REVIEW OF INSTITUTIONAL ARRANGEMENTS FOR

ACTEW CORPORATION LIMITED (ACTEW)

DECEMBER 2013

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Enquiries about this publication should be directed to:

Phil Liddicoat
Email: Phil.Liddicoat@act.gov.au
Phone: (02) 6207 0251
ACTEW Corporation Limited – Review of Institutional Arrangements Commerce and Works Directorate
GPO Box 158, Canberra City, ACT, 2601

Disclaimer

This report has been prepared by Dr Bruce Cohen at the request of the ACT Government in accordance with the Terms of Reference.

The information, statements, statistics and commentary contained in this report have been prepared by Dr Cohen from publicly available material and from material provided by the ACT Government, key stakeholders and from publicly invited submissions. Some of the material contained in the report has been verified with the parties concerned.

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Ms Katy Gallagher MLA
Chief Minister
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

Mr Andrew Barr MLA
Deputy Chief Minister and Treasurer
ACT Legislative Assembly
London Circuit
CANBERRA ACT 2601

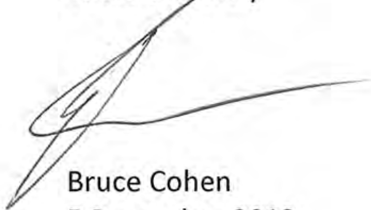
Dear Chief Minister and Deputy Chief Minister

Review of Institutional Arrangements for ACTEW Corporation Limited (ACTEW)

In accordance with the Terms of Reference for the *Review of Institutional Arrangements for ACTEW Corporation Limited (ACTEW)*, I am pleased to submit to you the Review's final report.

It has regard to written submissions from a number of organisations and individuals as well as consultations with senior representatives of ACTEW, the ActewAGL joint venture and across the ACT Government. The views of external bodies such as the National Capital Authority and the Queanbeyan City Council were also sought.

Yours sincerely



Bruce Cohen
5 December 2013

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Acknowledgements

I would like to acknowledge and thank all those who have participated in this Review process for the assistance provided, knowledge shared and openness demonstrated as I worked through the issues pertaining to the Review's Terms of Reference. I would particularly like to thank Dr Michael Easson AM and Mr Mark Sullivan AO for their valuable input, and also for facilitating my access to ACTEW's board, staff and facilities.

I have also benefited greatly from the input provided from across the entire ACT Government, from the ActewAGL joint venture partners and management, and also from members of the Canberra community with a keen interest in the institutional structures and regulatory frameworks through which their utility services are delivered.

Finally, I would like to express my appreciation for the Secretariat support provided by the Commerce and Works Directorate of the ACT Government, and in particular the tireless efforts of Mr Phil Liddicoat.

Bruce Cohen
December 2013

ACT Government
Commerce and Works

Terms of Reference

Review of Institutional Arrangements for ACTEW Corporation Ltd (ACTEW)

The Government is commissioning a review of the Territory's institutional arrangements for ACTEW.

ACTEW delivers water and sewerage services to the ACT and its region. It also holds the interests in both the energy retail and distribution partnerships that form the ActewAGL joint venture. Water, sewerage and some energy prices are set within the ACT by the Independent Competition Regulatory Commission (ICRC). There is a significant level of policy and operational interaction between ACTEW and ACT Government Directorates.

These arrangements have been in place for some years and this review is the opportunity to examine whether they continue to be appropriate and reflect best practice

The review will examine, and provide recommendations on, potential approaches which could:

- improve the existing arrangements and structures (both legal and regulatory) under which ACTEW operates;
- enhance the process of setting specific goals and objectives for ACTEW, including the potential prioritisation of commercial, social and environmental objectives; and
- enhance communication and accountability mechanisms operating between ACTEW and ACT Government Directorates.

Should the review contemplate any changes to the structure of ACTEW Corporation Ltd the review should provide recommendations on the most appropriate entity to hold ACTEW's 50 per cent interests in the partnerships that form the ActewAGL joint venture.

This review does not, however, extend to reviewing the structure of the ActewAGL joint venture itself.

The review should have regard to, and may make comment on, all relevant legislation and competition policy principles.

Consultation: The review should seek the views of key stakeholders and other interested parties in the community. A public call for submissions would be appropriate to facilitate this outcome.

