insert a new section within the provisions of the ICRC Act, which would outline an additional required step to be undertaken by an industry panel within a review of a price direction, once a preliminary assessment has been undertaken and a decision made to proceed with the review.

An industry panel, once a preliminary assessment of an application has been undertaken and a decision is made to proceed, would be required to provide the Commission with an opportunity to make a submission to the industry panel on the issues raised within the application for review. An industry panel, after consulting with the Commission, would also be required to determine a date by which a submission must be provided.

A right of reply for the original decision maker is consistent with the revised review framework that would be implemented by this Bill, and would provide the Commission the opportunity to provide evidence to support its original decision making process and to respond to particular matters raised within an application for review.

Clause 28 Implementation of price direction under review Section 24S (1) (a) and (b)

Section 24S of the ICRC Act currently provides guidance in relation to the implementation of a price direction under review. This clause would amend these provisions, to include the outcome of a review in which an industry panel sets aside a price direction, and remits the matter back to the Commission, to make a new price direction in line with any directions provided by the panel.

This amendment outlines that, in the case of such a decision by the industry panel, the original price direction remains in effect (unless separately suspended or altered by the panel), until such time that a new price direction, made by the Commission in line with the directions of the industry panel, comes into effect.

Clause 29 Effect of decision Section 24T (1) (a)

This clause would amend the effective date of a substituted price direction handed down by an industry panel, in a similar manner to changes to other effective date provisions made within clause 14, 16 and 17 of this Bill.

This amendment would make a substituted price direction handed down by an industry panel effective in line with the date or dates specified within the price direction, or if the industry panel does not include any dates within the substituted direction, 14 days after the day the final report and substituted price direction is presented to the Legislative Assembly.

Clause 30 Costs Section 24V (1) (b)

This clause would revise the distribution of costs associated with an industry panel, so to align it with the revised definitions of eligible parties that can apply for a review of a price direction, under the new review framework created by this Bill.

The clause outlines that the costs incurred by each party to a review would be payable by that party. The costs of the industry panel would be split between the utility to which the review relates and the applicant or applicants that had lodged the application for review, in line with proportions determined by the industry panel.

When making a determination of the split of costs between a utility and the applicant(s), an industry panel may choose to take into account the financial capacity of the applicant(s)

involved, so to ensure that an equitable dispersion of the industry panel costs associated with the review can be achieved.

Clause 31 New Section 24X

This clause inserts a new section that creates a formal requirement for an industry panel, after the completion of a review of a price direction in which it hands down a substituted price direction, to consult with the Commission about its information requirements related to implementing and managing the substituted price direction going forward.

This amendment would require an industry panel to provide any relevant information, for the purposes of implementing the substituted price direction, to the Commission following the completion of their review. The industry panel would be required to consult with the Commission before making a decision as to what information will be provided to the Commission.

Clause 32 Appointment of members of Industry Panels, Schedule 3, section 3.1(1)

This clause is related to the amendment made in clause 22 of the Bill. This provision would insert an appropriate note outlining that certain Ministerial appointments require consultation with an Assembly committee and are disallowable appointments, as per the conditions outlined for statutory appointments within Division 19.3.3 of the *Legislation Act 2001*.