



LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON PLANNING AND URBAN SERVICES

UTILITIES BILL 2000

UTILITIES (CONSEQUENTIAL PROVISIONS) BILL 2000

REPORT NO. 51

JULY 2000

STANDING COMMITTEE ON PLANNING AND URBAN SERVICES

The committee was established on 28/4/98 to inquire into and report on planning and lease management, road and transport services, housing and housing assistance, government purchasing and public utilities purchasing, electricity industry and regulation, construction industry policy, parks and forests, private sector employment inspectorate, building services, environment, heritage and municipal services and any other related matter (resolution of appointment, as amended on 25/11/99).

Committee members

Mr Harold Hird MLA (Chair)

Mr Dave Rugendyke MLA (Deputy Chair)

Mr Simon Corbell MLA

Inquiry Secretary – Mr David James

Committee Secretary – Mr Rod Power

For further information please contact the committee secretary on ph: 02 6205-0435
or fax: 02 6205-0432 or email: committees@act.gov.au

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SUMMARY OF RECOMMENDATIONS

Recommendation 1

It is recommended that the Utilities Bill 2000 and the Utilities Bill (Consequential Amendments) Bill 2000 proceed, but with the following amendments contained in Recommendations 2 to 14 of this Report. (Paragraph 3.5)

Recommendation 2

It is recommended that supplier of last resort arrangements for gas be developed along the lines of those for electricity. (Paragraph 3.12)

Recommendation 3

It is recommended that the Government ask ACTEW and AGL to specify the provisions of the Utilities Bill 2000 and its related regulations and codes that they believe are in conflict with the various national laws and codes, and then refer those concerns to the ACT Government Solicitor for advice and resolution. (Paragraph 3.15)

Recommendation 4

It is recommended that any exemption from licence conditions be made disallowable by the Legislative Assembly. (Paragraph 3.23)

Recommendation 5

It is recommended that the criteria for permanent membership of the Independent Competition and Regulatory Commission (ICRC) be amended to ensure that between them, the Commissioners have experience in the areas of commerce, economics, consumer interests, law and public administration. (Paragraph 3.31)

Recommendation 6

It is recommended that Annual Reports of licence holders be tabled in the ACT Legislative Assembly. (Paragraph 3.35)

Recommendation 7

It is recommended that the Essential Services Consumer Council (ESCC) include a member with experience in assisting or otherwise working with persons suffering financial hardship. (Paragraph 3.40)

Recommendation 8

It is recommended that the Independent Competition and Regulatory Commission release most decisions in draft form for public comment, and that the ACT develop a process for this similar to that of the Independent Pricing and Regulatory Tribunal (IPART) in NSW, with public access to material and reasons upon which the decision was based. (Paragraph 3.50)

Recommendation 9

It is recommended that the rights of utilities to appeal to the Administrative Appeals Tribunal (AAT) decisions of the Minister and regulatory bodies as specified under Section 35 of the *Electricity Supply Act 1997* and Section 59 of the *Gas Supply Act 1998*, be included in the Utilities Bill 2000. (Paragraph 3.55)

Recommendation 10

It is recommended that the public be given similar rights to utilities to appeal decisions of the Independent Competition and Regulatory Commission (ICRC) to the Administrative Appeals Tribunal (AAT). (Paragraph 3.60)

Recommendation 11

It is recommended that, following passage of the legislation, improved performance outcomes for utilities be developed, especially in relation to the environment; and that full public consultation precede the introduction of such performance measures. (Paragraph 3.78)

Recommendation 12

It is recommended that the new legislation be closely monitored after it is introduced and, in particular, that the government advise the Assembly in writing of how the legislation is working after eighteen months has expired. This advice should incorporate comment from departmental officials, regulatory bodies, utilities, licence holders and consumers. (Paragraph 3.85)

Recommendation 13

It is recommended that the Government continue to resource community consultation on the implementation of the Bills and Supporting Documents, and that the Government consider funding the ACT Council Of Social Services (ACTCOSS) to help conduct and facilitate community consultation, advocate in the public interest, help develop Codes and other technical instruments associated with the new legislation; and that funding for consultation be an ongoing component of the annual licence fees payable by utilities. (Paragraph 3.89)

Recommendation 14

It is recommended that utilities be encouraged to establish consumer committees to provide advice and feedback on consumer issues, and to assist in the development of policies affecting consumers. (Paragraph 3.90)

Utilities Bill 2000 & Utilities (Consequential Provisions) Bill 2000

CHAPTER ONE - CONDUCT OF THE INQUIRY

Referral By The Assembly

1.1 The ACT Legislative Assembly, on 2 March 2000 passed a motion that:

- (1) the Standing Committee on Planning and Urban Services inquire into and report on the Utilities Bill 2000, and the Utilities (Consequential Provisions) Bill 2000.
- (2) on the Committee presenting its report to the Assembly, resumption of debate on the question “That this Bill be agreed to in principle” for each of the Bills considered in the report, be set down as an order of the day for the next sitting; and
- (3) the Committee shall report by the first sitting day of June 2000;
- (4) the foregoing provisions of this resolution have effect notwithstanding anything contained in the standing orders.¹

1.2 On 27 June 2000, the Assembly passed a further motion:

That the resolution of the Assembly of 2 March 2000, referring the Utilities Bill 2000 and the Utilities (Consequential Provisions) Bill 2000 to the Standing Committee on Urban Services for inquiry and report, be amended by omitting paragraph (3) and substituting the following paragraph:

- (3) that if the Assembly is not sitting when the Committee has completed its inquiry, the Committee may send its Report to the Speaker or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, circulation and publication.²

¹ *Legislative Assembly for the Australian Capital Territory* Minutes of Proceedings No. 79 Thursday, 2 March 2000, p 757

² *Legislative Assembly for the Australian Capital Territory* Minutes of Proceedings No.92 Tuesday, 27 June 2000, p 895

Submissions

1.3 The committee placed advertisements in the local media on Saturday 11 March 2000 [Canberra Times] and Tuesday 14 March 2000 [Chronicle] inviting public comment on the Bills. Subsequently, seven submissions³ were received from the following organisations (in alphabetical order):

