ICRC

independent competition and regulatory commission

Response to the ACT Auditor General's Office Performance Audit – The Water and Sewerage Pricing Process

Report 3 of 2014

April 2014

The Independent Competition and Regulatory Commission is a Territory Authority established under the Independent Competition and Regulatory Commission Act 1997 (the ICRC Act). The Commission is constituted under the ICRC Act by one or more standing commissioners and any associated commissioners appointed for particular purposes. Commissioners are statutory appointments and the current Commissioners are Senior Commissioner Malcolm Gray and Commissioner Mike Buckley. We, the Commissioners who constitute the Commission, take direct responsibility for delivery of the outcomes of the Commission.

We have responsibilities for a broad range of regulatory and utility administrative matters. We have responsibility under the ICRC Act for regulating and advising government about pricing and other matters for monopoly, near-monopoly and ministerially declared regulated industries, and providing advice on competitive neutrality complaints and government-regulated activities. We also have responsibility for arbitrating infrastructure access disputes under the ICRC Act. In discharging our objectives and functions, we provide independent robust analysis and advice.

Our objectives are set out in section 7 of the ICRC Act and section 3 of the Utilities Act.

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Contents

Executive Summary

On 2 April 2014 the Auditor-General submitted a report to the Speaker of the Legislative Assembly titled "The Water and Sewerage Pricing Process". In an audit report of this kind the Commission would expect to see close and explicit connections between the recommendations and supporting findings and between findings and evidence and analysis. Unfortunately, in this audit report such connections are not apparent. As a result, almost all the grounds for findings and the consequential recommendations are weak at best.

The Commission is concerned that, as a result of these shortcomings, the audit report may give readers a false impression of the process it purports to audit, potentially misleading policy makers about the nature of the responses required and unnecessarily alarm the ACT community.

Audit objective and process

The Commission has a number of concerns relating to the audit objective and process. The initial proposition for the audit was that it commence before the water and sewerage service review process was complete, specifically at the time the Commission would be at its busiest producing the final report and price direction.

There was a disparity between the audit objective and its reflection in the matters covered in the audit report. The audit report devotes some 49 pages (of a total of 116 excluding the summary chapter) to assertions made by the Commission on the non-provision of certain information by ACTEW on demand forecasts. This is a matter of very limited relevance to the objective of the audit. There are also asymmetries in the treatment of auditees, where apart from chapter 5, there is, in fact, very little reporting on or analysis of ACTEW's contribution to the process in the audit report.

Auditing the performance of a regulator presents particular challenges as has been acknowledged in recent work by the OECD of measuring effectiveness and of the Productivity Commission on measuring efficiency. There is little sign in the audit report that those challenges have been recognised. In particular, the audit report shows no signs of recognising that what is being audited is a quasi-judicial process, that is, the process of setting water and sewerage prices in the ACT is a quasi-judicial process.

Inefficient and ineffective

The principal conclusion of the audit report is that the administrative and communications processes associated with the 2013 water and sewerage services pricing process were inefficient and ineffective. There are shortcomings in the analysis and evidence offered in support of these principal conclusions. The criteria by which efficiency and effectiveness would be judged are not identified; the points made in support of the conclusion in chapter 6 either do not relate to efficiency or effectiveness

or are themselves questionable; a more common sense approach of judging the effectiveness of the process by whether it achieves its objectives produces very different conclusions; and there was a failure to identify the issues most critically affecting the efficiency of the process.

Poor Communication and relationships

The analysis of communication and relationships with stakeholders offered in the audit report has a number of serious shortcomings. The attention is focussed almost exclusively on one stakeholder: ACTEW, and then only on a small subset of the communications with that stakeholder on a very narrow range of issues. False inferences have also been drawn in the audit report from the Commission adjusting the water and sewerage service review processes to suit the emerging issues.

The audit report has put forward the argument that failure to agree on an issue should be taken to imply poor communication and relationship between the Commission and ACTEW and that there were "personal and organisational conflicts not being resolved in a timely manner". The Commission rejects outright the suggestion that there was ever any personal conflict between the two entities. Robust exchanges may be expected to be occasional features of such a process.

Much evidence of effective communication between the Commission and ACTEW is ignored by the audit report. For example, the audit report devotes chapter 5 to one particular disagreement. It does not, however, devote the same attention to the communication between the Commission and ACTEW that occurred subsequent to those events.

It is not clear from the audit report, what meaning should be ascribed to the assertion that there was a poor relationship between the Commission and ACTEW. The relationship between the two entities was of regulator to regulated entity. Transactions between the two entities were much as would be expected in such a relationship. Much information was exchanged through extensive and, for the most part, appropriate means of communication. The entities did not always agree on issues, but they would not be expected to in such a relationship.

Provision of information in ACTEW's main submission

Chapter 5 of the audit report deals with the Commission's attempts to obtain certain information from ACTEW prior to the Commission completing and releasing its draft report. The events described in chapter 5 are largely irrelevant to the stated purpose of the audit. Following release of the draft report the Commission withdrew its request for the information and ACTEW provided information covering the same matters in its submission to the Commission on the draft report. Nevertheless, the Commission is concerned that the depiction of the unfolding of events in regard to these matters in

chapter 5 may seriously mislead the reader about the Commission's role in the events and the significance of the occurrences described.

The Commission's concerns about the portrayal and analysis of these events in the audit report include:

- the description of the meetings between the Audit Office and various officers of the Commission that initiated the Audit Office's interest in these matters is excessively brief and fails to capture the character of those meetings properly;
- failure to recognise the difference between the requests made of ACTEW by the Commission before the issue of the section 41 notice and the requests in the section 41 notice;
- failure to properly recognise the nature of and the role played by the Community Consultation Paper in mitigating the Commission's concerns; and
- failure to distinguish between reasonable beliefs that may have been held by the Commission as the events were unfolding and facts allegedly established by the Audit Office around a year later.

Queen's Counsel advice

The first part of chapter 3 of the audit report sets out legal advice relating to the basis for the price direction. While this part of the report goes into detail about the arguments underpinning the legal opinions provided to the Audit Office, it does not set out the arguments within the proper context, and conveys a misleading impression of the significance of the advice obtained.

While this division of legal opinion suggests it may be desirable to amend the ICRC Act to clarify the legislature's intent, it does not, in and of itself, make the price direction invalid. The only way in which a price direction issued by the Commission can become invalid is by being subject to successful legal challenge with a court finding that it is invalid. No legal challenge has thus far been mounted. Therefore the price direction remains valid and in force.

Further, since no legal challenge has been mounted at this point, the Commission does not consider that there are any "issues associated with the potential invalidity of the current price direction" required to be addressed by the ACT government.

Conflict in roles

Chapter 2 of the audit report deals with two alleged conflicts in the roles played by the Treasurer and the CEO of the Commission in the water and sewerage services pricing process. In the Commission's view there are no conflicts in the roles played by the Treasurer in providing references to the Commission, or the CEO of the Commission in acting as General Counsel to the Commission. The finding relating to the Treasurer is a matter to which the ACT Government should respond, however the Commission

has made some comment in the response since it considered it during the water and sewerage services investigation.

In contrast, the findings relating to conflicts in the CEO position is very much an issue for the Commission, as it goes directly to the Commission's management of its staff. The audit report states that none of the documents concerned with the CEO's employment arrangements that were consulted "explicitly provide for the provision of legal advice", however the Executive Contract under which the CEO is employed requires the CEO to "carry out all duties as may be directed from time to time by the Employer". The Commission considers that these are sufficient to allow the Commission to request the CEO occasionally to carry out the role of General Counsel. The Commission would not, of course, make this request of a CEO who was not qualified and in possession of a practising certificate.

Other matters

There are only three other matters which the Commission judges to be significant enough to be worth highlighting in this response. These are:

- the confusion in the audit report about the "expectations" of the Commission and ACTEW concerning which parts of the ICRC Act were applicable to a draft report;
- the ill-based suggestion that the Commission did not have full authority to consider governance issues it its review; and
- the difficulties of properly evaluating the expert advice on which the audit report relies.

These three matters commented on in detail in the response.

Recommendations from the audit report

The audit report contains eight recommendations, including an overall recommendation.

The **overall recommendation** suggests that "The ACT Government should review the water and sewerage price setting framework including legislative, governance and administrative arrangement." It will be apparent from the material presented in this response that the Commission does not consider that the conclusions and findings presented in the audit report constitute a sound basis on which to institute a review. Moreover, it would be premature to institute a review before the industry panel has made a decision on ACTEW's application for a review of the price direction. Given the controversy that has surrounded the Commission's introduction of a system of biennial recalibrations for the prices of water and sewerage services, it would be useful to allow the price to run through its first recalibration, scheduled to begin in November 2014.

Further to commenting on the overall recommendation made in the audit report, the Commission responds directly in the response to the specific recommendations made.

1 Introduction

1.1 Purpose of this Response

On 2 April 2014 the Auditor-General submitted a report to the Speaker of the Legislative Assembly titled "The Water and Sewerage Pricing Process".1 In an audit report of this kind the Commission would expect to see close and explicit connections between the recommendations and supporting findings and between findings and evidence and analysis. Unfortunately, in this audit report such connections are not apparent. As a result, almost all the grounds for findings and the consequential recommendations are weak at best.

The Commission has since the commencement of this audit process been engaging with the Audit Office, through the provision of documentation, written or oral briefings. When it transpired that the Audit Office may have relied on one version of events, the Commission provided documentation already in the Audit Office's possession to assist the Audit Office in their investigation.

The Commission is concerned that, as a result of these shortcomings, the audit report may give readers a false impression of the process it purports to audit, potentially misleading policy makers about the nature of the responses required and unnecessarily alarm the ACT community. The Commission has prepared this response with the aim of mitigating these adverse effects.