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Abbreviations and Acronyms

$	Australian dollars unless otherwise stated
ACAT	ACT Civil and Administration Tribunal
ACT	Australian Capital Territory
ACTEA	ACT Electricity Authority
ACTEW	ACTEW Corporation Limited
ACTEWA	Australian Capital Territory Electricity and Water Authority
ACTIA	ACT Insurance Authority
AGL	Australian Gas Light Company
CIT	Canberra Institute of Technology
CMAG	Canberra Museum and Gallery
CMTD	Chief Minister and Treasury Directorate
COAG	Council of Australian Governments
CPA	Competition Principles Agreement
CSA	Corporate Services Agreement
CSCSA	Customer Services and Community Support Agreement
CSD	Community Services Directorate
CSOs	Community Service Obligations
CTP	Compulsory Third Party
CWD	Commerce and Works Directorate
ECD	Enlarged Cotter Dam
EDD	Economic and Development Directorate
EPA	Environment Protection Authority (ACT)
EPC	Exhibition Park Corporation
ESDD	Environment and Sustainable Development Directorate
ETD	Education and Training Directorate
GBE	Government Business Enterprise
GL	Gigalitres (1 billion litres)
HD	Health Directorate

ICRC	Independent Competition and Regulatory Commission (ACT)
JCSD	Justice and Community Safety Directorate
JV	Joint Venture
LDA	Land Development Agency
LMWQCC	Lower Molonglo Water Quality Control Centre
M2G	Murrumbidgee to Googong Water Transfer Pipeline
ML	Megalitres (1 million litres)
na	not applicable
NCA	National Capital Authority
NPAT	Net Profit after Tax
NSW	New South Wales
NT	Northern Territory
NTER	National Tax Equivalent Regime
NWC	National Water Commission
NWI	National Water Initiative
PwC	PricewaterhouseCoopers
Qld	Queensland
SA	South Australia
TAMS	Territory and Municipal Services Directorate
Tas	Tasmania
TOC	Territory-owned corporation
TransACT	TransACT Communications Pty Ltd
UMA	Utilities Management Agreement
Vic	Victoria
WA	Western Australia
WAE	Work as Executed
WSMP	Water Security Major Projects

Executive Summary and Recommendations

The Task

ACTEW Corporation Limited (ACTEW) is the Australian Capital Territory's (ACT) largest publicly owned entity. Practically every household and business operating in the ACT interacts with ACTEW, or the ActewAGL joint venture in which it is a key participant, on a daily basis.

The purpose of this Review is to provide recommendations on potential approaches which could:

- improve the existing arrangements and structures (both legal and regulatory) under which ACTEW operates;
- enhance the process of setting specific goals and objectives for ACTEW, including the potential prioritisation of commercial, social and environmental objectives; and
- enhance communication and accountability mechanisms operating between ACTEW and ACT Government Directorates.

The Terms of Reference also require that should the Review contemplate any changes to the structure of ACTEW it should provide recommendations on the most appropriate entity to hold ACTEW's 50 per cent interests in the partnerships that form the ActewAGL joint venture. This Review does not, however, extend to reviewing the structure of the ActewAGL joint venture itself.

Reform of ACTEW's institutional arrangements

ACTEW is a *Corporations Act 2001* (Cth) (Corporations Act) company that is also regulated pursuant to the *Territory-owned Corporations Act 1990* (ACT) (TOC Act). It is directly involved in the provision of water and sewerage services, and has an indirect involvement in the provision of energy services through its interests in the ActewAGL joint venture. Its interests in the ActewAGL joint venture are held through two wholly owned subsidiaries that are also Corporations Act companies – ACTEW Retail Ltd and ACTEW Distribution Ltd.

ACTEW's current institutional arrangements are in part the product of the distinct natural and demographic characteristics of the ACT, and the nature of its historical development. They also derive heavily from the policy environment that operated during the 1990s – ACTEW's current structure formed in the context of a complex and passionate debate as to the benefits of competition, the potential for privatization and the support which existed for ongoing public ownership of the ACT's water, sewerage and energy assets.

The structures put in place have served the ACT for nearly a decade and a half. In that time there have been issues of concern and controversy. Some of these are ongoing. Yet in terms of its core responsibilities, ACTEW has generally fulfilled its

role of providing a safe and secure supply of water, and ensuring effective sewage transfer and treatment. Further the ActewAGL joint venture in which its hold a 50 per cent interest has operated profitably, and continues to be the major provider of energy services to the ACT community. As such, the circumstances in which this Review is being undertaken are not of apparent imminent crisis requiring drastic and dramatic reform.

In recent times ACTEW has gone through a period of considerable activity and change – having only recently completed major investments in water security infrastructure and taken back control for the direct provision of water and sewerage services. Together, these activities have necessitated a major organisational redesign. There is some benefit in allowing these changes to be bedded down, and to give ACTEW the opportunity to demonstrate their effectiveness.

At the same time, however, there is also a range of factors which provide impetus for reform of ACTEW's current institutional arrangements.

First, regard needs to be given to the nature of the industries in which ACTEW operates or holds an interest. While some structural elements of the water and sewerage sector and the energy industry are similar, as too are aspects of their regulatory frameworks, it is also the case that energy services are provided in a competitive environment, and one in which the participants are predominantly from the private sector.