- ACT Government
- ACT Shelter Inc
- ACTCOSS – 2 submissions dated May 2000 and June 2000
- ACTEW Corporation Ltd
- AGL
- Environmental Defender’s Office ACT Inc

Public Hearings

1.4 Two public hearings were held at which the following organisations/persons addressed the committee (listed in order of appearance):

Friday 26 May 2000

- ACT Government – Mr John Robertson, Mr Tony Hays, Ms Gail Morgan, Dr Susan Faulbaum, Mr James Edis
- ACT Council of Social Service Inc - Mr Daniel Stubbs, Mr Peter Sutherland, Mr Chris Johnston, Ms Fiona Tito
- Environmental Defender’s Office ACT Inc- Ms Rosemary Budavari
- Conservation Council of the South East Region and Canberra Inc – Ms Nicola Davies

³ The ACT Government sought public comment on the Utilities Legislation concurrently to this Inquiry, and made submissions to it from the following organisations available to the Committee: Conservation Council of the South-East Region and Canberra (Inc); ACT Council of Social Service Inc; Energex Retail Pty Ltd; CARE Inc; ACTEW Corporation; NJ Construction Pty Ltd.

- Communication, Electrical, Electronic, Postal, Plumbing, and Allied Services Union of Australia - Mr Neville Betts

Wednesday 21 June 2000

- ACTEW Corporation Ltd – Mr Paul Perkins, Mr Stephen Skehill, Mr Asoka Wijeratne
- ACT Council of Social Service Inc - Mr Daniel Stubbs, Mr Peter Sutherland, Mr Chris Johnston, Ms Fiona Tito
- ACT Government - Mr John Robertson, Mr Tony Hays, Ms Gail Morgan, Dr Susan Faulbaum

Discussions with Interstate Utilities and Regulators

1.5 The committee traveled to Perth and Sydney to discuss regulatory reform of utilities with the following organisations/individuals:

Monday 12 June 2000 - Perth

- Western Power Corporation – Mr David Eiszele, Mr Nenad Ninkov
- Office of Gas Access Regulation – Dr Ken Michael, Mr Peter Kolf
- Office of Energy – Dr Les Farrant, Mr Richard Harris, Mr Vince Walsh
- Water Corporation – Ms Meredith Blais, Mr Paul Ferguson, Mr Lloyd Werner, Mr Mike Tarca, Mr Greg Scrivener
- Office of Water Regulation – Dr Brian Martin

Wednesday 14 June 2000 – Sydney

- AGL – Mr Bruce Connery, Ms Patricia McKenzie, Mr Sam Pearce

Scrutiny of Bills Report No 2 of 2000.

- 1.6 Both Bills have been examined by the Standing Committee on Justice and Community Safety in Scrutiny Report No.2 of 2000. The Government responded formally to the comments on the Bills in this report on 22 June 2000. The Government also informed the Chair of this committee that they would be tabling an addendum to the Explanatory Memorandums of both Bills containing further explanation and clarification of matters raised by the Report.
- 1.7 The Committee has been mindful of this report and the resulting government response during its deliberations.

Acknowledgements

- 1.8 The Committee is grateful for the assistance provided in its investigations by officials in Western Australia from Western Power, the Office of Gas Access Regulation, Office of Energy, Water Corporation, Office of Water Regulation; and in Sydney from AGL Ltd; in discussions about regulatory reform of utilities with members.
- 1.9 The time and effort taken by those who made submissions, appeared as witnesses at public hearings, and who took an interest in the Inquiry generally is noted and appreciated by members of the Committee.
- 1.10 The Committee thanks the Minister for Urban Services, Mr Brendan Smyth MLA, for providing a staff resource to assist with the conduct of the Inquiry and the preparation of this report.

CHAPTER TWO – GOVERNMENT AIMS FOR THE PROPOSED REGULATORY ARRANGEMENTS

National Competition Policy and Regulatory Reform of Utilities

- 2.1 In 1993 the National Competition Policy Review, known as the Hilmer Commission Report, identified industries such as electricity, gas water and road transport, where reforms could yield substantial benefits to Australia's economy.
- 2.2 Australian Governments, primarily through the Council of Australian Governments (COAG), subsequently made a series of decisions in relation to the implementation of the National Competition Policy and related reforms, which have resulted in an ongoing process of restructuring utilities. Specifically the *National Competition Reform Act 1995* was passed, which provided, in part, for uniform protection of consumer and business rights and increased competition in all jurisdictions.

Regulatory Reform of Utilities in the ACT

- 2.3 These COAG agreements have required the ACT Government to:
- Restructure utilities.
 - Participate in the National Electricity Market (NEM).
 - Implement certain regulatory structures for utilities.
- 2.4 The ACT Government established a Regulatory Reform Taskforce to review the current arrangements and develop the new regulatory framework. In November 1998 the Government released the Statement of Regulatory Intent for Utilities in the ACT. Its purposes were to:
- Clearly state the proposed regulatory structure for these utilities to enable the community and the Legislative Assembly to reach informed views
 - Provide the opportunity for further community input in the development of the proposed regulatory reforms.⁴

⁴ *ACT Government* Statement of Regulatory Intent for Utilities in the ACT p1

- 2.5 The Statement outlined a series of seven principles that are guiding the regulatory approach of the ACT Government. These are described in detail in Chapter 3 and at Appendix 1.

The 2000-2001 Budget

- 2.6 The Government also stated in the 2000-01 Budget that Microeconomic Reform and National Competition Policy is one of five key elements of its economic strategy. As a key part of achieving this strategy,

“a new package of legislation addressing the regulation of utilities in the ACT is expected to be resolved during the year, with benefits to consumers including more transparent licensing arrangements, independent administration of licence conditions and more effective safety net provisions. The process will involve the administration of licensing by the independent regulator and separation of the technical regulatory and emergency service functions.”⁵

The Aims of the Utilities Bill 2000

- 2.7 The Utilities Bill 2000’s Explanatory Memorandum (p iv) states that:

“The Utilities Bill sets out a robust, ownership-neutral regulatory regime, which applies equally to entities supplying regulated utility services in the ACT and protects and enhances the interests of the ACT community as consumers of utility services.