1.2 Structure of this response

The Commission has overarching concerns about the audit objective and process. These are outlined in the next chapter. The following chapters deal with each of the main conclusions of the audit report as reflected in the summary in the "Conclusions" section of chapter 1 of the audit report. The summary is rather muddled and for the purposes of this response the Commission has identified the following points:

- administrative and communications processes associated with the 2013 water and sewerage services pricing investigation have been inefficient and ineffective;
- poor communication and relationships between the Commission and stakeholders, particularly ACTEW;

[1] The terms of reference provided for the Commission to undertake "an investigation into and the making of a price direction for regulated water and sewerage services" rather than "water and sewerage". This response adopts the correct terminology used in the terms of reference.

- various conclusions related to the provision of information in ACTEW's main submission to the issues paper, dealt with together in chapter 5 of the audit report;
- advice from Queen's Counsel that the price direction is invalid; and
- conflicts in the roles played by the Treasurer and in the CEO of the Commission also acting as its General Counsel.

These chapters are followed by a chapter devoted to matters not previously covered. The final chapter comments on the recommendations in the audit report

2 Audit objective and process

The Commission's concerns about the audit process fall into five groups:

- initiation of and timetable for the audit;
- the audit objective and its reflection in the matters covered in the audit report;
- asymmetries in the treatment of the auditees;
- failure to recognise the particular issues arising in the performance audit of a regulator; and

2.1 Initiation and timetable

The Audit Office's intention to conduct a performance audit of the water and sewerage services review was announced on 25 February 2013 to commence April 2013. The proposed audit did not appear on the forward program of the Audit Office's performance reviews that it is required by the Auditor-General Act to maintain. Explanations for the sudden appearance of this audit in the program as well as of its purpose were rather vague. The initial proposition was that the audit would commence before the review process was complete, specifically at the time the Commission would be at its busiest producing the final report and price direction. When the Commission protested at the unreasonableness of this, the Audit Office ceased its attempts to engage the Commission, but, as the Commission is now advised by the Audit Office, continued the audit process with other auditees. That is, the Audit Office began the audit before the process was complete. This may explain the weakness of the audit report in its coverage of matters subsequent to the production of the draft report, see for example 4.4 below. The Commission was never formally advised that the Audit Office intended to cease seeking engagement with it until the review was complete while continuing to engage with other auditees.

The timetable for the audit initially indicated a target date of mid-December 2013 for delivery of the audit report to the Speaker of the Legislative Assembly. The Commission received a draft audit report on 2 December 2013 with a requirement to provide comments within the minimum timeframe permitted under the Auditor-General Act. The Commission provided extensive comments on the draft audit report on the morning of 16 December 2013 and met with the Audit Office that afternoon, at the Audit Office's request, to discuss the Commission's comments on the draft audit report. The Commission met with the Audit Office again at its request on 17 December 2013 for further discussion of the Commission's comments.

The Commission received various correspondence from the Audit Office over the subsequent two months advising of various delays in the production of a proposed audit report. The Commission finally received copies of the proposed audit report on 20 February 2014 with a request for responses within the minimum timeframe permitted under the Auditor-General Act. The Commission had no further comments to

offer on the body of the report, but provided its comments on the recommendations in the proposed audit report as requested in the covering letter from the Audit Office. The Commission then received a modified proposed report on 13 March 2013. As recognised by the Audit Office, this was outside the Office's normal process with the usual transition being from proposed to final report. The Audit Office requested that auditees waive their statutory entitlement to 14 days from the day following the day the report was provided to comment on it. The Commission declined to do this and provided comments on the body of the report and revised comments on the recommendations of the modified proposed report within the statutory timeframe. The Commission received embargoed copies of the final report on 1 April 2014.

Meeting the timeframes required within this erratic and unpredictable process put a considerable strain on the Commission's resources. The changes between drafts seemed disproportionate to the time taken to produce them. The Commission notes that it released the draft report on water and sewerage services on 26 February 2013 and the final report on 26 June 2013, only one week more than the gap between the draft and final audit reports. In that period the Commission produced a completely new report taking account of a range of submissions, including a 318 page submission from ACTEW that provided a substantial quantity of fresh information.

2.2 Audit objective and matters covered

The audit report quotes a letter sent from the Commission to the Audit Office at paragraph 1.13 and further notes at paragraph 1.14, that:

> In recognition of the seriousness of the assertions made by the ICRC, the Auditor-General decided to conduct a performance audit in relation to the matters raised.

At paragraph 1.15, the audit report states that:

> The objective of the audit is to provide an independent opinion to the Legislative Assembly on the efficiency and effectiveness of the processes for the regulatory review of water and sewerage services in the ACT.

The first is a specific matter while the second is the broad objective of the audit. As will be demonstrated below, the first specific matter has very limited relevance to the objective of the audit.

The breadth of matters needing to be covered in the review in order to produce a price direction can be gauged from a perusal of the contents pages of the final report. In order to determine prices for the first year of the regulatory period, the Commission must make determinations in six areas:

- cost of capital;
- opening regulatory base;
- demand forecasts;

- forecast operating expenditure;
- forecast capital expenditure; and
- tariffs.

The audit report devotes some 49 pages (of a total of 116 excluding the summary chapter) to one of these areas: the non-provision of information on demand forecasts. Even then, the audit report is exclusively concerned with only one aspect of this, which is only relevant to the draft report and that only in terms of process rather than substance. The coverage of the other five areas is patchy at best and fails to provide a balanced view of the review process as a whole. Given that the audit objective is concerned with the whole of the process, this does not provide an adequate basis for conclusions to be drawn

2.3 Asymmetries in the treatment of auditees

Although the Commission is exclusively responsible for the regulatory review that is the subject of this audit, the audit report also identifies ACTEW as an auditee. The audit report does not explain the basis on which this has been done. In particular, the audit report does not explain how ACTEW's contribution to the process is to be assessed. Apart from chapter 5, there is, in fact, very little reporting on or analysis of ACTEW's contribution to the process in the audit report.

The audit report might, for example and as was done for the Commission, have compared the approach ACTEW took in the 2013 process to its approach in the 2008 process. This would have revealed that ACTEW included a complete business plan in its initial main submission to the 2008 process, including providing estimates of the prices required to support this plan over the five year regulatory period.[2] In its 2013 initial submission it did not provide a complete business plan and was, therefore, unable to provide estimates of the prices that would be required to support the expenditures that the submission proposed. Exposing these facts might have provided a clearer context for the material presented in chapter 5 of the audit report. Identification of the differences in ACTEW's submissions would also have provided a better context for the analysis of the differences between the Commission's draft and final reports and the alleged differences in "expectations" between the two organisations.

Paragraph 6.13 of the audit report suggests a cap on the Commission's expenditure on the review process, but no such suggestion is made in respect of ACTEW's expenditure. This is curious, given that 63 per cent of the audit report's estimate of $6.3 million for the cost of the review is accounted for by ACTEW's expenditure. In

[2] Paragraph 5.31 of the audit report quotes from a letter from the CEO of ACTEW to the Commission in which it is claimed that the initial main submission in 2008 only provided price estimates for the first year of the regulatory period. This is incorrect as a perusal of the submission on the Commission's website will confirm.

its quest for more efficient communication processes, perhaps the audit report needs to recognise that communication is a two-way process.

2.4 Performance audit of a regulator

Auditing the performance of a regulator presents particular challenges as has been acknowledged in recent work by the OECD of measuring effectiveness and of the Productivity Commission on measuring efficiency[3]. There is little sign in this audit report that those challenges have been recognised. In particular, the audit report shows no signs of recognising that what is being audited is a quasi-judicial process. That is, the Commission is required to make certain determinations under statute that become subordinate legislation. This is not a process of negotiation between the regulator and the regulated entity as some elements of the audit report seems to suggest, for example, the suggestions about dispute resolution made in 5.117 of the audit report.

Under the now well established principles that govern the determination of water and sewerage prices in the Territory, the Commission is required to set prices that will ensure that ACTEW derives enough revenue to meet the prudent and efficient costs of providing those services. ACTEW's role is to convince the Commission that the proposals for operating and capital expenditure that it puts before the Commission are prudent and efficient. The Commission must adopt whatever processes it considers will best enable it to meet its statutory obligations and discharge its overarching responsibility to safeguard the interest of the ACT community. The preferences of the regulated entity for one process or approach over another are not ignored, but must take second place to the Commission discharging its primary obligation. In many places the audit report seems to have difficulty in accepting this.

[3] See, for example, OECD (2005), OECD Guiding Principles For Regulatory Quality And Performance, which may be found here: http://www.oecd.org/fr/reformereg/34976533.pdf and Productivity Commission (2014) Regulator Audit Framework, which may be found here: http://www.pc.gov.au/__data/assets/pdf_file/0005/134780/regulator-audit-framework.pdf.

3 Inefficient and ineffective

This section discusses the principal conclusion of the audit report that the administrative and communications processes associated with the 2013 water and sewerage services pricing process were inefficient and ineffective. The arguments supporting this conclusion are summarised in the shortest chapter of the audit report: chapter 6. The Commission considers that the audit report does not make a convincing case that the processes audited were either ineffective or inefficient. Shortcomings of the analysis and evidence offered in support of the proposition that the processes have not been efficient or effective include:

- criteria by which efficiency and effectiveness and would be judged are not identified;
- points made in support of the conclusion in chapter 6 either do not relate to efficiency or effectiveness or are themselves questionable;
- a more common sense approach of judging the effectiveness of the process by whether it achieves its objectives produces very different conclusions; and
- failure to identify the issues most critically affecting the efficiency of the process.