By contrast, the nature of the water industry, and its predominant public ownership in Australia, suggests a role for a government owned entity different from that applicable to a participant in the energy industry. Water has a particular focus for the Australian community having regard to our historically variable climate, and particularly so for the ACT as an inland territory situated within the Murray Darling Basin. This in turn suggests institutional arrangements should also differ – for example, to enable more regard to be given not only to issues of commerciality but also to other broader environmental and social objectives.

Secondly, much has changed to the environment in which ACTEW delivers it services since it was first established. The ACT population has grown – for example, from just over 315,000 in 2000 to just under 375,000 in 2012 (ICRC, 2013c:65). While ACTEW operates in a relatively small market place by Australian standards, and one more likely than larger urban areas to benefit from such economies of scale and scope as may arise from combining energy with water and sewerage activities, this growth means that on their own water and sewerage services are now more able to be provided at or above minimum economies of scale than was the case in the earlier years of the ACT's development.

Separately, concern for environmental issues has increased over the past decade, in part driven by the experiences of the Millennium Drought. Amongst other things, this drought has also led to significant new investments in water supply infrastructure. Together these events have focused greater community attention on water service provision. In turn, they have highlighted the importance of having

institutional structures in place which are focused on effective decision making with respect to investments and operations in the water sector.

The energy sector too has seen significant change. Since ACTEW was first corporatized, the industry has moved from a state and territory based industry structure to a far more nationally oriented one. Participants in the industry have reorganized – with widespread privatization, and disaggregation of distribution from retail and generation activities. Such changes can be seen clearly in the ACT, where ACTEW now holds its interests in the ActewAGL joint venture together with two private sector participants – AGL and Jemena.

While all of these changes are relevant in of their own right, in terms of factors contributing to the impetus for reform perhaps the most important change is ACTEW's recent decision to take back responsibility for the operation of its water and sewerage assets from the ActewAGL joint venture.

In and of itself, such a step is consistent with efficiency benefits being best able to be achieved by ACTEW through the direct management of those water and sewerage assets, rather than in combination with energy assets. Further, while there may be some synergies between water, sewerage and energy service provision, this action also indicates there is capacity to extract at least some, if not most, of these benefits through means other than institutional integration – for example through the contracting of services, as now occurs. Similarly, where benefits may continue to arise from sharing commercial expertise and jurisdictional knowledge, particularly at the board level, this does not of itself require institutional integration – there is nothing to preclude, for example, individuals serving on multiple boards, and allowing each organisation to benefit from their relevant skills and expertise.

Whether or not influential to ACTEW's decision to take back responsibility for water and sewerage operations from the joint venture, another key factor supporting change is the relatively poor returns generated by ACTEW's water business in recent years. While myriad factors can be said to have influenced this outcome – many of which may have been beyond ACTEW's control – its water business only just broke even in the 2012-13 financial year, and in the previous two years suffered losses. Given the higher gearing levels ACTEW now faces, this outcome suggests there would be benefit in establishing an entity responsible solely for the provision of water and sewerage services, so as to allow it to focus on enhancing this financial performance, and also to better enable the community to see clearly how this business is performing.

Looking forward, there are also a number of environmental factors which are likely to be relevant. Ongoing population growth, for example, can be anticipated to enhance economies of scale with respect to water and sewerage service provision. There is also potentially greater uncertainty in both water and energy sectors, due to climate variability and technological change, which in both instances means entities responsible for providing the respective services would likely benefit from greater clarity of focus for management.

While such factors suggest there is reason for reform, any consideration of new institutional arrangements also needs to have regard to a variety of financial factors, including transitional costs, ongoing costs and the effects of reform on dividends. In considering these factors, however, it is noted that it is beyond the scope of this Review to undertake a detailed business case with respect to any potential reform option, and as such the assessment of these matters is necessarily general in nature.

Transitional costs are difficult to estimate, as they will depend on how reform is to occur. The potential for such costs to be significant should not be underestimated, and in considering specific reform options regard needs to be given to simplicity so as to minimise these costs as far as possible.

In relation to ongoing costs, if separate entities are created there are likely to be a range of corporate costs that will need to be borne. Where there are two separate entities, these costs would ordinarily be anticipated to increase. It is important to recognise, however, that there are already costs being incurred by ACTEW with respect to managing its interest in the ActewAGL joint venture. In 2012-13 this was estimated to be $15.3 million, although it appears by far the largest proportion of this related to allocated debt financing costs. Any additional corporate overhead costs in a new entity could be expected to be offset, at least in part, from reduced overhead costs in the water and sewerage business. Also relevant is the need to recognise that the ACT's investment in the ActewAGL joint venture is a significant one. Under the joint venture arrangements, ACTEW's role is not simply that of a holding company but also that of a partner (e.g. through its wholly owned subsidiaries). These interests need to be managed as such, and this requires resources to be allocated so as to ensure decisions are made on an ongoing basis with appropriate knowledge, experience and expertise. To do otherwise risks being a false economy. Making the costs of managing the ACT's interests in the ActewAGL joint venture more explicit will also assist in future decision making with respect to these assets.

