

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**STANDING COMMITTEE FOR THE CHIEF MINISTER'S
PORTFOLIO
(INCORPORATING THE PUBLIC ACCOUNTS COMMITTEE)**

REPORT ON

AN INDEPENDENT COUNCIL ON COMPETITION POLICY

Portfolio Committee Report No 1
October 1998

RESOLUTION OF APPOINTMENT

The Standing Committee for the Chief Minister's Portfolio was appointed by the Legislative Assembly on 28 April 1998 to examine any matter under the responsibility of the Chief Minister's portfolio. The Assembly also resolved that the committee perform the duties of a public accounts committee, specifically:

- (a) to examine:
 - (i) the accounts of the receipts and expenditure of the Australian Capital Territory;
 - (ii) the financial affairs of authorities of the Australian Capital Territory; and
 - (iii) all reports of the Auditor-General which have been laid before the Assembly;
- (b) to report to the Assembly, with such comments as it thinks fit, on any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed; and
- (c) to inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question.

MEMBERSHIP OF THE COMMITTEE

Mr Ted Quinlan MLA Committee Chair

Mr Trevor Kaine MLA Deputy Committee Chair

Mr Greg Cornwell MLA

Secretary: Bill Symington

1. INTRODUCTION

1.1. On 24 June 1998 the Assembly resolved that:

This Assembly, noting the likely impact of deregulation of the Canberra Milk industry and the impact of the National Competition Policy Agreement on other industries:

- (1) strongly endorses any move to establish an independent council to monitor, review and make recommendations to the Assembly on all aspects of the implementation of National Competition Policy;
- (2) calls on the Government to support the establishment of such a council and to consult with and consider the views of the Standing Committee for the Chief Minister's Portfolio in relation to possible appointees to the council before any such appointments are made;
- (3) further requires the Carnell Government to mount a full and vigorous defence of the ACT Milk Industry by taking the strongest possible action to prevent the distribution of milk outside the authority of the ACT Milk Authority until such time as the possible deregulation of the industry has been considered in the light of the National Competition Policy; and
- (4) requires the Chief Minister to report to the Assembly by the last sitting day in August 1998 with a proposed model for such a council including a defined role, accountability arrangements and resource issues.

Proposed independent council on competition policy - Chief Minister's Statement

1.2. On 27 August 1998 the Assembly referred to the committee for inquiry and report a Ministerial statement by the Chief Minister concerning the implementation of an independent council on competition policy.

1.3. The Chief Minister's statement (Attachment 1), proposed the Independent Pricing and Regulatory Commission established under the Independent Pricing and Regulatory Commission (IPARC) Act 1997¹ as the best model for an independent council which would be known as the

¹ Chief Minister, Statement on the implementation of an independent council on Competition Policy, 27 August 1998, p5

Independent Competition and Regulatory Commission (ICRC).² It is implicit in the Chief Minister's statement that the price regulation functions of the Independent Pricing and Regulatory Commission would continue within the ICRC.

1.4. The Chief Minister's statement also stated that the ICRC should be characterised by:³

- independence from direct influence of Government, Ministers or Members of the Legislative Assembly
- capacity to receive references from the Government, Members of the Assembly, the administration and the community or to self refer
- capacity to initiate inquiries, including public inquiries
- accountability for its outputs including exposure to the accountability mechanisms of the Assembly
- responsibility toward the Government's position on issues
- linkages with national regulatory bodies
- skills and experience relevant to its functions
- capacity to consult across a broad spectrum
- capacity to exercise judgement free of conflicts of interest

1.5. The Chief Minister proposed amendment of the IPARC Act to give effect to the characteristics in paragraph 1.4 above and, further, to provide for:⁴

- the transfer to the ICRC of regulatory functions and the competitive neutrality complaints function from within the Chief Minister's Department
- a small ICRC secretariat

1.6. The statement proposed that the ICRC be a single, part-time commissioner and would assume responsibility for handling competitive neutrality complaints.⁵

² *ibid*, p7

³ *ibid*, pp3,4

⁴ *ibid*, pp5,6

⁵ *ibid*, pp7 and 6

1.7. The committee had the benefit of a detailed briefing on the Chief Minister's statement by officers of the Chief Minister's Department.