3.1 Lack of criteria

The audit report does not define criteria for the assessment of efficiency or effectiveness. Effectiveness is usually measured by the extent to which the objectives of an activity were met. Efficiency is usually measured by the extent to which the resources consumed in the process exceeded those that would be consumed had the process achieved some benchmark representing best practice. The audit report fails to demonstrate that the processes were inefficient or ineffective against either of these commonly used criteria.

By focussing on administration and communication, the audit addresses processes rather than outcomes which is required for an assessment of efficiency and effectiveness. The approach to assessing effectiveness in the audit report might best be described as the identification of factors that might, but would not necessarily, have impacted effectiveness had they actually been present.

3.2 Irrelevant or questionable

If a process is ineffective it fails to achieve any of its objectives. The question of efficiency does not arise because ineffectiveness implies that the resources employed in the process have simply been wasted. It is logical therefore to discuss effectiveness first.

3.2.1 Effectiveness

Three points, together with various sub-points, are offered in paragraph 6.2 of the audit report in support of the contention that the processes were not effective. These are:

- Delay in the production of the draft report and changes between the draft and final reports;
- Poor stakeholder communication; and
- A poor relationship between the Commission and ACTEW

The second and third points are dealt with in chapters 4 and 5 of this response and shown to be without foundation. Even if the assertions were true that would not demonstrate lack of effectiveness since a process with these characteristics might still be effective, although is, perhaps, less likely to be so than one without them.

The last sub-point under the third dot point of paragraph 6.2 relates to the advice from Queen's Counsel, although the connection between this and the allegedly poor relationship between the Commission and ACTEW is somewhat obscure. The significance of the Queen's Counsel advice for the processes audited is dealt with in chapter 6 of this response.

The first point opens with the statement "the Draft Report (February 2013) and proposed price direction, …, was the first opportunity for stakeholders to provide feedback and input on key technical and regulatory issues associated with the water and sewerage pricing investigation.". This statement is simply not true.

The issues paper for the review (February 2012) canvassed a number of technical and regulatory issues, in many cases foreshadowing considerations subsequently taken up in the draft report. For example, under the heading "Public ownership of the corporate service provider" on page 10, the issues paper made the following statement:

> This raises the question whether the incentives to avoid imprudent investment are the same for publicly and privately owned businesses operating under the same regulatory regime. If not, the regulator may need to adopt a different approach when dealing with a publicly owned business than it would adopt in dealing with a privately owned one.

Under the heading "Capital intensity" on pages 11 - 13, the issues paper identified and discussed the appropriateness of the typical firm approach for setting the rate of return allowed to be earned by ACTEW, including how to determine the rate of return on equity and noting that this question had been raised in the 2008 review. It also raised the issues of whether and how the burden of the sharp increase in capital expenditure on water security projects should be spread over future generations.

These discussions clearly flagged the Commission's intention to consider these matters in its draft report and encouraged stakeholder input to its preparation of that report. The Commission received a number of submissions, taking up many of these issues and including a substantial submission from ACTEW. All of these were considered by the Commission in preparing its draft report.

The first dot point in paragraph 6.2 of the audit report finishes with:

> Some of the technical and regulatory features of the Draft Report (February 2013) and proposed price direction, e.g. the removal of the 'fair cost recovery scheme' and changes to the way the return on capital was calculated, were not included in the Final Report and price direction (June 2013) and resulted in a significant shift in the price direction;

In fact, the fair cost recovery scheme was included in the draft report but not in the final report because the Commission recognised that to impose such a scheme could threaten the financial viability of ACTEW. Changes to the way the rate of return on capital is calculated were introduced in the draft report and retained in the final report. Further changes to the way the return on capital is calculated were introduced in the final report, again with the objective of safeguarding the financial viability of ACTEW.[4] More broadly the process of draft report, submissions, reconsideration of issues and final report is designed precisely to allow the Commission to make these sorts of changes where it can be demonstrated that it is in the public interest for the Commission to do so.

3.2.2 Efficiency

In justifying its conclusion that the processes audited were inefficient, the audit report states, at paragraph 6.4, that:

> The conclusion is supported by the material presented in this report, which highlights a range of issues associated with the regulatory review process primarily associated with communication inadequacies and organisational and personal conflicts of view between the agencies not being resolved in a timely manner.

At paragraph 6.11 the report states that:

> While it is not possible to determine with certainty the dollar impact of the inefficiencies and issues identified throughout this report on the total cost of the process, it is possible to conclude that as a whole, these have contributed to the high cost of the 2013 process.

As detailed in chapters 4 and 5 of this response, the Commission strongly disputes that there were "communication inadequacies and organisational and personal conflicts". The process for the resolution of disputes in a timely manner is described in section 2.4 of chapter 2 of this response.

Even if these objections are put aside and the assertions of the report taken at face value, the Commission finds that, not only are no estimates of the purported inefficiencies offered, but no attempt is made to demonstrate the logical link between the "range of issues" and the costs of the review. There would, for example, have been

[4] The rate of return on capital is analogous to an interest rate and is usually expressed as a percentage. The return on capital is analogous to an interest payment and is measured in dollars.

a cost associated with the Commission engaging in more communication activity. It is not obvious, given the nature of the issues in contention between the Commission and ACTEW, that more communication would have resulted in savings elsewhere sufficient to offset these costs and provide net reductions in the cost of the process. Such a demonstration is required to make a link between alleged failings in the Commission's communications activities and the efficiency of the process.

The other material marshalled in support of the assertion of inefficiency, in paragraphs 6.5 – 6.10 of the audit report is the cost of the review to the Commission and ACTEW. Unless compared against a suitable benchmark, the absolute level of costs is of little use in forming a judgement about the efficiency of the processes audited. The only comparator offered is the Commission's costs for the 2008 investigation. Since the 2008 investigation took place in very different circumstances and did not have to confront the particularly difficult issues that arose in the 2013 investigation, the usefulness of this comparator is questionable.

An alternative comparator is the scale of the revenues to ACTEW, which represent costs to the community, that would result from the prices determined through the processes audited. Over a five year regulatory period, ACTEW revenues from applying the prices set by the Commission to water and sewerage services would amount to about $1.3 billion. The question then becomes how much should be spent to ensure that this figure should not be $1.35 billion or $1.25 billion.

That said, the Commission does have some concerns about the efficiency of the process and has acted to address those concerns in features it has incorporated in the form of regulation that will apply over the current regulatory period. The nature of those concerns and the steps the Commission has taken to address them are discussed in the following section.

Given the objectives of the audit and that ACTEW is one of the auditees, the Commission is somewhat surprised that the audit report does not comment on ACTEW's inability to substantiate its costs for the process, which are described as "asserted". ACTEW's costs relating to the process were 68 per cent above the Commission's costs, with ACTEW's costs including some $1.26 million for contractors and consultants compared to the Commission spending $0.47 million. ACTEW also spent $200,109 on legal fees while the Commission spent $5,637.50.

Paragraph 6.12 also makes reference to the prospective costs of the industry panel review sought by ACTEW. Any costs associated with this process will accrue well after the processes subject to the audit, which concluded with the issuing of the price direction. These costs are only being incurred as a result of ACTEW lodging an application for an industry panel review and, under the ICRC Act, ACTEW will bear those costs. The responsibility for justifying any resultant costs passed through to its shareholder and the wider community clearly lies with ACTEW. In so far as the audit report's inclusion of these costs in the costs of the processes audited constitutes an implicit assumption that the application will be successful in securing substitution of a

new price direction. This inclusion is highly prejudicial to the position of the Commission in the forthcoming industry panel review.

3.3 Assessing effectiveness

Commonsense suggests that the obvious way to assess the effectiveness of a process is by assessing the extent to which it achieved its objectives. The objectives of the processes audited were to conduct an investigation into the pricing of water and sewerage services conforming to the relevant provisions of the ICRC Act and to provide a price direction to apply from 1 July 2013.

In its final report the Commission provided an assessment of the activities conducted during the investigation against the requirements of the Act. This showed that each of the requirements had been met. Although noting that the price direction is subject to an industry panel review to determine whether it accords with section 21(2) of the Act, the audit report does not contain anything that calls that assessment into question.[5] Indeed, at paragraph 3.51, the audit report records that the final report conformed to the requirements in 21(1) of the Act. A price direction was issued and is currently being adhered to by ACTEW. The effect of this price direction was to reduce the annual water and sewerage services bill for the typical domestic customer by about 7 per cent or $83 per year.

It is apparent that the process achieved its objectives and should, therefore, be assessed as effective.

It is widely recognised that, while the objectives identified above constitute the formal objectives of the process, there are other objectives that the process is expected to fulfil. In the present context, two are worth singling out. The first is ensuring that ACTEW as the provider of water and sewerage services to the ACT community remains viable. The second is providing a transparent process for the setting of water and sewerage services prices to assist the Government as shareholder to manage the entity and provide the community with assurance that the entity, which the community ultimately owns, is being run in the community's best interests.

Changes made to the pricing mechanism through the processes of the investigation and embodied in the price direction made significant contributions to achieving these objectives. The move to a firm specific cost of capital means that ACTEW is reimbursed for the costs it actually incurs as commonsense would suggest is appropriate.[6] The move to calculate the return on capital by applying the nominal cost of capital to the un-indexed value of the regulated asset base means that ACTEW

[5] A price direction subject to an industry panel review remains in force unless the panel, on application from a party, suspends or alters it.

[6] In this context the terms "cost of capital" and "rate of return on capital" refer to the same thing.

actually receives the dollar amount required to meet its interest costs and pay the shareholder the return identified in the calculation of its firm specific cost of capital.[7] For the shareholder, this means that, for the first time, the profits that ACTEW achieves and pays to the Government should be closely aligned with the return on equity set in calculating the cost of capital. Finally, for the community, this means that the pricing process is less complex and easier to comprehend.