Finally, in relation to the effect of reform on dividends, this too is uncertain. It will depend upon a range of factors including the levels of debt allocated to any new or reformed entities, the outcome of ACTEW's appeal of the ICRC's most recent pricing determination with respect to water and sewerage services, and the extent to which greater focus will facilitate improved financial performance. In part, such outcomes will in turn depend on the manner in which any reform occurs. Hence the level of borrowing allocated to an entity holding the ACT's interests in the ActewAGL joint venture may depend on the valuations placed on these interests, which may be subject to revision if transferred to a new entity. This is because the book value of some of these assets appears to be below net realizable value due to the application of the relevant Australian accounting standards. However, it is beyond the scope of this Review to determine whether a transfer of these assets to a new entity may enable a different value to be ascribed to these assets.

Separation of the water and sewerage business from the holding of interests in the ActewAGL joint venture

On balance, having regard to all of the factors outlined above and in particular ACTEW's decision to take back control of its water and sewerage operations, the Review believes the circumstances are appropriate for the ACT to reform ACTEW's current institutional arrangements.

Specifically, the Review considers it would be beneficial if ACTEW's water and sewerage business was established in an entity separate from that which holds the interests in the ActewAGL joint venture. Such a change would reduce any confusion that exists in the community as to the roles and responsibilities of ACTEW relative to that of the ActewAGL joint venture. More importantly, it would enable management given responsibility for water and sewerage to focus firmly upon these activities. For this reason, this Review also does not regard it as beneficial for management responsibilities across the two new entities to be undertaken by the same people. Such an approach is inconsistent with ensuring a clear focus for each organisation, and risks institutionalizing potential conflicts. However, having regard to the various synergies which have been discussed above, and skills and corporate knowledge that exist within the ACTEW board, the Review does consider there would be benefit if there was some ongoing common board representation – particularly through any transitional period.

In forming this view it must be noted, however, that the Review's Terms of Reference precluded reviewing the structure of the ActewAGL joint venture. As such, there are some limitations on the extent to which the Review has been able to assess in detail the costs and benefits of ACTEW's current structure to the joint venture itself, and more specifically, the extent to which they are dependent on the current structure or could be achieved through other means. For the same reason, the Review did not regard it as appropriate to undertake a detailed assessment of the joint venture agreements, and hence the consents and approvals which may be required to be obtained to give effect to the reforms being proposed.

Recognising these constraints, the following points are noted with respect to ACTEW's interests in the ActewAGL joint venture:

- there is a range of joint venture agreements in place, and any potential change needs to recognise and respect any rights that exist under those agreements, including with respect to any services provided by ActewAGL joint venture partners to the joint venture itself, and any consents and approvals required to be given;
- even if required consents and approvals were to be given, conditions may be attached that may need some time and resources to satisfy;
- commercial service agreements are in place between ACTEW and the ActewAGL joint venture, in particular the CSA and the CSCSA. Any potential reform will need to recognise and respect any rights that exist under those agreements, and also that in relation to the CSA and CSCSA there is likely to be a cost to the ActewAGL joint venture if the volume of services to ACTEW or

successor entities were reduced or the arrangements were unwound or terminated prior to expiry; and

- in any event, there would be costs incurred in the resulting restructuring and redrafting exercise with respect to the ActewAGL joint venture agreements, which would need to be met.

If the ACT Government is to embrace this proposed reform, there is a need to do so in a manner that respects the interests of the ActewAGL joint venture partners – generally as they are businesses operating within the ACT in a critical industry; specifically having regard to the relationships and agreements that exist between the joint venture partners.

Legal form

A second key issue addressed by this Review is the legal form of any new or reformed entities that might be created if there is to be change to ACTEW's current institutional arrangements.

One factor weighing in favour of ACTEW's current corporate form is that presently through its wholly owned subsidiaries it holds a 50 per cent interest in the ActewAGL joint venture that supplies energy services to the ACT and surrounding regions. After two decades of reform, the energy sector in Australia is primarily supplied by private sector entities, the retail sector operates in a competitive market framework, and both it and the distribution sector are subject to national regulatory arrangements. Institutional arrangements need to accommodate the fact that ACTEW's interests are held not simply in the form of passive investment management through a holding company but that under the joint venture agreements the owner of these interests has active responsibilities as a partner (e.g. through its wholly owned subsidiaries). As such, the entity holding those interests need to be able to participate in the joint venture with flexibility having regard to the energy industry's competitive pressures – in terms of staffing, expertise, investment, etc – and in so doing have a commercial focus. These characteristics tend towards ACTEW's interests in the ActewAGL joint venture being held by a Corporations Act entity.