The regime is based on relevant utilities being required to have operating licences for the specific utility services they provide (e.g. electricity and gas distribution, electricity and gas retail, water supply and sewerage). Licenses will contain a range of specific conditions with which utilities must comply. Some of these conditions will be embodied in detailed industry and technical codes to be approved by a regulatory commission and the Minister respectively.

The Bill makes standard customer contracts enforceable subject to minimum terms and conditions and subject to variation by agreement between utilities and customers in accordance with other applicable laws of the Territory.

⁵ *ACT Government* 2000-01 Budget Paper No 3 p49

The Bill also sets out specific legal rights of utilities, including rights of access to and ownership of, assets, as well as allowing for the Minister to give disallowable directions as to the provision of certain utility services.

The responsibilities of three key bodies are defined by the Bill, namely:

Independent Competition and Regulatory Commission (ICRC)-which acquires the role of licence regulator in addition to existing functions;

Essential Services Consumer Council (ESCC)-which replaces the existing Essential Services Review Committee and functions as the appeal body for consumer complaints of up to \$10,000; and

Chief Executive-as technical regulator

Provisions of existing legislation in relation to electricity and gas supply, water rates and other matters are dealt with by this Bill and the cognate Utilities(Consequential Provisions) Bill 2000.

The Components of the Utilities Package

- 2.8 The Utilities Bill 2000 and the Utilities (Consequential Provisions) Bill 2000 refer to a number of supporting documents. These documents are listed below and described in detail at Appendix 3.

Benchmark Customer Contract
Consumer Protection Code
Dam Safety Code
Drinking Water Quality Code Of Practice
Electricity Contestable Work Accreditation Code
Electricity Distribution (Supply Standards) Code
Electricity Network Boundary Code
Electricity Network Use of System Code
Electricity Service and Installation Rules Code
Electricity Supplier of Last Resort Code
Franchise Customer Electricity Metering Code
Gas General Metering Code
Gas Network Boundary Code
Gas Network Code: 1-10 TJ Market
Gas Safety and Operating Code
Management of Electricity Network Assets Code
Utility Services License

Water and Sewerage Network Boundary Code
Water and Sewerage Network (Design and Maintenance) Code
Water and Sewerage Service and Installation Code
Water Supply and Sewerage Service Standards Code
Water Metering Code

Consultation by the Government

- 2.9 The ACT Government has released the Utilities Package (both Bills and Supporting Documents) for community consultation in a process concurrent to this inquiry by the Committee.
- 2.10 The Committee has been made aware that the ACT Government has provided funding to ACTCOSS to enable this organisation to participate in the consultation process.

CHAPTER 3 - POTENTIAL IMPACTS OF THE PROPOSED REGULATORY ARRANGEMENTS

Introduction

- 3.1 The Utilities Package is a large, complex and in parts highly technical set of documents. Although the terms of reference for the Inquiry require the Committee to investigate and report specifically on the Utilities Bill 2000 and the Utilities (Consequential Provisions) Bill 2000, the Utilities Package contains some twenty-two supporting documents, as outlined at Paragraph 2.7. The Package is highly interconnected with the Bills, Codes and Licences all containing numerous references to each other. The Committee therefore has examined the Utilities Package in its entirety.
- 3.2 The Committee has assessed the impact of the package against the Principles of Good Regulation set out in the *Statement of Regulatory Intent for Utilities in the ACT*. This document has guided the ACT Government in the development of the Utilities Package and therefore is seen as a suitable set of benchmarks for assessment by the Committee. These seven principles, which are described in further detail at Appendix 1, are:
- Consistency
 - Standard setting
 - Independent standards administration
 - Cost reflective
 - Infrastructure management
 - Outcomes focused
 - Transparency and certainty
- 3.3 The evidence presented to the Committee by utilities, interest groups and interstate regulators is conclusive in its overall support for the broad aims of the new legislation. All groups consulted spoke of their support in principle for the introduction of the regulatory framework, albeit with varying suggested amendments and concerns.
- 3.4 In terms of the principles of good regulation, the areas of most concern to the Committee were that of consistency, standard setting and transparency and certainty. These concerns are discussed in further detail within this chapter.

Recommendation 1

- 3.5 It is recommended that the Utilities Bill 2000 and the Utilities Bill (Consequential Amendments) Bill 2000 proceed, but with the following amendments contained in Recommendations 2 to 14 of this Report.**

The Principle of Consistency

- 3.6 The consistency of the regulatory arrangements across the utilities sector is in the main well developed by the Utilities Regulation Package. The application of one bill governing the regulation of electricity, water, gas and sewerage in the one jurisdiction is considered by all parties consulted to be an ambitious and far-reaching proposal, and one that will be largely achieved by the package. Certainly the legislation is consistent in that it will be applicable to all types of utilities in the ACT.

Consistency with National Codes

- 3.7 The view was expressed to the committee, particularly in its visits to Sydney and Perth that the framework was not entirely suitable in its current form for application to all four different utilities, and that the differences between utilities were not sufficiently recognised.
- 3.8 AGL raised this as being particularly applicable in the area of gas, and was concerned about the requirements for gas network operators in all circumstances to:
- connect customers
 - have standard customer contracts
 - supply customers on request.
- 3.9 In all three areas AGL's submission raised concerns that these requirements placed gas operators in certain circumstances to operate in a manner that they considered to be inconsistent with the National Gas Code.
- 3.10 The Government's response to the claim regarding supply was that:
- “As AGL notes, the Consumer Protection Code stipulates that electricity suppliers are not required to supply non-franchise customers. This is because of the existence of supplier of last resort arrangements for

electricity. AGL's concerns may need to be addressed through the development of similar supplier of last resort arrangements for gas."⁶

- 3.11 The Committee acknowledges that situations may arise in which utilities may have to supply non-franchised customers (eg, if a retailer ceased trading before an alternative supplier was available). The Committee also appreciates that supplier of last resort arrangements for natural gas may not be exactly the same as for electricity, due to the different nature of the market arrangements.