It is difficult to see on what basis a process that delivered all the elements outlined above could be judged to be ineffective.

3.4 Assessing efficiency

Assessing the efficiency of a largely one-off process like the water and sewerage services investigation is difficult because it is hard to find an appropriate benchmark for best practice that mirrors the features of the process being assessed. It is clear, for example, that the 2008 investigation does not provide an appropriate benchmark for the 2013 investigation. The 2008 investigation did not confront a $236 million revenue shortfall from the previous period or a 52 per cent increase in ACTEW's debt.[8] Nor did it inherit a history of prices increasing by 31 per cent over the previous five years.[9] In addition, water consumption, which had already declined by 14 per cent between the 2000-04 and 2005-08 regulatory periods, fell a further 15 per cent between the 2005-08 and 2009-13 regulatory periods.[10]

As noted above, the Commission was concerned about the efficiency of the regulatory process, but not because of its absolute cost, which is unremarkable given what is at stake, nor because the investigation in 2013 unfolded in a different way to that of 2008, which was entirely appropriate given the radically different circumstances in which the two investigations were conducted. The Commission's concerns arose rather from its direct experience of the investigatory process itself.

As the investigation unfolded the Commission became convinced that the four or five yearly review process, of which the current investigation represented the most recent example, was ill adapted to the task of setting water prices, particularly in the wake of the events of the 2009-13 regulatory period. The Commission documented a number of these shortcomings in its draft report. In short compass, the problem is that a five year interval between interactions between the Commission and ACTEW is simply too long.

[7] A fuller discussion of the reason for these changes and their effect is provided in chapter 4 of the Commission's final report.

[8] Change in ACTEW's water and sewerage liabilities from 2007 to 2012.

[9] Change in volumetric water prices from 2008-09 to 2012-13.

[10] Change in average annual billed consumption between regulatory periods. Regulatory period 2005-08 was only four years long, covering financial years 2004-05 to 2007-08 inclusive..

The five year interval means the Commission is left with the task of assessing the prudence and efficiency of investments that have been made five years previously, the inception and planning of which may go back considerably further. Whether an investment decision is prudent hinges crucially on the circumstances at the time it is made and the risks to ACTEW achieving the objectives set for it that those circumstances present. Trying to recapture those circumstances long after they have ceased to obtain is difficult. Those most closely associated with the decision may have moved on and the corporate memory of the circumstances of the decision may be sketchy. In such circumstances, a considerable expenditure of resources, both in the Commission and within ACTEW, may be necessary in attempting to reconstruct the circumstances of the decision. There is also a heightened risk that the Commission will get the assessment of prudence wrong.

From ACTEW's perspective, a periodic interaction with the Commission at long intervals means that ACTEW's knowledge of the attitude of the Commission to its proposed investment program becomes more and more out of date. At the beginning of a regulatory period, ACTEW has a Commission endorsed investment profile stretching over the subsequent four or five years. As time passes without further interaction with the Commission, the time horizon over which the endorsed investment profile stretches becomes shorter and shorter. By the end of the regulatory period, ACTEW will have no basis for knowledge of the Commission's attitude to its current investment plans.

As the 2008-13 regulatory period graphically illustrates, the challenges confronting ACTEW in achieving its objectives can change rapidly, necessitating revisions to its investment plans. A four or five yearly cycle of interaction provides ACTEW no opportunity to update the Commission on changes in its business environment and the Commission no opportunity to provide feedback on ACTEW's proposed responses to those changed conditions. This restriction on opportunities to communicate means that, when an investigation finally takes place, the Commission and ACTEW may be seriously out of touch with each other's circumstances and approaches. This produces conditions in which much catching up needs to be done and which are ripe for misunderstandings and consequent disputation.

This direct experience of the inefficiencies of the investigatory process led the Commission to conclude that the solution lay, not in imposing more restrictive rules, but in reforming the process itself.[11] The Commission acted on this conclusion and instituted changes in the form of regulation to apply to the regulatory period beginning on 1 July 2013. The principal changes are that the Commission and ACTEW will formally interact every two years instead of every four or five and that ACTEW will provide information for the Commission to consider on a rolling six year horizon. This means the shortest time horizon over which ACTEW will have knowledge of the

[11] The imposition of more rules as recommended in the audit report not only fails to address the underlying problem, but risks introducing new problems. Recent experience with the regulation of the distribution and transmission networks for electricity provides salutary lessons in this regard.

Commission's appraisal of its investment plans is four years instead of zero years. Every two years the Commission will adjust the key parameters of the regulatory model in the light of any changed circumstances and re-determine prices to reflect the then current circumstances.

The Commission labelled this process a biennial recalibration.[12] If nothing changes between biennial recalibrations, no adjustments will be made save for any already foreshadowed such as adjustments for inflation. Alternatively, if dramatic changes occur, such as the onset of a major and unexpected drought, the biennial recalibration enables the Commission to make the necessary adjustments, including to ensure that ACTEW's prudent and efficient costs of providing water and sewerage services are properly reflected in the prices it is permitted to charge.

The Commission deliberately linked the information that the recalibration requires to material prepared by ACTEW in carrying out its normal operations. This will limit the cost of the recalibration process and align the recalibration to ACTEW's internal business plans approved by the ACTEW board. It will also ensure that the Commission is much better informed about the then current status of ACTEW's operation when commencing the next review, substantially reducing the cost of that process.

[12] The design of the biennial recalibration process was also informed by consideration of how best to achieve efficiency in the provision of water and sewerage services. These aspects are covered in the Commission's two reports.

4 Poor communication and relationships

The analysis of communication and relationships with stakeholders offered in the audit report has a number of serious shortcomings. These include

- attention is focussed almost exclusively on one stakeholder: ACTEW, and then only on a small subset of the communications with that stakeholder on a very narrow range of issues;
- false inferences are drawn from the Commission adjusting the processes of the review to suit the issues emerging;
- failure to agree on an issue is taken to imply poor communication and relationships; and
- evidence that communications were effective and relationships satisfactory is ignored.

It is not clear from the audit report, what meaning should be ascribed to the assertion that there was a poor relationship between the Commission and ACTEW. The relationship between the two entities was of regulator to regulated entity. Transactions between the two entities were much as would be expected in such a relationship. Much information was exchanged through extensive and, for the most part, appropriate means of communication. The entities did not always agree on issues, but they would not be expected to in such a relationship.

4.1 Focus on ACTEW

While the audit report frequently asserts that stakeholder communication was poor, little evidence to substantiate such an assertion is presented in the audit report. The audit report is not comprehensive in its analysis of the communication with stakeholders undertaken by the Commission. It restricts itself almost entirely to communication with ACTEW, when the Commission has made clear that it regards the ACT community as its most important stakeholder. The Commission notes that, at paragraphs 5.118 – 5.127, the audit report is critical of its efforts to communicate with this stakeholder. Even in the communication with ACTEW, the audit report restricts itself to a narrow range of instances not representative of the extensive range of issues covered and processes used in communications between the Commission and ACTEW.

At paragraph 5.18 of the audit report, it states that:

> Throughout the course of the water and sewerage pricing investigation ACTEW provided a range of information and documentation to the ICRC. Information was provided through formal submissions and informally, in response to requests for information from the ICRC.

In this and paragraph 5.19, the audit report lists 6 submissions provided to the Commission by ACTEW. In addition to the processes listed in the above quote, the

Commission also communicated with ACTEW through the consultant it employed to assist it with the technical evaluation of ACTEW's proposed operating and capital expenditures. During the period of this consultancy, interaction with ACTEW was intense.

In addition to the extensive two-way communication with ACTEW throughout the audit process, the Commission also briefed government on several occasions, and held 2 information sessions and 1 public hearing. None of this is considered or even mentioned in the audit report.

4.2 Process adjustments

At paragraph 4.52, the audit report begins a purported analysis of delivery of materials against plan. The plan used for this purpose is taken from the context paper released by the Commission in November 2011 to provide background for both the water and sewerage services review and the secondary water reference that proceeded in parallel with the water and sewerage services review for the first nine months of the process, through end June 2012. The context report contained proposed timetables for both review processes. The issues paper for the water and sewerage services review was released in February 2012, following after release of the issues paper for the secondary water review.

By February 2012, the Commission had determined that the proposed timetable for the water and sewerage services review was incompatible with managing both reviews simultaneously and was not suited to the issues that were emerging as the water and sewerage services review began to unfold. Accordingly, the Commission proposed a different timetable in the issues paper. Importantly, this timetable did not commit to releasing the issues papers or preliminary and working conclusions reports that had been proposed in the context paper. Rather, in the issues paper, the Commission stated that:

> If it identifies a need, the Commission may also elect to release further papers and analysis on specific issues in advance of the release of the draft report.

No mention is made in the audit report of the changes in timetable that the Commission proposed in releasing the issues paper for the water and sewerage services review. The Commission determined that only one further paper was necessary: the Community Consultation Paper released in September 2013.

The audit report correlates the alleged slippages and non-production of discretionary documents that the Commission had already withdrawn from the timetable with poor stakeholder communication. One source of slippage in the Commission's timetable, cited by the audit report, was the unanticipated need to produce the Community Consultation Report. This slippage was the direct result of the Commission giving priority to consultation with its most important stakeholder, the ACT community. The audit report at paragraph 5.125 criticises the Commission for the timing of the release

of this report during the caretaker period for the 2012 election. To have waited until the end of this period to release the Paper would have delayed subsequent releases by a further month.

The delay of a couple of weeks at the end of the process was to allow the ACT Government adequate time to consider what advice it wished to provide the Commission on the appropriate setting for the return of equity. It was not until after release of the draft report that the possible need for such advice could be identified.