In the case of ACTEW's water and sewerage operations, however, the nature of the industry is substantially different, with major urban water utilities across Australia operating within an industry structure with limited competition and significant monopoly characteristics. Further, it is an industry involved in the provision of essential services required to meet critical human needs, and with widespread public health externalities. It is also an industry in which decision making involves interaction with a range of other policy areas that involve substantive roles for government – in particular, water resource and natural resources management.

These characteristics contribute to the Review's view that, all other things being equal, such an entity would best be established as a corporation by ACT statute. Primarily, this is because this legal form best provides the ACT Government with the required capacity to set the parameters of, and in some instances have a role in, the decision making and activities of such an entity. It is also more consistent with an

entity that is required to achieve multiple objectives that are both commercial and non-commercial in nature.

However, while this Review considers in the first instance that the most appropriate legal form for an entity with responsibility for the provision for water and sewerage services in the ACT is as a corporation created by ACT statute, in determining a pathway for reform consideration also needs to be given a range of other factors, such as:

- the extent of change required to give effect to such an outcome;
- whether the benefits that would arise from such a reform are sufficient to warrant change;
- whether or not the issues such change is designed to addressed can be managed in other ways, at least in the short term; and
- whether a change in corporate form would create additional, different issues that may need to be addressed.

ACTEW has already gone through substantial change in recently restructuring its water and sewerage business. Hence there is benefit in limiting the scope and scale of change which may be required as a consequence of this Review. It is recognized that if ACTEW's interests in the ActewAGL joint venture are to be separated from its water and sewerage business, this in itself would be a significant task to be managed.

As such, the Review considers that while it may not be optimal for a publicly owned water and sewerage utility to be a Corporation Act entity, in the shorter term various issues of concern associated with such a corporate form – such as potential conflict between objectives and objects – could be addressed through the clarification of the entity's roles and responsibilities, improved specification of objectives and objects in legislation and constitutions, and by more robust processes and communications operating between ACTEW and the ACT Government.

While the Review does not believe it is appropriate to recommend a change in corporate form from a Corporations Act entity at this time, this conclusion would have been different if there was an overarching ACT legislative framework in place that more readily encompassed a wider range of entities, including territory authorities with limited commercial activities and corporations created by ACT statute that are significant government business enterprises, as well as TOCs. If and when such a legislative framework is established, it would be appropriate for this issue to be reassessed and for the ACT's publicly owned water and sewerage utility to be established as a corporation by ACT statute.

Objectives

Various concerns have been raised in relation to the arrangements setting objectives for TOCs:

- first, there is a general question as to the effect of specifying objectives in ACT legislation for a Corporation Act entity which also specifies its objects in its

constitution, having regard to the legal capacity of such an entity and the nature of directors' duties;

- secondly, the confusion that may arise from having objects, or objectives, specified in two separate instruments – one under Commonwealth legislation, the other in ACT statute – where they are expressed differently; and
- thirdly, conflict that may exist as between the objectives set out in section 7 of the TOC Act.

While the interaction of the Corporations Act and the TOC Act theoretically creates a potential confusion, the practical import in the case of ACTEW is likely to be limited given the nature of its objects and objectives. Nevertheless, in the creation of any new or reformed entities with separate responsibilities for the provision of water and sewerage services, and the holding of energy interests in the ActewAGL joint venture, care should be taken in establishing objects and objectives which are consistent.

A more complex issue is the potential for confusion where objectives under the TOC Act contain a range of commercial and non-commercial objectives. The Productivity Commission (2011a:69) argues that while water utilities may need to achieve a range of objectives, economic efficiency provides a framework for making trade offs between objectives. While the Review agrees there are benefits of such approach in facilitating decision-making in relation to trade-offs to be made between competing objectives, this is not straightforward in relation to matters that are not easily monetized – for example, with respect to the provision of universal and affordable access to services. Specifying such a single objective is also unlikely to be consistent with the underlying bases for why those services continue to be provided by publicly owned entities.

While the maintenance of multiple objectives makes the role of directors of such entities more difficult, it also reflects the complex environment in which such entities are required to operate. This is particularly so for a water and sewerage utility, which provides services to meet critical human needs with significant public health externalities, and whose activities are closely inter-related with a range of other policy areas.

As such, this Review considers it appropriate for an entity of this type to be subject to multiple objectives operating contemporaneously. The Review notes the potential difficulty that may arise in balancing such economic, social and environmental objectives is a factor which favours the establishment of the publicly owned water and sewerage utility as a corporation by ACT statute. Such a form better enables the use of directions powers to resolve any uncertainties, as it comes without the perceived or actual risk of the person giving such directions being deemed a director for the purposes of the Corporations Act.