Competition Policy Forum

1.8. The ICRC is intended to replace the existing Competition Policy Forum the function of which has been to provide ongoing monitoring and advice to government on the implementation of competition policy. The ICRC would have a significant range of powers to make determinations, to review practices and to seek resolution of competitive neutrality complaints.

1.9. It is not the committee's intention to comment in this report on the issues relating to the operations of the Forum except to observe that it has had limited resources for undertaking in depth consideration of competition policy issues as they affect the ACT community, has lacked legislative powers to investigate emerging issues of concern and the government had not referred matters to it.

2. THE ISSUES

2.1. The issues before the committee were:

- (i) whether the ICRC would be an appropriate agency for adjudicating competition neutrality issues and effectively discharging the role of regulator, across a wide spectrum of commercial activities
- (ii) whether the ICRC should be a single commissioner or comprise a representative council
- (iii) the accountability of the ICRC to the Assembly and to the wider community.

3. CONSIDERATION OF THE ISSUES

3.1. The Chief Minister noted an expectation within the Assembly and the community that reforms aimed at producing a more competitive, efficient economy should always be tested to ensure the overall impact is positive and that, in developing the model for an independent (competition and regulatory) council, those characteristics outlined in paragraph 1.4 above would address the balance between the need for:⁶

⁶ *ibid*, pp2,3

- lower prices
- more choice
- better customer service
- a broader range of products
- cost efficient, effective and consistent regulatory services
- independence of the regulator

3.2. Implicit in the Chief Minister's statement was that the regulatory process should be open to the point that justice should be done and appear to be done.

Appropriateness and capacity of the proposed ICRC for adjudicating competition neutrality issues across a wide spectrum of commercial activities

3.3. The existing pricing regulator is a single commissioner responsible for promoting effective competition, facilitating a balance between efficiency and environmental and social considerations and ensuring non-discriminatory access to monopoly and near monopoly infrastructure⁷ in order to give price directions, recommend prices regulation, arbitrate disputes on and advise the Minister about access agreements and investigate matters referred by the Minister.⁸

3.4. In practice, the pricing regulator examines and adjudicates on the prices proposed to be charged by ACTEW for electricity, water and sewerage services and in so doing establishes such prices on a fixed basis.

ICRC role and function

3.5. The Chief Minister's proposal would see the ICRC acquiring a role and function well beyond that of the pricing regulator to embrace the responsibility of also inquiring into competitive neutrality complaints, such complaints being referred by the Government, by the Assembly, by other community bodies or by commercial interests. The ICRC would also have the power to initiate its own inquiries where appropriate.

⁷ Independent Pricing and Regulatory Commission Act 1997, section 7

⁸ *ibid*, section 8

3.6. The committee has no in principle objection to the ICRC incorporating the function of the pricing regulator as well as the additional responsibilities outlined above. However, the committee considers the pricing regulator should remain as a separate entity with the specific role of undertaking those inquiries directly related to pricing and related market activities by monopoly and near monopoly enterprises and, in particular, prices proposed to be charged by ACTEW.

Accessibility

3.7. The committee notes that the ICRC would have the capacity to receive references from the government, from Members of the Assembly, from the administration and the community and that it also have the capacity to initiate its own inquiries.

3.8. The committee generally supports the proposed path for references to the ICRC although it has reservations regarding references by the administration. The committee considers that any matter proposed to be referred by the administration should be referred through the government with due notification to the Assembly.

3.9. The committee supports references directly to the ICRC by the community. However, in order to avoid frivolous inquiries or those which lack substance, the ICRC should assess the merits of community based references against specific criteria. These criteria should include a public interest test against which the ICRC could justify an inquiry which might not otherwise meet the general criteria.

3.10. Where the ICRC accepts a community or non-government agency reference it should notify the Assembly.

3.11. With regard to self referral, the committee expects that the ICRC would satisfy itself that grounds exist for an inquiry. As with other ICRC inquiries, the committee considers the ICRC should notify the Assembly of any self-referred inquiry.