As issues emerged in the course of the investigation, the Commission changed its view about how the investigation should best proceed. This willingness to vary the discretionary outputs, intended to be published by the Commission, derived from the Commission's belief that securing the best outcome for the ACT community was more important than continuing to produce a set of discretionary outputs, the relevance of which had become questionable.

4.3 Failure to agree

It is asserted in the summary section of chapter 5, the detail of which is considered in the following chapter of this response, that there was a breakdown in communication between the Commission and ACTEW. The chapter itself is, however, replete with instances of communication that was extensive, detailed and clear. There was certainly substantial disagreement between the entities over a range of matters, but this is not the same as nor does it imply that there was a breakdown in communications. It may simply indicate that the parties had different and strongly held views. Elsewhere the audit report recognises that:

> Reconciling or making trade-offs between the conflicting goals for water and sewerage services price setting is a challenge.

Confronted by such a challenge it should not be surprising that there are matters about which the regulator and the regulated entity simply disagree and where no amount of communication will resolve that disagreement.

It is asserted in paragraph 6.2 of the audit report that there were "personal and organisational conflicts not being resolved in a timely manner". The only evidence offered in support of this very serious assertion is the particular disagreement covered in chapter 5 of the report. Whether this disagreement could reasonably be described as a conflict may be a matter for individual judgement. The Commission never felt that such a word would have been appropriate. The regulator's role in this process is to restrain the exercise of monopoly power by the regulated entity. It is not atypical of such situations that disagreements arise and may become sharp. This was the experience of Commissioner Buckley who managed regulatory resets at both the ACCC and AER.

The Commission rejects outright the suggestion that there was ever any personal conflict between the two entities. For the reasons cited above, robust exchanges may be expected to be occasional features of such a process. There is no evidence that these ever developed into personal animosity between any individuals within the two organisations. The Commission only responded positively to requests for meetings from ACTEW when it judged that the circumstances and subject matter were likely to make a meeting productive. There were a small number of occasions when, mainly for legal reasons, the Commission determined that it was not in the public interest for it to respond to certain approaches from ACTEW. The Commission considers it extravagant to suggest that these occurrences constituted evidence that there was personal conflict.

4.4 Evidence ignored

Much evidence of effective communication between the Commission and ACTEW is ignored by the audit report. One example is particularly striking. As previously noted, the audit report devotes chapter 5 to one particular disagreement. It does not, however, devote the same attention to the communication between the Commission and ACTEW that occurred subsequent to these events.

This disagreement became irrelevant to the process of the investigation with the publication of the Commission's draft report. In response to the draft report, ACTEW provided a detailed submission that constructively addressed many of the issues the Commission had raised in its draft report and provided the information the Commission had been seeking through the process described in chapter 5 of the audit report. The content of this submission and the results of the intensive consultations between the Commission and ACTEW that followed enabled the Commission to move from a position of rejecting ACTEW's capital and operating expenditure estimates in the draft report to accepting revised estimates in the final report. In addition and on the basis of information provided through these processes, the Commission was able to accept as prudent expenditure on the Murrumbidgee to Cotter pipeline and associated works that it had not been able to accept at the draft report stage. Such outcomes do not support the assertion that the relationship between the two entities was poor nor that communication was ineffective.

5 Provision of information in ACTEW's main submission

Chapter 5 deals with the Commission's attempts to obtain certain information from ACTEW prior to the Commission completing and releasing its draft report. As noted earlier, the events described in chapter 5 are largely irrelevant to the stated purpose of the audit. Following release of the draft report the Commission withdrew its request for the information and ACTEW provided information covering the same matters in its submission to the Commission on the draft report. Nevertheless, the Commission is concerned that the depiction of the unfolding of events in regard to these matters in chapter 5 may seriously mislead the reader about the Commission's role in the events and the significance of the occurrences described. This chapter of this response, therefore, seeks to provide a balanced view of these events and an assessment of their significance in the context of the review overall.

The Commission's concerns about the portrayal and analysis of these events in the audit report include:

- the description of the meetings between the Audit Office and various officers of the Commission that initiated the Audit Office's interest in these matters is excessively brief and fails to capture the character of those meetings properly;
- failure to recognise the difference between the requests made of ACTEW by the Commission before the issue of the section 41 notice and the requests in the section 41 notice;
- failure to properly recognise the nature of and the role played by the Community Consultation Paper in mitigating the Commission's concerns; and
- failure to distinguish between reasonable beliefs that may have been held by the Commission as the events were unfolding and facts allegedly established by the Audit Office around a year later.

5.1 Meetings

The characterisation of the events dealt with in paragraph 5.2 and 5.3 is strongly disputed by the Commission.

In regard to the meeting of 27 September 2012, the CEO of the Commission, the only member of the Commission's staff present at the meeting, contends that the conversation referred to in paragraph 5.2 was initiated during a meeting to discuss the recently concluded financial audit of the Commission by a question from a member of the Audit Office staff about certain notes on the whiteboard in the CEO's office. In answer to this question, the CEO replied that the notes related to difficulties that the Commission was having in obtaining information from ACTEW and how this might be related to ACTEW's CEO having concerns about the possible influence of that information on the outcome of the upcoming election. The CEO had no prior intention

of raising this matter with the Audit Office staff and, had it not been for the question, the CEO would not have done so.

The meeting on 4 October 2012, referred to in paragraph 5.3, was initiated by the Auditor-General. At this meeting the Auditor-General reported that the conversation of 27 September had been relayed to the Auditor-General and the Auditor-General wished the Commission to advise the Auditor-General whether the Commission had concerns along the lines outlined by its CEO or whether the remarks by the CEO should be treated as off the cuff and not a cause for concern.

At the meeting with the Audit Office on 9 October 2012 attended by the CEO and Commissioners, the Senior Commissioner provided a factual account of the meeting of 13 August 2012 between the Commission and ACTEW. The Commission did not offer any interpretation of events or speculate about the motives for the remarks made by ACTEW's CEO at the meeting of 13 August.

Given the importance of these meetings to the train of events that are the subject of chapter 5, the Commission would have expected them to be presented more carefully in the audit report, including by taking care to present any differences between accounts given by those present at the meetings in a balanced way.

5.2 Nature of the section 41 notice

When ACTEW failed to provide the information sought by the Commission that would reveal the price implications of the proposals in its submission in response to the issues paper, the Commission was faced with a difficult choice. The important implications of the choice the Commission made for the character of the subsequent events is overlooked by the audit report.

Confronted by ACTEW's refusal to provide the information sought, the Commission had two options in attempting to obtain the information. First, the Commission could have sought to compel ACTEW's compliance with section 7.1 of the previous price direction, outlined in paragraph 5.15 of the audit report. This process involves long time lags between decision points and might well have wound up before a court. Alternatively, the Commission could have issued a notice under section 41 of the ICRC compelling ACTEW to provide the information. This was more attractive in offering a potentially faster resolution of the issue, but depended for its effectiveness on ACTEW having made the forecasts of billed water consumption that the Commission was seeking. Whereas, seeking enforcement of section 7.1 of the previous price direction would have allowed the Commission to compel the construction of such forecasts.

In the interests of minimising the delay introduced into the review process, the Commission chose to issue a section 41 notice because it believed at the time that ACTEW had made the forecasts sought. This belief was based on a number of statements made by ACTEW, including in the commentary on its profit forecast in its then most recent statement of corporate intent. Unfortunately, the choice made by the

Commission had the effect of converting a request to provide certain forecasts into an argument about whether such forecasts had actually been made.

In relation to the Commission's grounds for believing that ACTEW might have the material sought in its possession, paragraph 5.50 states that:

> The assumptions underpinning each agency's point of view on this issue were never effectively communicated between the ICRC and ACTEW.

This is misleading. In its letter of 16 October 2012, quoted at paragraph 5.68 of the audit report, the Commission clearly states that one of its grounds for believing that the material sought was in ACTEW's possession was statements made in ACTEW's statement of corporate intent. ACTEW chose to ignore this and instead had its legal representatives accuse the Commission of making grave allegations, as quoted at paragraph 5.71. If instead had ACTEW either supplied the statutory declarations the Commission had requested or advised the Commission of the basis for the revenue forecasts in the statement of corporate intent as detailed at paragraphs 5.45 to 5.49 of the audit report, the issue might have been settled at this point.

5.3 Community Consultation Paper

As explained above, the events that are dealt with in chapter 5 had no impact on the effectiveness of the process because the Commission took action, including the provision of the Community Consultation Paper, to mitigate their effect.

At paragraph 5.124, the audit report states that:

> The Audit Office considers that the Community Consultation Paper contained minimal information or analysis with respect to the methodology or assumptions that underpinned the potential prices to be charged.

The Commission considers that the Paper contained the information and analysis appropriate to the purposes of the Paper. As the Paper itself makes clear, its purpose was not to provide technical analysis but to raise important issues for consideration broadly in the community. A clear description of the assumptions and model used to generate the results reported in the Paper was provided in Chapter 2 on pages 3-6. Although this description was shorter than the Commission would normally provide in a draft or final report, it would have been sufficient to make clear to anyone familiar with the pricing process exactly how the results had been derived. It was sufficiently complete to allow ACTEW's submission in response to the Paper to include detailed criticism of aspects of the methodology, for example, in regard to the return on capital.

At paragraph 6.2 of the audit report the following example is given in support of the proposition that there was "a poor relationship between the ICRC and ACTEW":

> organisational and personal conflicts between the agencies not being resolved in a timely manner during the process (refer to Chapter 5)

As far as the processes of the review are concerned, the disagreement between the Commission and ACTEW was resolved by the release of the Community Consultation Paper. The Commission made forecasts of billed water consumption itself based on information in ACTEW's submission to the issues paper. The Commission then used those to illustrate the effects on prices of the various propositions in that submission. This allowed the ACT community to make informed comment on those propositions to assist the Commission in preparing its draft report.