Other governance matters

In addition to the key issues addressed above, the Review considers a range of additional governance matters including:

- the development of additional processes with respect to board appointments, including the public advertising of all board appointments and the establishment of consistent standards in relation to tenure, with flexibility for particular circumstances. The aim of recommendations on this issue is to ensure a balance is struck between ensuring regular turnover to inject fresh ideas and enthusiasm, and retaining necessary skills and experience, particularly during transitional processes;
- the potential benefit of revising the arrangements with respect to powers of direction, noting though that the situation is complex and there is a risk here of unintended consequences; and
- the scope for applying general government policies across all public entities, including publicly owned utility service providers.

Enhancing the regulatory framework

ACTEW provides services and undertakes its operations subject to a broad regulatory framework which imposes a range of responsibilities and obligations as to how it must operate.

In many instances individual pieces of legislation deal with a variety of subject matters. For example, the *Utilities Act 2000 (*ACT) regulates the electricity and gas industries as well as the water and sewerage sector. Moreover, it provides for technical regulation and the provision of community service obligations (CSOs) in addition to establishing industry wide licensing arrangements.

The legislative framework that applies to ACTEW is supported by a range of other instruments including regulations, codes, guidelines, plans, licences and determinations. The ACT Government has also set out a range of strategic plans and policy statements which inform the application of this regulatory framework. These range from the '*Canberra Plan: Towards Our Second Century'* which is designed to guide the growth and development of Canberra, and which seeks to respond to challenges including climate change and water security, to the ACT Government's policy '*Competitive Neutrality in the ACT'*, which has been prepared in keeping with the ACT's commitment to the National Competition Policy (NCP) reforms.

Based on an assessment of this regulatory framework, this Review finds opportunity for reform including:

- *to clarify responsibilities and obligations with respect to supply augmentations*

  At an holistic level, all Australian jurisdictions have recognised there is scope for improvement in the way in which supply augmentation decisions are made.

Thus as part of the national urban water framework developed by COAG in 2008, all jurisdictions have agreed to adopt *National Urban Water Planning Principles* (see Department of the Environment, 2013).

There are numerous reasons why the ACT Government would wish to retain a role in decision making processes with respect to water supply. In the first instance, such decisions involve the provision of a basic and essential service, and as such the government will naturally retain a keen interest in ensuring that this service is being provided in an efficient and secure manner. As the Productivity Commission (2011a) and the National Water Commission (2011) argue, however, this does not mean the government has to play a determinative role in supply augmentation decisions, and further that there is a range of benefits in allocating such responsibilities to entities independent of government.

More difficult, however, is removing the government from a role in supply augmentation decisions where the task of comparing supply options may be impacted upon by decisions in related policy areas not easily able to be assessed or determined by such an independent entity. Issues such as environmental flow requirements generally involve policy decisions for government that extend beyond areas of responsibility for water utilities, for example with respect to natural resource management issues. They will also most likely reflect the underlying view of the government decision-maker as to the relative merits of seeking to reduce the human impact on natural resources through conservation as compared allowing demand to be met in an unconstrained fashion. In any event, such decisions can be anticipated to impact on the need for new investment in water supply infrastructure.

Separately, determining the appropriate role for government in decision-making of this type is made more complex again where it has a direct financial interest in the supply augmentation decisions – both as an owner and recipient of dividends from the utility responsible for those assets, and also where it borrows on behalf of the utility to enable it to fund its infrastructure investments. In both cases, the scale of investment may be so significant as to alter the risk profile of the business, and as such warrant involvement of the government.

Finally, it would be unrealistic for government not to retain – either legislatively or impliedly – a reserve power to take action if it determined that regulatory processes were not operating effectively, that the responsible utility has failed to fulfil its obligations with respect to security of supply, or there had been such an unexpected change in circumstances that it was necessary for action to be taken. This is of particular issue for an industry where decision making historically has been based on long-term averages, but where there appears to be increased uncertainty as to the use of such averages for future supply decisions.

Recognising the benefits that arise from decision-making based on clear evidence utilising transparent process, there would appear to be scope in the ACT for ongoing regulatory enhancement to ensure, as far as possible, that decision making processes are established which minimise the need for reactive intervention, and which additionally provide confidence to the community that decisions with respect to water supply augmentation are being made in an appropriate manner. This is of particular importance given the scale of investments periodically required, and the potential for circumstances in which decisions are to be made to vary over time.

Further, this Review believes there would be benefit in transparently specifying the process for adaptive decision making to be adopted in the ACT with respect to future water supply augmentation infrastructure, and other related major capital works.

- *to clarify responsibilities and obligations with respect to temporary restrictions*

  While this Review considers there to be some merit in the argument that the water utility continuing to have responsibility for the imposition of water restrictions in the ACT consistent with its role as primary decision maker with respect to water supply augmentations, it is concerned that this is in effect allocating to the utility a power of a regulatory nature that is enforceable through the courts. Such an allocation of responsibility is inconsistent with broader NCP reforms, which seek a separation of operational and regulatory responsibilities so as to remove conflicts of interest in decision making. As such, while it is recognised that the ACT's publicly owned water utility would need to have significant input into any decision-making process, including with respect to determining the bases upon which restrictions may be imposed, and the nature and extent of those restrictions, this Review believes decisions as to the imposition (or removal) of restrictions would on balance better vest with the relevant Minister. To enable the water utility to appropriately undertake its planning responsibilities, however, it is essential that the nature and timing of these decisions are made transparently and according to a clearly established basis.