Structure and membership of the ICRC

3.12. As noted in paragraph 1.6 above the Chief Minister proposes that the ICRC comprise a single commissioner.

3.13. The committee, however, has interpreted the resolution of the Assembly of 24 June 1998 as seeking an independent council structured so as to access a wider spectrum of community views, experience and perspectives on all aspects of the implementation of national competition policy. Such a council would require a broad representation and the committee does not consider that the ICRC in the form of a single commissioner as proposed could be expected to meet this requirement.

3.14. The committee observes that a single commissioner, as is presently the case with the pricing regulator under the IPARC Act, is required to follow a formula approach in examining pricing matters on a fixed position. The committee considers that it would be difficult for a single commissioner ICRC to avoid subjective overtones in dealing with complex competition issues. As importantly, any public perception of subjectivity by having a single commissioner should be avoided.

3.15. Officials suggested to the committee that a single commissioner ICRC guided by appropriate criteria would be no different than, say, three commissioners in dealing with competitive neutrality issues.

3.16. The committee has difficulty in accepting this view. Among other things, the ICRC should have an advisory function and, in that regard, will need to be equipped to assess relevant government policy, articulate national competition issues, consult with affected community interests and endorse policy initiatives as necessary.

3.17. An effective ICRC should be representative of community interests. Further, as indicated in paragraph 3.6 above, the ICRC should also include the pricing regulator as a separate entity. The pricing regulator would undertake inquiries directly concerned with pricing and related market activities by monopoly and near monopoly enterprises and, in particular, prices proposed to be charged by ACTEW. Accordingly, the committee proposes an alternative membership structure for the ICRC.

3.18. The committee considers the ICRC should comprise five commissioners representative of the community/consumers, large and small business and employees and that the chair should be a person with community standing.

3.19. The committee recommends a structure where one commissioner functions as the pricing regulator, dealing with pricing and related market activities by monopoly and near monopoly enterprises as is presently the case under the IPARC Act. This commissioner would also participate in ICRC deliberations on competition policy and competitive neutrality issues.

3.20. There should be considerable benefit arising from the cross fertilisation between the roles of the pricing regulator and that of the commissioners dealing with competition policy and competitive neutrality issues.

ICRC costs

3.21. Chief Minister's Department officials advised the committee that the annual operating expenses for the ICRC would be about \$300,000 (for three staff and one part-time commissioner). The secretariat would be independent of the Department. The committee notes that these costs would be marginally higher with an ICRC comprising five part-time commissioners instead of one part-time commissioner.

3.22. The Department proposed that regulated industries meet the costs associated with price and access inquiries. The committee notes that this is the case with inquiries by the pricing regulator and considers this situation should continue.

3.23. The Department also indicated that persons or agencies initiating an inquiry by the ICRC into competition policy matters would be required to meet the costs involved in the inquiry. (Inquiries initiated by Members of the Assembly were excluded from this provision). The committee is not attracted to this proposition. It would impose an economic penalty on those persons or agencies concerned enough to progress a matter with the ICRC. As importantly, the concept could well act as a disincentive for persons or agencies to progress with the ICRC matters of vital Territory interest and concern.

3.24. The committee would expect that the ICRC in accepting any reference for inquiry would do so on the basis of the public and/or the Territory interest. Accordingly, the committee does not consider it appropriate for costs involved to be charged to the person or agency which initiated the inquiry. The costs of any such inquiries would add marginally to the operating cost estimate provided by officials.

3.25. Schematic representations of the proposed ICRC functions, relationships with stake holders and its deliverables provided by the Chief Minister's Department are at attachment 2. Also included in attachment 2 are details of establishment and annual operating costs of the ICRC. As noted above, these estimates are based on a single commissioner ICRC.

ICRC Accountability

3.26. The committee notes the intention that arbitration and appeal provisions on pricing and access issues are to be addressed in the context of legislative amendments.⁹ The committee accepts the desirability of such provisions in relation to pricing issues.