The only outstanding issue in regard to this disagreement remaining after September 2012 was the section 41 notice, which ACTEW wished to see withdrawn. The Commission closed this issue by withdrawing the notice following release of the draft report in February 2013.

5.4 Significance of alleged findings of fact

There are a number of alleged findings of fact in chapter 5 of the audit report that the Commission considers either questionable in substance or relevance. These are that:

- the Commission's assertion that ACTEW deliberately withheld information is not supported by the evidence;
- during the meeting of 13 August 2013, whilst in possession of the information, ACTEW did not want to release the information and be responsible for influencing the outcome of the forthcoming election is not supported by the evidence;
- the Commission's assertion that this actions threaten the public interest; and
- ACTEW did not have the information the Commission was seeking.

5.4.1 Withholding information

In previous reviews, including the 2008 review, ACTEW had provided the Commission with a submission that included a complete business plan as an input to the Commission's draft report. This submission presented the prices required through the forthcoming regulatory period to support the operating and capital expenditures proposed in the submission. In its 2012 submission, ACTEW did not do this, presenting data on proposed operating and capital expenditures, but not identifying the prices that would be required to support those expenditures.

The omission of the critical information on price outcomes meant that it was impossible for the Commission or the community to properly evaluate the impact of these proposals on the ACT community. Whether it had actually created the information at the time of its submission is irrelevant to the impact the failure to provide it, as the Commission had requested and was expecting, had on the processes of the review.

5.4.2 Influence on the forthcoming election

In reviewing the evidence in the audit report concerning the 2012 ACT election and its influence on ACTEW's willingness to provide the information, it is clear that there is some evidence to support the Commission's assertion, but that not all evidence corroborates it. There does not seem to be any evidence that directly contradicts it. It seems to the Commission that, in these circumstances, a more accurate summary of the situation would be to say that the evidence does not allow a determination as to be made as to whether the assertion is correct or not.

5.4.3 Public interest

The Commission identified two potential threats to the public interest flowing from ACTEW's refusal to provide the information sought. The first and lesser concern was about the impact of the non- provision of the information on the forthcoming ACT elections. Here the Commission and ACTEW had different views about the appropriateness of providing or not providing the information sought in the context of an election campaign.

The second and more serious concern was that by failing to identify the pricing implications of the proposals in its submission ACTEW was withholding information vital to the community's evaluation of its proposals. As noted earlier, whether or not ACTEW had actually created the information at this point was irrelevant to this concern. When it became apparent that the information was not going to be forthcoming in a reasonable timeframe, the Commission created a number of scenarios to illustrate how the major proposal in ACTEW's submission might affect prices. The Commission made the results available to the community by releasing a Community Consultation Paper in September 2012.

It is noteworthy that the audit report devotes almost all its attention to the first and lesser of the Commission's concerns despite the fact that, in its letter to the Auditor-General, the Commission had devoted far more space to its second and greater concern than to its first and lesser concern.

5.4.4 Possession of the information

After thorough inquiries, the audit report concludes that ACTEW did not possess the information that the Commission was seeking. The Commission has no reason to question this conclusion. Its relevance to the matters subject to audit is, however, questionable. First, as explained above, whether or not ACTEW had created the information was irrelevant to the impact that its non-provision had on the processes of the review.

Second, the Commission's actions subsequent to ACTEW's refusal to provide the information even when specifically requested to do so were driven by its belief that there were grounds for supposing that ACTEW did have the information sought. As the audit report concludes at paragraph 5.47:

> These figures [in ACTEW's *Statement of Corporate Intent*] can legitimately lead to an expectation that ACTEW had 'information or a document' with respect to forecast water sales volumes at least up to 2015-16 (but not necessarily up to 2017-18).

This belief provided the basis for pursuing provision of the information by issuing a section 41 notice. Even then, as explained in section 5.2 above, the Commission was prepared to consider that its belief might be mistaken and offered ACTEW a way of resolving the matter.

6 Queen's Counsel advice

The first part of chapter 3 of the audit report sets out legal advice relating to the basis for the price direction. While this part of the report goes into detail about the arguments underpinning the legal opinions provided to the Audit Office, it:

- does not set out the arguments within the proper context; and
- conveys a misleading impression of the significance of the advice obtained.

6.1 Context

The context in which the legal advice set out in the audit report needs to be seen is as follows.

Over its sixteen year life, the Commission has received a number of references requiring the provision of a price direction where either the period for which the direction was to apply was not stated or where the Commission was asked to determine the period. In those cases the Commission has dealt with such references by determining the period for which the price direction applies. Examples include the 2006 electricity terms of reference, 2001 gas investigation and the 2001 taxi fare investigation. The water and sewerage services pricing inquiry is, therefore not exceptional either in the absence of a period from the reference or in the way the Commission has dealt with the reference. This audit report is the first time that the validity of this approach has been questioned.

In the context of the present audit, four lawyers have provided opinions about the validity of this approach: the Queen's Counsel and the AGS cited in the audit report, the ACT Solicitor-General, also quoted in the audit report, and the Senior Counsel whose advice was sought by the Commission. The first two advised that in their opinion the price direction is invalid; the last two have provided contrary opinions. It should be noted that, while the first three opinions were provided to the audit, the Commission was not able to provide the opinion it obtained because to do so would compromise its capacity to seek legal professional privilege for the advice should the price direction be subject to legal challenge. The audit report fails to record the reason that the Commission did not provide its legal advice to the audit.

6.2 Significance

While this division of legal opinion suggests it may be desirable to amend the ICRC Act to clarify the legislature's intent, it does not, in and of itself, make the price direction invalid. The only way in which a price direction issued by the Commission can become invalid is by being subject to successful legal challenge with a court

finding that it is invalid.[13] No legal challenge has thus far been mounted. Therefore the price direction remains valid and in force.

Further, since no legal challenge has been mounted at this point, the Commission does not consider that there are any "issues associated with the potential invalidity of the current price direction" required to be addressed by the ACT government.

[13] Following an application for review under section 24K of the ICRC Act, an industry panel may substitute a new price direction for the original price direction or confirm the original direction.

7 Conflicts in roles

Chapter 2 of the audit report deals with two alleged conflicts in the roles played by the Treasurer and the CEO of the Commission in the water and sewerage services pricing process. In the Commission's view there are no conflicts in the roles played by:

- the Treasurer in providing references to the Commission; or
- the CEO of the Commission in acting as General Counsel to the Commission.

7.1 Treasurer

While this is a matter to which the ACT Government should respond, the Commission considers that the discussion of this issue in the audit report misses much that is essential and, since it considered them during the water and sewerage services investigation, takes the opportunity to outline the missing elements here.

As explained in chapter 2 of the final report of the Commission, which the audit report was critical of, the Commission including as discussed below, there is an essential and unavoidable conflict of interest in a government owning an entity like ACTEW on behalf of the community.[14] As guardians of community welfare, a government would be expected to ensure that such an entity operates effectively and efficiently in the community's best interest. Importantly, this includes protecting the community from the exercise of any market power over prices that such an entity may enjoy. At the same time, as the recipient of any profit that the entity makes, a government has an interest in maximising that profit. Clearly, restricting the extent to which the entity is allowed to exercise its market power to protect the community limits the profits it is able to make and deliver to government. Herein lies the conflict.

This conflict does not relate to a particular minister and cannot be removed by assigning responsibilities amongst ministers. It is inherent in the conflicting roles of government to safeguard community interests and maximise the profits earned by the businesses it owns. Since this conflict is inherent and unavoidable, it cannot be removed, but it can be mitigated. Three methods are commonly employed to provide such mitigation:

- Vesting the power to determine prices in an entity independent of government specifically charged with protecting the community from the exercise of market power, a regulator;
- Ensuring that the accountabilities and processes for managing the business are as transparent as possible; and

[14] This issue was also covered in chapters 1 and 2 of the draft report.

- Oversight of the processes of setting prices and managing the business by the legislature.

These elements are all present in the ACT for ACTEW. They do not mean that the Treasurer cannot attempt to use the terms of reference for an investigation and provision of a price direction to somehow restrict the independent entity, the Commission, from discharging its responsibility. They do, however, force the Treasurer to do so in the full glare of scrutiny by the Legislative Assembly and, hence, the wider community. The history of references to the Commission suggests this has been sufficient to dissuade any Treasurer from providing other than appropriate references to it.

The Commission also notes that Dr Bruce Cohen does not identify any conflict in the Treasurer's roles in his recently released report on the institutional arrangements for ACTEW.[15]

7.2 CEO of the Commission

In contrast to the matter just discussed, this is very much an issue for the Commission, going as it does directly to the Commission's management of its staff. The relevant finding is summarised in chapter 2 as:

> There is a conflict in the roles undertaken by the ICRC Chief Executive Officer. The ICRC Chief Executive Officer has undertaken the role of General Counsel (or Chief General Counsel) for the organisation as part of the 2013water and sewerage price setting process. Adopting the title of General Counsel (or Chief General Counsel) infers that the advice given is 'independent' of the role of Chief Executive Officer. The Chief Executive Officer does not have sufficient independence to act as the General Counsel (or Chief General Counsel) and should not assume this role.

Before moving to consider the specific assertions in this paragraph it is important to note that "the commission is constituted by 1 or more standing commissioners" (s.6(1) ICRC Act). Thus, when the CEO, acting as General Counsel, provides advice to the Commission, the party rendering the advice and the party receiving it are separate and distinct. The decision maker in the situation is the party receiving the advice not the party providing it. This means that, whenever the Commission's CEO advises the Commission in a legal capacity, the CEO is not also a recipient of that advice nor does the CEO take a decision based on that advice.