  The Review also considers that decision making with respect to temporary restrictions would benefit if greater clarity was provided as to the ACT's water security objective, and that such restrictions and related measures such as water efficiency initiatives would be undertaken more efficiently and cost effectively if implemented through a single publicly owned entity.

Ancillary reforms addressed in this Review include making the process for costing the impact of technical regulation more robust; enabling clarification of regulatory and policy requirements during pricing processes; encouraging clearer technical regulation and assessing the potential for streamlining of water related legislation.

Financial interactions between ACTEW and the ACT Government

In the context of accountability and communications mechanisms, the Review has considered three key areas in relation to the financial interactions between ACTEW and the ACT Government:

- *borrowings*

  The ACT Government has determined ACTEW is a monopoly service provider of water and sewerage services and not in competition with other comparable businesses. As a consequence, ACTEW is not required to pay a levy to equalize its cost of debt with the private sector. ACTEW therefore enjoys the benefits of concessional interest rates obtained by the ACT Government for its borrowings. In this regard, the approach taken by the ACT Government appears consistent with that taken by the Independent Competition and Regulatory Commission (ICRC) in the most recent pricing determination.

  However, in adopting the approaches that they have, both the ACT Government and the ICRC are assuming there is not even the potential for competition for the provision of water and sewerage services.

  The Review acknowledges the prospects of any such competition in water and sewerage provision is likely to be very limited given the scale and physical nature of the ACT water and sewerage systems, and the inherent complexities associated with introducing competition in the water sector (see, for example, PC, 2011:74). Nevertheless, it is generally the case that secondary water systems operate in the ACT that are not owned or operated by ACTEW (see ICRC, 2012). Further, the potential for competition is also already recognised in legislation (see, for example, the *Independent Competition and Regulatory Commission Act 1997* (ACT) (ICRC Act) which provides generally for access agreements (see Pt 5) and the arbitration of access regime disputes (see Pt 6)).

  For the foreseeable future though, perhaps more important is that the approach taken by the ACT Government with respect to cost of debt may impact on the comparability of ACTEW's internal costs relative to that of third party service providers – both in relation to services ACTEW provides to its water and sewerage customers, and separately with respect to services ACTEW provides to others (for example, the maintenance of stormwater assets). Ensuring that borrowings to ACTEW are provided at commercial rates will mean that competition for the provision of such services is undertaken on a more even footing, consistent with competitive neutrality principles.

  Finally, it is necessary to recognise that ACTEW currently holds interests in the ActewAGL joint venture, and a proportion of its borrowing relates to the capital requirements associated with that joint venture. In ACTEW's 2012-13 Annual Report, the liabilities ascribed to its joint venture interests was $371 million, of which $257 million is borrowings. If the ACT Government chooses

not to separate out these interests, then as a portion of ACTEW's borrowing relate to investments in an industry with substantial competition (at least on the retail side) and very significant private sector involvement, a borrowing rate more clearly relevant to a comparable commercial entity would be appropriate for at least that proportion of its debt funding.

- *major capital works*

  In the main ACTEW's capital works program involves projects with comparatively low project cost. Occasionally, however, ACTEW is required to implement a major or significant project, such as recently seen with the suite of major water security projects which ranged in cost from tens of millions to over four hundred million dollars.

  An issue that arises in relation to the more significant or larger capital projects is whether and to what extent the Voting Shareholders or the Treasurer should be involved in the capital works approval process on behalf of the ACT Government.

  Having regard to practices adopted in other jurisdictions, the Review supports a role for government in assessing major capital works in the water and sewerage sector in the ACT. In particular, the Review argues that as a provider of debt financing to the publicly owned water and sewerage utility, the ACT Government should play a role in decision making with respect to major capital infrastructure.

  It is acknowledged that an issue arises as to whether this assessment should relate to overall levels of borrowing, or whether it should be based having regard to individual projects and the extent to which each individual project will affect debt levels and overall gearing ratios. Critical to any such role is that it be transparent, so as to maximize the benefits of having an independent, commercially focused utility. To this end, it would be anticipated that such a process would only relate to major capital works projects that would materially impact on the utility's balance sheet.

- *dividends paid by ACTEW to the ACT Government*

  Since 1997 ACTEW has paid dividends at the rate of 100 per cent of its net profit after tax (NPAT). This is substantially in excess of the minimum dividend rate of 50 per cent specified in the ACT's Competitive Neutrality policy.