Recommendation 2

- 3.12 It is recommended that supplier of last resort arrangements for gas be developed along the lines of those for of electricity.**

- 3.13 In relation to the other claims by AGL, the general thrust of the ACT Government submission is that the legislation cannot be viewed in isolation without the relevant sections of the applicable codes, or that AGL has misread the intention of the legislation. However, ACTEW in its submission also states there is "the potential for conflict between the ACT Utilities Bill regime and the National Regime for Gas Regulation."⁷

- 3.14 The Committee considers that the Utilities Bill 2000 and its related regulations and codes should be consistent with the various national laws and codes relating to gas and electricity reform initiatives. The Committee considers that the Government should ask ACTEW and AGL to specify the provisions that they believe are in conflict and then refer those concerns to the ACT Government Solicitor for advice and resolution.

Recommendation 3

- 3.15 It is recommended that the Government ask ACTEW and AGL to specify the provisions of the Utilities Bill 2000 and its related regulations and codes that they believe are in conflict with the various national laws and codes, and then refer those concerns to the ACT Government Solicitor for advice and resolution.**

Consistency of Conditions of Licences

⁶ ACT Government Submission dated 28/6/00 p2

⁷ ACTEW Submission dated 13/6/00 p7

- 3.16 The consistency of the regulatory arrangements as they apply to individual licence holders however, is a source of concern reflected in both the submissions and by witnesses.
- 3.17 The AGL submission stated that “The ICRC has the power to exempt any entity from compliance with a licence condition or to impose licence conditions in a discriminatory manner between licencees. This is inappropriate in a competitive market.”⁸
- 3.18 ACTCOSS stated that “the current legislation provides essentially that ICRC can actually grant exemption on the request of the utility for licence conditions. That is not subject to any framework.”⁹
- 3.19 The Standing Committee on Justice and Community Safety (Scrutiny of Bills and Subordinate Legislation) Report states that “the discretion of the ICRC under clause 36 to vary a licence is not subject to any explicit limitation other than a requirement that the ICRC is satisfied that the variation is appropriate. On the face of it, it is desirable to give guidance.”¹⁰
- 3.20 In response the Government stated that its rationale for giving this power to the ICRC was that “there might be for short periods of time particular licence conditions perhaps as a result of a natural disaster or something where certain elements could not be met by a utility for reasons outside of its control. In those circumstances, it may not be appropriate to continue to basically fine these people for things that they cannot do or require them to meet conditions, which, for good reasons, might be impossible.”¹¹
- 3.21 The Committee notes the intention of the Government but is concerned that the powers conferred on the ICRC at Section 37 are broad in their scope. The committee considers it is important for any and all exemptions from licence conditions to be tabled in the Territory’s parliament, where they might be disallowed.
- 3.22 The committee also notes that the Government has stated that “it is proposed to make ICRC’s decisions on licence condition exemptions disallowable and to amend clause 25 to make it clear that ICRC must give

⁸ AGL Submission dated 19/6/00

⁹ Transcript of Proceedings 26/5/00 - Uncorrected Proof Copy Ms Tito p14

¹⁰ Standing Committee on Justice & Community Safety (Scrutiny of Bill and Subordinate Legislation): Scrutiny Report No.2 of 2000 p5

¹¹ Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Robertson p23

consideration to the objects specified in clause 3 in making licence decisions.”¹²

Recommendation 4

3.23 It is recommended that any exemption from licence conditions be made disallowable by the Legislative Assembly.

The Principle of Standard Setting

3.24 This principle states that standards should be set in accordance with community values and objectives.

3.25 The legislation has attracted a degree of criticism from interest groups regarding the relatively narrow scope that the community will have for providing direct input into the decision making process of the ICRC, and the nature of information that the ICRC will not be required to release publicly.

3.26 ACTCOSS stated that “there is insufficient guidance in the current Utilities Bill for the community to be certain that the ICRC will act in the community’s best interests. This is made even more difficult for the ACT community because the ICRC is not required to give reasons for all its determinations as is required in Victoria, nor is it required to consider all its objectives in each decision and report against those as is required in NSW.”¹³

Membership of the Independent Competition and Regulatory Commission

3.27 Both ACTCOSS and the EDO stated that the membership of the ICRC is too restrictive in nature to have a truly representative viewpoint. Commissioners and Associate Commissioners are restricted to having backgrounds in economics, commerce, industry, law or public administration.

3.28 The Government was of the view that the comparatively small size of the ACT jurisdiction meant that “there is scope for groups such as ACTCOSS, the Conservation Council or general members of the public that if they are concerned they can make representations to the ICRC, or they can make

¹² ACT Government Submission dated 28/6/00 p2

¹³ Transcript of Proceedings - Uncorrected Proof Copy 21/6/00 Ms Tito p11

representations to the Assembly or Government.”¹⁴ It was further contended that some of the interstate regulators “advised against having specific representation on the regulatory bodies becauseyou will either reach a dilemma where you never make a decision or there will be a bias.”¹⁵

- 3.29 The Committee is mindful that the ACT is a small jurisdiction and that the regulatory framework should endeavor to provide decisions that are cost-effective, timely, informed and balanced. The skills needed by the ICRC will be highly technical, and require a great deal of experience in the area of economics.
- 3.30 The Committee does however feel that the criteria for membership of the ICRC can be amended to ensure that between them, the Commissioners have experience in the areas of commerce, economics, consumer interests, law and public administration.

Recommendation 5

- 3.31 It is recommended that the criteria for permanent membership of the Independent Competition and Regulatory Commission (ICRC) be amended to ensure that between them, the Commissioners have experience in the areas of commerce, economics, consumer interests, law and public administration.**

Release of Public Information by the Regulator and Licence Holders

- 3.32 There was evidence presented to the Committee by both ACTCOSS and the EDO that licence holders are not required to make annual reports available to the public. Instead a summary is to be made available to the public as a condition of the licence.
- 3.33 The committee also notes that a range of licence decisions made by the ICRC are only to be published in the ACT Government Gazette.
- 3.34 The committee considers that the availability of annual reports by licence holders to be a cornerstone of public access to a regulatory regime. The appropriate place for such reports to be published is in the Territory’s

¹⁴ Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Robertson p24

¹⁵ *ibid* Mr Hays p27

parliament where they may be debated by members and, if wished, referred to parliamentary committees for further examination.

Recommendation 6

3.35 It is recommended that Annual Reports of licence holders be tabled in the ACT Legislative Assembly.

Membership of the Essential Services Consumer Council

3.36 The Essential Services Consumer Council will be an important component of community input into the Utilities Regulatory Package. It is primarily a complaints body covering all four utilities, reporting directly to the Minister, and operating independently of the ICRC.