The conflict alleged to exist in the first sentence of the quote above is never identified anywhere in the audit report.

[15] Review of Institutional Arrangement for ACTEW Corporation Limited (ACTEW) December 2013.

A more correct rendering of the second sentence would be to say the Commission's CEO occasionally acts as the Commission's General Counsel when the Commission considers it to be in the Commission's interests for the CEO to do so. The CEO did perform this role on occasion during the water and sewerage services investigation. The investigation was already well in train when the CEO took up duty and did not make a particular call on the specific skills the CEO possessed beyond the legal ones. Hence the CEO's role in the investigation overall was minor, but, when the CEO was involved, it was mainly the CEO's legal skills that were called upon. By being presented without context in the audit report, the correct statement that "90 percent of the time that they [the CEO] spent on water and sewerage pricing process was for the purpose of providing legal advice" could mislead the reader into believing that a large proportion of the overall time of the CEO was spent in providing legal advice, which is not correct.

The CEO adopting the title of General Counsel is not intended to infer nor to imply that the advice given is independent (with or without quotes) of the role of CEO. What it indicates is that in the execution of a function under that title, including the provision of advice, the CEO is acting formally as a practising lawyer and is accepting the full range of professional responsibilities which that entails. In the case of the Commission's CEO those responsibilities are now substantial because the CEO holds a current unrestricted practising certificate. Many, indeed most, of the functions that the CEO undertakes are not required to be undertaken by a practising lawyer. When, however, the CEO is acting in this way, it is important to indicate to all involved that this is the case.

The last sentence of the quote from the audit report is an unsubstantiated assertion that is, in fact, incorrect. The critical question here, which the audit report never substantively addresses, is whether there is a conflict between the roles of CEO and General Counsel. The functions of the Commission's CEO are specified at section 10B of the ICRC Act and includes at (1)(b):

> managing the day-to-day operations of the commission secretariat in accordance with—
>
> (i) applicable governmental policies (if any) for the commission; and
>
> (ii) the policies set by the commission (if any); and
>
> (iii) each legal requirement that applies to the commission;

That is, the Commission's CEO has the statutory function of ensuring that the operations of the Commission are in accordance with "each legal requirement that applies to the commission". Since all the functions that the CEO is asked to perform by the Commission when acting as General Counsel are directed at ensuring that the Commission has due regard for all its legal obligations, it is difficult to see how there could be any conflict between the roles of CEO and General Counsel.

The only circumstances in which the Commission can envisage that it would be inappropriate to rely on legal advice from the CEO in the role of General Counsel would be if the legal advice concerned some aspect of the CEO's own behaviour. This has never arisen and were it to arise the Commission would seek advice from a source outside the Commission entirely. If there is a conflict for the CEO, it is hard to see how there would not be a similar conflict for any of the staff that report to the CEO.

The audit report states that none of the documents concerned with the CEO's employment arrangements that were consulted "explicitly provide for the provision of legal advice". The Commission notes that they do not provide for the CEO to act as Chief Financial Officer of the Commission either, but the Financial Management Act requires that the CEO do so. The Executive Contract under which the CEO is employed requires the CEO to "carry out all duties as may be directed from time to time by the Employer".

The Commission considers that these are sufficient to allow the Commission to request the CEO occasionally to carry out the role of General Counsel. The Commission would not, of course, make this request of a CEO who was not qualified and in possession of a practising certificate.

Were the Commission not to make use of the legal skills of its current CEO in this way, the Commission would have to source the legal advice it requires from outside the Commission. This would involve additional expense for the Commission in externally sourcing expertise that is own staff able to provide, not a very efficient mode of operation.

Finally in regard to this matter, it is asserted at paragraph 2.55 of the audit report that:

> There was poor understanding in the ICRC with respect to internal roles and the responsibilities for the provision of legal advice.

No evidence is offered in support of this assertion. The people most concerned with the provision of legal advice through the relevant period were the Commissioners, as recipients, the CEO and the legal, regulatory and consumer affairs advisor also employed by the Commission. There is no doubt that these four had a thorough understanding of the above mentioned roles and responsibilities. Indeed, in the case of the Commissioners, they largely created them. There is no evidence that other staff working on the water and sewerage services investigation were not aware of relevant arrangements for legal input, for example, to the price direction. In fact the legal, regulatory and consumer affairs advisor was the principal author of the price direction and worked closely with the staff working on the report.

8 Other matters

Although there is much else in the report with which the Commission disagrees, there are only three other matters which it judges to be significant enough to be worth highlighting in this response. These are:

- the confusion in the audit report about the "expectations" of the Commission and ACTEW concerning which parts of the ICRC Act were applicable to a draft report;
- the ill-based suggestion that the Commission did not have full authority to consider governance issues it its review; and
- the difficulties of properly evaluating the expert advice on which the audit report relies.

8.1 ICRC Act and draft reports

In the summary of chapter 3, there is the following curious paragraph:

> In the ICRC there was an expectation that the Draft Report and proposed price direction (February 2013) did not need to meet legislative requirements that applied to a final report and final price direction, including the matters required to be considered as part of an investigation. However, ACTEW expected that the Draft Report and proposed price direction (February 2013) would represent the ICRC's conclusions and demonstrate how legislative requirements under the ICRC Act were met.

Neither here nor elsewhere in the chapter nor anywhere else in the audit report is there a statement of what the legal requirement actually is. Chapter 3 refers to the expectations and views of the Commission and ACTEW. The Commission's understanding of the legal position is summarised in the Commission document quoted in paragraph 3.43. As far as the Commission is aware there is no legal advice questioning this interpretation of the relevant sections of the ICRC Act. The Commission considers that the draft report and proposed price direction that it produced conformed to the requirements of the ICRC Act. There does not seem to be any claim to the contrary in the audit report. The audit report at paragraphs 3.47 describes the Commission's interpretation as a "contention". It is rather more than that. Since the Commission is the responsible authority under the Act, its interpretation of the Act is the law unless and until subject to successful legal challenge.

The schema of the ICRC Act in respect of draft and final reports is quite clear. The two forms of report are quite distinct and subject to different legal requirements. It is not the case, for example, that the draft report is a first or early draft of the final report. They serve different functions in a process designed to allow the Commission's thinking to evolve towards its final position, as conveyed in the final report, through a sequence of interactions with stakeholders. The draft report represents an important watershed in that process, but it is not the final stage.

It is difficult for the Commission to understand why ACTEW would not have understood this. The corporation has participated in many Commission investigations of water and sewerage services prices over the years, each conducted in the same way as the one under audit in regard to the roles played by the draft and final reports.

Although the draft and final reports are subject to different legal requirements and serve different purposes, it is important to understand that all the issues covered in the final report were also covered in the draft. The draft report was complete in that it provided all the material necessary for a draft determination of prices and formulation of a proposed price direction, as required by the ICRC Act. The final report was not required to fill in gaps left by the draft report, but rather gave the Commission the opportunity to reconsider positions it had reached in the draft report on the basis of submissions received, some of which included significant quantities of new material.

Although the audit report uncritically repeats ACTEW's contention that the draft report and proposed price direction do not meet the requirements of Parts 4 and 4A of the ICRC Act in the first dot point of paragraph 3.48, it offers no analysis of its own on the question. It should be noted that the Commission has not said and is not quoted as saying that the draft report and proposed price direction did not meet the requirements of Parts 4 and 4A, simply that they were not required to do so. The audit report fails to throw any light on the question of whether there was a genuine issue here at all. In fact, the draft report and proposed price direction met all the requirements of parts 4 and 4A that they were, not being finals, able to meet.

The audit report asserts at paragraph 3.48, without any supporting argument, that "… the Audit Office considers a better approach would be to ensure that the Draft Report and proposed price direction addresses all the requirements of Part 4 and Part 4A" without acknowledging that this is exactly what the Commission did.

In light of the above, principle (a) in recommendation 5 of the audit report is unnecessary. The relationship between the Part 3 and Parts 4 and 4A has never caused any difficulty in past Commission investigations. Any problem caused by ACTEW's purported difficulty in understanding the relationship between the two parts might be most readily and efficiently addressed by the corporation spending a few more dollars on legal advice.

8.2 Stretch

The summary at the beginning of chapter 3 contains the following

> While the ICRC was required to take account of the consideration set out in the 2013 terms of reference, none of the considerations expressly required the ICRC to consider ACTEW's governance arrangements. By making these considerations, the ICRC has stretched the authority conferred on it by the terms of reference.

The basis for the comment in the last sentence appears to be the legal advice from the Australian Government Solicitor quoted at paragraph 3.56. The critical part of this

quote is "… nothing which was done was beyond the legal power the ICRC possesses." The Commission is at a loss to understand what the notion that it may have "stretched" its authority is supposed to mean.

The Commission points out that at 1e of the terms of reference it was expressly required to consider:

> all potential regulatory models, including consideration of the provision of sufficient flexibility in price setting across the regulatory period to minimise the impact of significant price fluctuations.

At 1g the Commission was expressly required to consider:

> any other matters the commission considers relevant to the enquiry.

The Commission explained in its draft report, a relevant excerpt from which appears in paragraph 3.54 of the audit report, why it found it necessary to consider governance issues given the two elements in the terms of reference quoted above. By suggesting that the Commission has stretched its authority, the audit report is commenting on what other matters the Commission should have considered relevant to the inquiry. The Commission notes that this is a matter of regulatory judgement not legal principle and that there is no indication that the audit report drew on the expertise of its regulatory consultant, Dr. David Cousins, to inform its views on this matter.