3.27. The committee considers that all ICRC reports would be presented to the Assembly. The Assembly should determine action to be taken on findings and recommendations contained in ICRC reports dealing with competition policy and competition neutrality matters. The capacity would therefore exist for any report of the ICRC to be reviewed by the Assembly or one of its committees.

3.28. The committee notes the intention that the ICRC would be accountable for the quality of its outputs including exposure to accountability mechanisms of the Assembly on the results of its inquiries and that it would liaise with and report to inter governmental forums. The ICRC pricing regulator would also issue pricing determinations in respect to the regulated industries.

3.29. The committee is satisfied that the proposed level of reporting, enhanced by the additional reporting arrangements for notifying the Assembly of inquiries outlined above in the section of this report dealing with accessibility should ensure an appropriate level of accountability by the ICRC.

4. CONCLUSIONS

4.1. The committee is satisfied that the ICRC, incorporating those changes recommended in this report, would be an appropriate independent body capable of identifying the public interest through the investigation of competitive neutrality complaints across a broad spectrum of activities of direct relevance to the ACT.

4.2. In summary, the main changes sought by the committee are that:

- (i) the ICRC should comprise five commissioners, including the pricing regulator, broadly representative of the community to ensure that it is equipped to consult widely in assessing the implications and effects of competition policy issues
- (ii) the pricing regulator should function as a separate entity within the ICRC

⁹ Chief Minister's Statement, op cit, pp8,9

- (iii) there be defined criteria for the ICRC to assess Territory and the public interest in accepting references for inquiries from individuals and non-government bodies
- (iv) there be appropriate reporting arrangements for the ICRC.

5. RECOMMENDATIONS

5.1. The committee recommends that the government:

- (1) brings forward to the Assembly amendments to the Independent Pricing and Regulatory Commission Act 1997 to provide for:**
 - (a) the establishment of an Independent Competition and Regulatory Commission (ICRC) to:**
 - (i) continue the functions of the existing pricing regulator, as currently provided in the Act, as a separate entity within the the ICRC**
 - (ii) monitor the implementation of competition policy; and**
 - (iii) inquire into and resolve issues of competitive neutrality and the implementation of competition policy;**
 - (b) the ICRC to comprise five members, including the pricing regulator, representative of the community/consumer interests, large and small business and employees and that it be chaired by a person with appropriate standing within the ACT community;**
 - (c) the ICRC to inquire into any matter relating to competitive neutrality or the implementation of competition policy referred to it by the government or the Assembly, and for the Assembly to be notified of any matter referred to the ICRC by the government;**
 - (d) any individual or non-government body to initiate a request to the ICRC to inquire into any matter relating to competitive neutrality or the implementation of competition policy and for the ICRC to:**
 - (i) assess the merits of any such request against defined criteria;**
 - (ii) assess whether the Territory or the public interest would benefit from an inquiry;**

- (iii) undertake any inquiry arising from within its own financial resources; and
 - (iv) inform the Assembly of any matter accepted for inquiry;
- (e) the ICRC to initiate and to inform the Assembly about any inquiry it initiates;
- (f) the ICRC to present to the Assembly:
 - (i) reports on inquiries by the pricing regulator, for information;
 - (ii) reports on inquiries into competitive neutrality issues or the implementation of competition policy for consideration by the Assembly; and
 - (iii) an annual report on its the operations.
- (g) the ICRC to inform the Assembly on a periodic basis of requests for inquiry into competitive neutrality or the implementation of competition policy matters which it does not accept for inquiry; and
- (h) appropriate avenues for arbitration and/or appeal in respect of decisions by the ICRC pricing regulator; and
- (2) consult with the Standing Committee for the Chief Minister's Portfolio on proposed appointments to the ICRC.

Ted Quinlan MLA
Chair

ATTACHMENT 1

Attachment 1 is not available in electronic format. Please contact the Committee Office on (02) 6205 0127 if you would like a copy of it.

ATTACHMENT 2

Attachment 2 is not available in electronic format. Please contact the Committee Office on (02) 6205 0127 if you would like a copy of it.