3.37 Submissions were received from both ACTCOSS and ACT Shelter concerning the lack of a member “who has had experience in assisting or otherwise working with persons suffering financial hardship.”¹⁶

3.38 A high proportion of the workload of the members of the ESCC will be to help resolve issues and develop satisfactory outcomes for such persons, in an environment that should be highly sensitive to such community issues such as financial hardship.

3.39 The committee is supportive of improving the quality of decision making under this regulatory framework, especially where it is can be seen to be “value-adding” to the framework without significantly increasing its complexity or cost to utilities and consumers. This recommendation, as well as the previous two, appear to be areas where the quality of public interaction with the regulatory framework can be improved.

Recommendation 7

3.40 It is recommended that the Essential Services Consumer Council (ESCC) include a member with experience in assisting or otherwise working with persons suffering financial hardship.

The Principle of Independent Standards Administration

¹⁶ ACTCOSS Submission May 2000 p19

- 3.41 Evidence was presented to the Committee that the new regulatory framework would create a very powerful regulator, primarily because of its independence. This independence has led to a perception by both utilities and public interest groups that the ICRC could exercise its authority to their possible disadvantage.
- 3.42 ACTEW and ACTCOSS both agreed that the new legislation gave the ICRC significant power with little opportunity for utilities or consumers to appeal or exercise formal powers of grievance or appeal. They disagreed about whether the legislation was heavily weighted towards the protection of their own particular interests.
- 3.43 The Government presented its position as having struck a balance between the two that neither side was perhaps entirely happy with, but that was considered appropriate. They saw the ICRC as having a number of objectives, and that “some of those are potentially competing in the discharge of its responsibilities. It will need to strike a balance.”¹⁷
- 3.44 ACTCOSS however stated that the utilities had a far greater capacity to influence a regulator or to challenge a decision stating that “the utilities will probably have enough money to go to the Supreme Court on questions of law if the stakes are high enough, but the capacity of community members to do that is extremely limited.”¹⁸
- 3.45 Yet ACTCOSS recognised the problems inherent in providing levels of open consultative processes within an independent regulator, stating that it is important that “in this utilities area you do not have an open slather. You cannot afford to have individual ratbags blowing apart your whole regulatory regime by repeated appeals and abuse of the process. But you have got to have some way of constructive public participation in the decision making and appeals from the decision making.”¹⁹

Draft Decisions by Regulators

- 3.46 The Committee is aware that not all jurisdictions have appeals mechanisms for utilities regulation. However the committee’s attention has been drawn to a need of both utilities and consumers to have more meaningful input into the decisions of the ICRC, whilst at the same time not compromising its independence and effectiveness.

¹⁷ Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Robertson p28

¹⁸ *ibid* Mr Sutherland p12

¹⁹ *ibid*

- 3.47 The Committee spoke to regulators in Western Australia who were using a process of issuing draft decisions for comment and considered it to be working effectively.
- 3.48 The Utilities Bill does provide for draft decisions in some circumstances, especially in relation to codes that are also disallowable instruments. Yet ACTCOSS considered this process to be much more effective in NSW, where IPART is required to release material to any interested party that the decision was based upon, and take additional submissions prior to the release of the final decision.
- 3.49 The Committee supports this approach, as it provides meaningful input with access to information by the public. At the same time, the Committee acknowledges the possibility that unusual situations may arise eg emergencies.

Recommendation 8

- 3.50 It is recommended that the Independent Competition and Regulatory Commission release most decisions in draft form for public comment, and that the ACT develop a process for this similar to that of the Independent Pricing and Regulatory Tribunal (IPART) in NSW, with public access to material and reasons upon which the decision was based.**

The New Legislation and the Administrative Appeals Tribunal

- 3.51 It is also of concern to both the utilities that the new regulatory framework will remove a number of rights that were available to them under the *Electricity Supply Act 1997* and the *Gas Supply ACT 1998* to appeal to the Administrative Appeals Tribunal (AAT) for a review of certain decisions.
- 3.52 ACTEW stated that electricity utilities would be losing the right to “appeal to the AAT for review of decisions made by the Minister in relation to granting, transferring or canceling a licence, or imposing or varying conditions of licence.”²⁰ Gas utilities would be losing rights of appeal to the AAT for:

²⁰ ACTEW Submission dated 13/6/00 p5

- “decisions of the Minister in relation to issuing or revoking an authorisation, or imposing conditions on authorisations;
- decisions of the Chief Executive to issue a sub-s 24(1) notice;
- decisions of the Gas Technical Regulator or an inspector to issue notices;
- decisions of an inspector to seize an object; or
- decisions of a gas pipeline operator to issue a notice.”²¹

3.53 It is considered by the Committee that to remove these rights, and not replace them with an alternative or substitute, is potentially unfair, as well as being a possible disincentive to new entrants, especially given the appeal rights for utilities in other states.

3.54 The committee has not received any evidence that the current regulatory regime contains appeals mechanisms that are viewed as being misused or are inappropriate.

Recommendation 9

3.55 It is recommended that the rights of utilities to appeal to the Administrative Appeals Tribunal (AAT) decisions of the Minister and regulatory bodies as specified under Section 35 of the *Electricity Supply Act 1997* and Section 59 of the *Gas Supply Act 1998*, be included in the Utilities Bill 2000.

3.56 There was also a broad concern about a perceived lack of ability of the public to appeal to the AAT or an equivalent body a range of decisions of the ICRC.

3.57 ACTCOSS stated that they were undecided about the form of any appeals body but gave the following options:

- Review by AAT
- An appeals mechanism specifically designed for the utilities industry
- Giving certain community groups or representatives standing before a court to resolve appeals.²²

²¹ *ibid*

²² Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Sutherland p13

3.58 The committee is of the view that the ICRC should produce a document outlining what information can:

- Be released in full to the public
- Be released in summary form to the public
- Not be released to the public
- Released by the government upon appeal to relevant bodies.

This document can provide a starting point for groups wishing to access material or appeal decisions under the new legislation.

3.59 The committee also recommends that wherever possible, the public be given the same rights to appeals to the AAT as utilities under the new legislation.