At paragraph 3.58 the audit report states:

> The recommendations [on governance] are at best 'particulars of the results of its investigations.'

It is not clear what purpose is served by the audit report referring to recommendations of the Commission in this pejorative way. The Commission notes that, following receipt of its final report, the ACT Government commissioned a report from Dr Bruce Cohen to review the Territory's institutional arrangements for ACTEW Corporation Limited.[16] In announcing the review the Treasurer's press release stated:

> As part of the terms of reference, Dr Cohen will examine the existing ACTEW arrangements to determine whether they remain appropriate and effective, in order to ensure the ACT's water and sewerage requirements are delivered within the most efficient and effective arrangements.

This was precisely the concern that drove the Commission to make its governance recommendations. The Commission also notes that many of the conclusions Dr. Cohen draws in his comprehensive and detailed report are along similar lines to the recommendations made by the Commission.

[16] Review of Institutional Arrangement for ACTEW Corporation Limited (ACTEW) December 2013.

Interestingly, paragraph 2.15 of the audit report quotes from chapter 2 of the Commission's final report in which the Commission allegedly stretched its authority. The quote, however, stops just short of the final sentence of the paragraph, which reads:

> Recognition of this trade-off is fundamental to both the sound governance of ACTEW and its effective regulation.

8.3 Experts' advice

As noted in Appendix A of the audit report, the audit approach and method included the engagement of Dr David Cousins as a subject matter expert in the field of regulatory economics and requests for legal advice and assistance from the Australian Government Solicitor and Mr Peter Hanks QC. The report of Dr Cousins and advice from the lawyers is quoted in extract at various points of the report. The Audit Office has declined the Commission's request to have access to the full text of the report of Dr Cousins and the legal advice. This creates a number of difficulties for the Commission in assessing the audit report.

In regard to the legal advice, without seeing the questions that were posed to the lawyers and the full text of their responses it is difficult to assess whether the extracts provided accurately convey the substance of the advice. For example, Mr Hanks is quoted in paragraph 3.1 as advising that " ' … the Price Direction made by the ICRC … is invalid' ". Not only does the quote not even include a complete sentence on such a critical point, it is, as has been shown earlier, manifestly incorrect as it stands. The correct position is stated by the AGS quoted in paragraph 3.16 as advising:

> Accordingly, if application was made to the ACT Supreme Court, in our view it is probable (but by no means certain given the alternative arguments available) that it would declare the 2013-19 price direction to be invalid.

Given the report does not provide the complete sentence which encapsulates Mr Hanks' opinion, the reader is left wondering what question Mr Hanks was asked and how the full text of his advice read.

The Commission was very interested to read such extracts as are provided in the audit report from the report of Dr Cousins. The Commission welcomes the broadly positive tone of the extracts provided at paragraphs 4.15, 4.16, 4.19, 4.21 and 4.35 and would be interested to read Dr Cousins's comments in full. The Commission notes that the audit report did not add emphasis to any of these broadly positive comments. The audit report reserves its only emphasis of Dr Cousins's comments for the sentence included in the quote at 4.36:

> An alternative may be that the framework for setting prices is first largely determined by the Government, albeit after taking advice from the regulator and others.

The quote from Dr Cousin at paragraph 4.37 includes the words " … there would seem a strong case for developing a clear set of principles, consistent with the National Water Initiative Pricing Principles that the ICRC could then apply in reviewing prices." Chapter 8 of the Commission's draft report dealt at length with the question of whether the Commission's approach was consistent with the principles established under the National Water Initiative, concluding that it was. The Commission would like to know whether Dr Cousins was aware of this analysis and whether he agreed with it, and, if he did not, why not. Access to the full text of Dr Cousins's report would have been helpful in this regard.

9 Recommendations from the audit report

The audit report contains eight recommendations, including an overall recommendation.

The **overall recommendation** suggests that "The ACT Government should review the water and sewerage price setting framework including legislative, governance and administrative arrangement." It will be apparent from the material presented earlier in this response that the Commission does not consider that the conclusions and findings presented in the audit report constitute a sound basis on which to institute a review. Moreover, it would be premature to institute a review before the industry panel has made a decision on ACTEW's application for a review of the price direction. Given the controversy that has surrounded the Commission's introduction of a system of biennial recalibrations for the prices of water and sewerage services, it would be useful to allow the price to run through its first recalibration, scheduled to begin in November 2014.

Recommendation 1 suggests the ACT Government review the Treasurer's role in the water and sewerage services pricing process. For the reasons given in 7.1 above, the Commission considers this unnecessary.

Recommendation 2 states:

> The ICRC Chief Executive Officer should not undertake the role of General Counsel for the ICRC.

For the reasons given in 7.2 above, the Commission considers this a baseless and unwarranted interference in its management of the affairs of the Commission and the duties of its staff.

The Commission does not agree with **Recommendation 3**. The current price determination is valid. The Commission's view is that the interpretations and findings of the audit report do not identify any issues requiring to be addressed by government.

The Commission agrees in part with **Recommendation 4**. There is clearly a case for removing the doubts about the legislative intention that have been raised in connection with sections 15, 16 and section 20 of the ICRC Act. However, the Commission does not consider that the interpretations and findings presented in the audit report provide sound reasons for a broader review and amendment of Parts 3 and 4 of the ICRC Act alone. Although the case is not made in the report, the Commission considers that a thorough review of the whole of the ICRC Act may be worthwhile.

Recommendation 5 states:

> The ACT Government, in consultation with key stakeholders, should develop a set of principles for the conduct of water and sewerage pricing investigations in the ACT. The principles should include:

a) a requirement to clearly identify the nature and purpose of stakeholder consultation documents prepared by the ICRC. At a minimum, the principles should require that a draft report and proposed price direction must comply with, and represent, any requirements of a final report and final price direction;

b) guidance with respect to the prioritisation of objectives that are sought from the water and sewerage pricing investigation;

c) guidance with respect to administrative processes to be conducted as part of the investigation, in order to facilitate open and timely communication of key issues, findings and conclusions at an early stage of the process;

d) protocols for the provision of information required, including outlining the type and nature of information to be provided by ACTEW as the regulated entity; and

e) protocols for the resolution of disputes between the regulator and the utility being regulated during a water and sewerage pricing process.

The principal difficulties with this recommendation are that parts of it are unclear and its relationship to the ICRC Act do not seem to have been considered. We address each of these matters in turn below.

For **(a)**, on whom does "the requirement to identify" fall.

The last sentence would appear to conflict with the ICRC Act as presently drafted, which, as noted earlier places different requirements on draft and final reports. If there is to be a change here and, as noted earlier, the case has not been made, it should involve a change to the ICRC Act.

The meaning of "and represent" is obscure. If it means that the draft report should be a draft final report, that is, only minimal changes permitted between the two reports, it will cause major problems. For example, in the process the subject of this audit report it would have meant the Commission was unable to:

- Make use of the radically revised information that ACTEW provided on operating and capital costs in response to the draft report, being forced instead to stick with the principle of relying on historical data established in the draft report;
- Respond to presentations made to it by ACTEW on the role of the Murrumbidgee to Cotter pipeline in the water security program, being forced instead to exclude that expenditure of about $40 million from the regulated asset base thus denying ACTEW a return on that investment;
- Alter the method of calculating the return on capital in response to concerns about the impact of not doing so on ACTEW's financial viability, being forced instead to maintain a methodology that it was known would threaten that viability of ACTEW;
- Abandon the Fair Cost Recovery Scheme after it had been shown to place an unsustainable burden on ACTEW's finances, being forced instead to retain the Scheme and impose the burden; and

- Respond to representations from the ACT Government on the appropriate return on equity to be earned by ACTEW.

In fact, under this proposal, it is unclear whether the Commission would have any substantive leeway to respond to submissions made to it after release of the draft report.

For **(b)**, while the Commission has no particular objection to this element, it would also likely require amendment of the ICRC Act and the Utilities Act to avoid conflict.

For **(c)**, the first part would almost certainly threaten to compromise the independence of the Commission; the second is simply unrealistic. If key findings and conclusions are available at an early stage of the process, the efficient thing to do is bring the process to an early conclusion. This element shows no appreciation whatever for the complexity of the matters typically dealt with in an investigation of the prices of water and sewerage services.

For **(d)**, the Commission considers that a proposal along these lines could have some merit. The Commission has already acted to provide formal guidelines, embodied in the price direction, for the information to be supplied to the biennial recalibration process. The difficulty with a generic approach is that it is not responsive to particular terms of reference or the context in which the investigation is being undertaken, both of which could generate varying data requirements.

For **(e)**, as will be apparent from parts of the foregoing discussion, the Commission does not consider that the case for requiring such protocols has been made nor have the implications of imposing them for the independence of the Commission and its continuing capacity to protect the community against the untrammelled use of market power been properly considered.

The Commission agrees in part with **Recommendation 6**. Following its release of the draft report on water and sewerage services, the Commission reviewed its internal processes for producing that report and instituted changes to improve the management of the production of the final report. Since then the Commission has continued to develop and document its project management procedures for the efficient and effective operation of the Commission. However, the Commission itself will determine the scope and coverage of the mechanisms required.

Recommendation 7 is a matter for government and the Commission makes no comment.

Abbreviations and acronyms

ACT	Australian Capital Territory
ACTEW	ACTEW Corporation Limited
AGS	Australian Government Solicitor
Commission	Independent Competition and Regulatory Commission (ACT)
CEO	Chief Executive Officer
CFO	Chief Financial Officer
ICRC	Independent Competition and Regulatory Commission (ACT)
ICRC Act	*Independent Competition and Regulatory Commission Act 1997* (ACT)
QC	Queen's Counsel
Utilities Act	*Utilities Act 2000* (ACT)