Recommendation 10

3.60 It is recommended that the public be given similar rights to utilities to appeal decisions of the Independent Competition and Regulation Commission (ICRC) to the Administrative Appeals Tribunal (AAT).

The Principle of Being Cost Reflective

3.61 This principle concerned the standard of services matching community expectations at a price that would enable the owners of the utilities to earn a fair return on their capital investment.

3.62 The Committee was presented with no firm analysis or information in relation to the potential costs of the implementation to utilities of the new regulatory regime.

3.63 ACTEW in their submission did however provide some estimates of the costs to their organisation, and stated that “compliance costs are likely to be considerable. ACTEW estimates that its annual costs of complying with the requirements of the new regime will run at around \$2 to \$3 million. It is likely, however, that the initial compliance costs will be higher than this, due to:

- (a) the costs of establishing the necessary internal procedures and systems for achieving and monitoring compliance under the new regulatory regime; and

- (b) the requirement for meeting improvement programs and aspirational standards built into instruments, forming part of the package, such as the Water Quality Code of Practice.”²³
- 3.64 The Committee was presented with no conclusive evidence of the potential impact of these costs of regulation on consumers.

Regulator Operational Costs

- 3.65 The Government said that in the long term it was envisaged that the regulator’s operational costs would be met by the licence fees payable by utilities.²⁴
- 3.66 The issue of whether there could be a perception of the regulator being seen to be dependent on licence fees, and therefore dependent on payments from one or two large utilities, was raised by the Committee. The Government was of the view that this would not occur, because the ICRC would perform a number of other functions funded for by budgetary means.²⁵ ACTCOSS stated that regulatory capture by industry was always a possibility, and had occurred in other states.²⁶
- 3.67 The Committee acknowledges that this issue needs to be watched once the legislation takes effect. The Committee appreciates that the ICRC will need to demonstrate that it is acting in the public interest and not with any narrow bias.

The Principle of Infrastructure Management

- 3.68 This principle is concerned with ensuring that the regulation will encourage capital investment and fair access to infrastructure to encourage competition and efficiency.
- 3.69 The utilities have stated that the concerns that they have raised in their submissions with the legislation may prove to be disincentives for new entrants into the market.
- 3.70 ACTEW said that “there is a risk that, notwithstanding the introduction of contestability, potential new utility players will be discouraged from

²³ ACTEW Submission dated 13/6/00 p3

²⁴ Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Robertson p31

²⁵ *ibid* Mr Hays p32

²⁶ *ibid* Mr Sutherland p16

entering the relatively small ACT market by the high compliance costs.”²⁷ However, ACTEW also stated that they regarded the legislation as workable, and the estimated costs as “manageable.”²⁸

- 3.71 AGL regarded the power of the ICRC to “exempt any entity from compliance with a licence condition or to impose licence conditions in a discriminatory manner between licencees” as “inappropriate in a competitive market.”²⁹ This issue has already been discussed at Paragraphs 3.16 to 3.23.
- 3.72 The Committee was presented with no substantial evidence stating that the standard of service would be affected by the new legislation.

The Principle of Being Outcomes Focused

- 3.73 This principle is concerned with the regulation achieving outcomes, without over prescribing processes on how to achieve them.
- 3.74 The evidence presented to the Committee seems to point to a concern by utilities that the new mandatory codes represented part of a fairly “heavy” regulatory regime. “Matters which were formerly conducted on a voluntary basis according to national codes, custom and industry practice and supplier specific initiatives will become subject to mandatory controls, such as the industry and technical codes.”³⁰
- 3.75 Certainly the impression the Committee has received is that utilities will be dealing with more mandatory regulation specifying how they conduct activities in this new legislation than previously.

Environmental Outcomes

- 3.76 In some areas, there was concern that the outcomes are not clear enough for the performance of utilities, especially in relation to that of environmental outcomes. The EDO said that the legislation did not contain targets for reduction of greenhouse emissions, or sufficient emphasis on demand

²⁷ ACTEW Submission dated 13 June 2000 p3

²⁸ Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Perkins p5

²⁹ AGL Submission p1

³⁰ ACTEW Submission dated 13 June 2000 p3

management. ACTCOSS recommended that utilities “be active in energy conservation strategies.”³¹

- 3.77 The Committee notes that it is important that further work is done to incorporate such outcomes and future targets in the Codes and Licences. The Committee considers it essential that the community should participate in the development of this.

Recommendation 11

- 3.78 It is recommended that, following passage of the legislation, improved performance outcomes for utilities be developed, especially in relation to the environment; and that full public consultation precede the introduction of such performance measures.**

The Principle of Transparency and Certainty

- 3.79 This principle states that the new utilities package should be clear, predictable and well understood by industry and consumers.
- 3.80 The Committee has heard evidence that the utilities package is a complex and far reaching set of documents, not easily digested by the ordinary consumer. ACTCOSS indicated that initially they had no easily identifiable source of expertise to devote to the analysis of the package. ACTEW stated that the package’s complexity was unprecedented in any other jurisdiction.
- 3.81 The Committee notes that the package is some 500 pages long, and that there has been a general view amongst the major stakeholders that time is needed to “absorb “ and “understand” all the parts of the package. The Committee also notes that the Government intends to develop and add further documents to the Utilities Package.
- 3.82 The Committee appreciates the observation by ACTCOSS stated that the Government had made a genuine attempt to consult, and that the public would probably not take a strong interest until implementation.³²

The Implementation of the Utilities Package

³¹ ACTCOSS Submission dated May 2000 p17

³² Transcript of Proceedings 21/6/00 - Uncorrected Proof Copy Mr Sutherland p20

- 3.83 The Committee is of the view that the implementation of the Utilities Package will be a large and complex task, and one that will require further development of policies, codes and technical processes. Further ongoing consultation with community and industry will continue to be needed in a meaningful, informed and genuine process.
- 3.84 To facilitate this, the Government needs to fund on-going consultation, and be committed to review the new legislation. The Committee also has noted the existence of a community advisory council at AGL, and is of the opinion that internal consultative mechanisms are desirable to encourage discourse between utilities and consumers.

Recommendation 12

- 3.85 It is recommended that the new legislation be closely monitored after it is introduced and, in particular, that the government advises the Assembly in writing of how the legislation is working after eighteen months has expired. This advice should incorporate comment from departmental officials, regulatory bodies, utilities, licence holders and consumers.**
- 3.86 The Committee notes that in respect of community consultation, it is considered appropriate to build on the existing level of expertise that ACTCOSS has developed in relation to the utilities package, and that they be given the opportunity to continue facilitating consultation on behalf of consumers and advocating in the public interest.
- 3.87 The Committee also notes that in NSW this is done through funding of the Utility Consumer's Advocacy Project, operating through the Public Interest Advocacy Centre, while in Victoria there is a Consumer Consultative Committee funded by the Office of Regulator General.
- 3.88 The Committee is mindful that resources are limited and recommends that funding for consultation be an ongoing component of the annual licence fees payable by utilities.

Recommendation 13

- 3.89 It is recommended that the Government continue to resource community consultation on the implementation of the Bills and Supporting Documents, and that the Government consider funding the**

ACT Council Of Social Services (ACTCOSS) to help conduct and facilitate community consultation, advocate in the public interest, help develop Codes and other technical instruments associated with the new legislation; and that funding for consultation be an ongoing component of the annual licence fees payable by utilities.

Recommendation 14

3.90 It is recommended that utilities be encouraged to establish consumer committees to provide advice and feedback on consumer issues, and to assist in the development of policies affecting consumers.

**Harold Hird MLA
Chair
July 2000**

APPENDIX 1. PRINCIPLES OF GOOD REGULATION

In the Statement of Regulatory Intent for Utilities in the ACT, the ACT Government sets out a number of principles of good regulation to guide their approach to the development of the new regulatory regime.

Descriptions of these seven principles are outlined below:³³

1. Consistency

The regulatory arrangements should apply to all industry participants regardless of whether the service provider is publicly or privately owned. Wherever practicable regulatory arrangements should be consistent with approaches in other jurisdictions. A generic approach will be adopted across the utilities sector that still allows the regulation to be tailored to suit the nature of the services provided and to meet specific ACT objectives.

2. Standard Setting

Regulatory standards should be set by Government and the ACT Legislative Assembly in accordance with community values and objectives.

3. Independent standards administration

Regulatory arrangements and standards should be independently administered and enforced.

4. Cost reflective

The standards of services should match community expectations at a fair price that enables the owners to earn a fair rate of return on their investment.

5. Infrastructure management

Regulatory arrangements need to ensure the necessary capital investment in the future management, maintenance and expansion of service capacity and

³³ *ACT Government: Statement of Regulatory Intent for Utilities In the ACT* p3

fair access to essential infrastructure to encourage competition and efficient use.

6. Outcomes focused

The regulatory regime should focus on outcomes rather than over prescribing ways of achieving outcomes.

7. Transparency and certainty

Regulations should be clear predictable and well understood by industry and consumers.

APPENDIX 2. THE UTILITIES BILL 2000 – SUMMARY AND EXPLANATION OF CONTENTS

This appendix lists the parts of the Utilities Bill 2000 and provides a brief summary of their functions, as outlined in the Bill’s Explanatory Memorandum.

Part 1 Preliminary

Part 2 Utility Services

This part primarily outlines the terminology that underpins the utility structures used in the Act.

Part 3 Licensing of Utilities

This part describes a scheme for the granting of utility licences by ICRC.

Part 4 Industry Codes

This part mainly provides for industry to put forward codes defining practices, standards and other matters relating to the operation of utility services for approval by ICRC.

Part 5 Technical Regulation

The Bill’s Explanatory Memorandum (p12) states that “technical codes are different from industry codes in that they only relate to performance and protection issues, and they prevail over industry codes to the extent of any inconsistency”.

Part 6 Access to Utility Services

This part deals with contracts and rights relating to the supply of utility services.

Part 7 Network Operations

This part deals with installation and work on network facilities and the role of authorised persons in relation to them.

Part 8 Protection of Networks

This part deals with interference with, and contamination of, networks.

Part 9 Controller's Power to Take Over Operations

This part establishes a procedure for action where provision of utility services is threatened.

Part 10 Enforcement

This part describes the powers of inspectors in relation to enforcement of ICRC's functions concerning utility services.

Part 11 Essential Services Consumer Council

This part establishes ESCC as a body to hear complaints about any utility service (and non-service issues such as access to premises by utilities).

Part 12 Complaints

This part deals with the complaints that may be brought to ESCC and the way ESCC can deal with them.

Part 13 Community Service Obligations

This part relates to the way utilities are to provide utility services in line with Government programs on matters such as community, social or environmental issues.

Part 14 Vicarious Liability

This part provides for matters such as liability and the state of mind of people who are companies are to be gauged for the purposes of the Act.

Part 15 Miscellaneous

APPENDIX 3. DRAFT SUPPORTING DOCUMENTS - APPLICATIONS AND PURPOSES

This appendix provides a summary of the purposes and applications of the 22 draft documents that support the Utilities Bill 2000 and the Utilities (Consequential provisions) Bill 2000. The majority of the documents were circulated for consultation by the ACT Government as part of the new utilities regulatory regime on 14 February 2000.³⁴

1. Benchmark Customer Contract

This document sets out the conditions of the contract under which the Utility provides Utility Services to a Customer's Premises.

It is part of the Utility's Standard Customer Contract.

This draft Standard Customer Contract applies to Franchise and Non-Franchise Customers unless the Customer and the Utility negotiate a separate contract.

2. Consumer Protection Code

The purpose of this Code is to:

- (1) outline the basic rights of a Customer or Consumer, as the case may be, in relation to:
 - (a) connection to, and disconnection from, a Utility's Network; and
 - (b) the supply by a Utility of electricity, gas, water and sewerage services;
- (2) set out the circumstances in which a Utility can interrupt, restrict or disconnect supply of a Utility Service to a Customer or Consumer.
- (3) Outline particular obligations that a Utility must adhere to in dealing with Customers or Consumers; and
- (4) Set out the provisions that a Utility must or may include in its Standard Customer Contracts with its Customers for the provision of electricity, gas, water and sewerage services.

³⁴ The 4 Gas codes were released for public comment on 22 June 2000.

3. Dam Safety Code

This Code applies to Water Utilities.

The purpose of this Code is to ensure Dams are properly managed in order to prevent unsafe operation and/or failure that can, in turn, cause loss of life and damage to property and the environment.

4. Drinking Water Quality Code of Practice

This document is intended to provide a framework for reporting and water quality management relating to the supply of drinking water in the ACT.

Operators of water systems (water utilities) are required to obtain a licence under the Public Health Act 1997 and that licence may include standard conditions. Licence holders are required to comply with this Code of Practice.

5. Electricity Contestable Work Accreditation Code

This Code applies to Electricity Distributors. The purposes of this Code are to:

- (1) require each Electricity Distributor to prepare an Accreditation Scheme or adopt an Approved Accreditation Scheme; and
- (2) set out those matters that must be included in an Approved Accreditation Scheme.

6. Electricity Distribution (Supply Standards) Code

This Code applies to Electricity Distributors.

The purpose is to prescribe minimum standards for the quality and reliability of electricity distributed through Electricity Networks.

7. Electricity Network Boundary Code

This code applies to Electricity Distributors.

The purpose of this Code is to define the boundary between:

- (1) a Transmission Network and an Electricity Network;

- (2) the Electricity Network of one person and the Electricity Network of another Person where those Electricity Networks are connected;
- (3) an Electricity Distributor's Electricity Network and a Customer's Premises.

8. Electricity Network Use of System Code

This Code applies to Electricity Distributors and to Electricity Suppliers.

The purpose of this Code is to impose an obligation on an Electricity Distributor and an Electricity Supplier (unless they are the same Person) to enter into a commercial agreement setting out the terms upon which Utility Services relating to the distribution of electricity are provided by the Electricity Distributor to the Electricity Supplier.

9. Electricity Service and Installation Rules Code

This Code applies to Electricity Distributors.

The purpose of this Code is to require Electricity Distributors to develop Service and Installation Rules that set out the requirements and associated obligations and procedures for the safe, reliable and efficient connection of Electrical installations to an Electricity Network.

10. Electricity Supplier of Last Resort Code

This Code applies to Electricity Distributors and Electricity Suppliers of Non-Franchise Customers.

The purposes of this Code are to set out those matters that:

- (1) relate to the provision by an Electricity Distributor or an Electricity Supplier of Supplier of Last Resort Services; and
- (2) must be addressed in each Standard Customer Contract, Negotiated Customer Contract and Standard Supplier of Last Resort Contract.

11. Franchise Customer Electricity Metering Code

This Code applies to Electricity Distributors and Electricity Suppliers of Franchise Customers.

The purpose of this Code is to set out those matters that relate to electricity metering and with which:

- (1) each Electricity Distributor must comply in providing Electricity Connection Services to Franchise Customers; and
- (2) each Electricity Supplier must comply in providing Electricity Supply Services to Franchise Customers.

12. Gas General Metering Code

The purpose of this Code is to set out those matters that relate to gas metering and with which:

- (1) each Gas Distributor must comply in providing Gas Connection Services to Customers; and
- (2) each Gas Supplier must comply in providing Gas Supply Services to Customers.

13. Gas Network Boundary Code

The purpose of this Code is to define the boundary between:

- (1) a Gas Transmission Network and a Gas Distribution Network
- (2) the Gas Distribution Network of one Person and the Gas Distribution Network of another person, where those Gas Distribution Networks are connected;
- (3) a Gas Distributor's Gas Network and a Customer's Premises.

14. Gas Network Code: 1-10 TJ Market

This Code documents certain important elements of the relationship between Gas Distributors and Gas Suppliers operating in the ACT to support the introduction of a competitive natural gas market for Customers with annual loads of 1-10 terajoules.

15. Gas Safety and Operating Plan Code

This Code applies to the operator of a Gas Transmission Network or a Gas Distribution Network in relation to the transmission and distribution of natural gas.

16. Management of Electricity Network Assets Code

This code applies to Electricity Distributors

The purpose of this Code is to require Electricity Distributors to design, construct, operate and maintain their Electricity Networks with reasonable care to avoid injury to any person or property.

17. Utility Services Licence

This Licence confers on the Licensee the right to provide a Utility Service.

18. Water and Sewerage Network (Design and Maintenance) Code

This Code applies to Water Utilities and Sewerage Utilities.

The purpose of this Code is to prescribe minimum standards for the design, construction, operation and maintenance of Water Networks and Sewerage Networks.

19. Water and Sewerage Network Boundary Code

This Code applies to Water Utilities and Sewerage Utilities.

The purpose of this Code is to define the boundary between:

- (1) Water Networks
 - (a) the Water Network of one Person and the Water Network of another Person; and
 - (b) a Water Utility's Water Network and a Customer's Premises.
- (2) Sewerage Networks
 - (a) the Sewerage Network of one Person and the Sewerage Network of another Person
 - (b) a Sewerage Utility's Sewerage Network and a Customer's Premises.

20. Water and Sewerage Service and Installation Code

This Code applies to Water Utilities and Sewerage Utilities.

The purpose of this Code is to require Water Utilities and Sewerage Utilities to develop Service and Installation Rules that set out the requirements and associated obligations and procedures for the safe, reliable and efficient connection of a Customer's Premises to a Water Network and a Sewerage Network.

21. Water and Sewerage Service Standards Code

This code applies to:

- (1) water supplied within the urban area identified by the Territory Plan; and
- (2) Water Utilities and Sewerage Utilities.

The purpose of this Code is to prescribe minimum standards:

- (1) for quality and reliability of water supply distributed through Water Networks; and
- (2) for the provision of Sewerage Services, including the removal of sewerage from Customer's Premises through Sewerage Networks.

22. Water Metering Code

This Code applies to Water Utilities.

The purpose of this code is to set out those matters that relate to water metering

APPENDIX 4. ACRONYMS

AAT	Administrative Appeals Tribunal
ACTCOSS	ACT Council of Social Service Inc
ACTEW	ACTEW Corporation Ltd
COAG	Council of Australian Governments
EDO	Environmental Defender's Office ACT Inc
ESCC	Essential Services Consumer Council
ICRC	Independent Competition and Regulatory Commission
IPART	Independent Pricing and Regulatory Tribunal (NSW)
NEM	National Electricity Market