  ACTEW's NPAT includes an equity accounted share of the ActewAGL joint venture's profits. However, ActewAGL's cash distributions are generally lower than reported profits as the joint venture retains a portion of the monies to fund its capital expenditure. As ACTEW's NPAT is not entirely comprised of cash earnings, the ACT Government's current dividend policy requires ACTEW to borrow funds. This borrowing may be characterized as either being used to meet a portion of the dividend payment or to fund ACTEW's reinvestment into

the joint venture. This latter characterization is conceptually recognised in ACTEW's accounts, which allocate a proportion of overall debt to ACTEW's interests in the ActewAGL joint venture. Either way it contributes to rising debt levels.

This situation is exacerbated because each year ACTEW receives a number of 'gifted assets'. Gifted assets are water and sewerage assets built in new, primarily greenfield developments by either the Land Development Agency (LDA) or private developers, then given free of charge to ACTEW when completed. Under the current accounting framework ACTEW must record gifted assets as revenue, therefore its pre-tax profit is increased by the full amount of the value of the assets gifted. Over recent years the value of these assets has been between $3 million and $5 million per annum.

In 2009 Treasury undertook a review of the dividend policy that applied to ACTEW and concluded that there was not a compelling case to support a revision of the dividend policy at that time. It recommended that the 100 per cent dividend policy be maintained until matters with potential to significantly impact ACTEW's revenue and cash position were resolved. Now that the major water security projects are largely complete, the time is suitable to assess the sustainability, or otherwise, of ACTEW continuing to pay 100 percent of NPAT in dividends.

If dividend arrangements are not changed, ACTEW will have to continue to borrow to cover the cash shortfall in payments from the joint venture and it will have little ability to make any substantive repayments of its debt burden. If institutional arrangements change, the manner in which debt is allocated to new entities could impact on the timeliness with which a change in dividend policy would be required.

Improving communication and accountability mechanisms

Most ministers and directorates are allocated roles and responsibilities in relation to the ACT Government's interactions with ACTEW (see *Administrative Arrangements 2013 (No. 1)*). Ministers interacting with ACTEW's current activities include:

- the Chief Minister, both in a ministerial capacity and as a Voting Shareholder;
- the Treasurer, both in a ministerial capacity (as Treasurer and also Portfolio Minister) and as a Voting Shareholder;
- the Minister for Police and Emergency Services;
- the Minister for Community Services;
- the Minister for Economic Development;
- the Minister for the Environment and Sustainable Development;
- the Minister for Health;
- the Minister for Regional Development;
- the Minister for Territory and Municipal Services; and
- the Minister for Workplace Safety and Industrial Relations.

Generally the range and variety of issues that arise involving the ACT Government and ACTEW require that their interactions will necessarily occur in a multi-layered fashion, with the seniority or specialist skills required from personnel dependent both on the nature and significance of the issues to be addressed. It would not be feasible or sensible for all such interactions to occur through a single point of contact for either the Government or the utility.

There is however a range of opportunities to enhance communications and accountability mechanisms including:

- streamlining business reporting processes to government having regard to the respective roles and responsibilities of senior management, the board, Voting Shareholders, the Portfolio Minister and directorates in the context of the entity being a wholly publicly owned, with the Voting Shareholders holding their shares on trust for the Territory.

  The balancing of the flow of information requires that it be sufficient for each participant to undertake their respective roles, but not so excessive as to provide them with information that is not relevant or suitable for that purpose – for example, for Voting Shareholders if it relates to day-to day operational activities – or such that its provision undermines the effectiveness of the governance structure established for the entity or the roles played by other participants in that structure;
- improving the arrangements with respect to the drafting of Statements of Corporate Intent so that they are available to the Legislative Assembly in a more timely manner;
- ensuring the full annual report as required under the TOC Act and the *Annual Reports (Government Agencies) Act 2004* (ACT) will be available at the time of the scheduled annual general meeting for any publicly owned entity subject to the TOC Act; and
- ensuring that any relevant entity involved in utility service provision is consulted in relation to any policies or proposed new regulation that may materially impact upon it, prior to the measure's adoption.

Recommendations

Recommendation 1.1

To ensure transparency for the community, the ACT Government should annually enunciate the scope of activities it expects ACT's publicly owned utilities to undertake. This should be done for any entity:

(a) *responsible for the provision of water and wastewater services to the ACT, including with respect to any activities which it may undertake outside the ACT; and/or*

(b) *that is participating, directly or indirectly, in the provision of energy services in the ACT.*

Recommendation 1.2

To exploit economies and opportunities for growth, the ACT Government should:

(a) *integrate responsibility for the delivery of operational water-related service activities in the ACT through a single publicly owned entity. Potential opportunities for such integration in the ACT include the delivery of stormwater services, secondary water projects and water efficiency initiatives.*

However, where a single public owned entity is given such responsibilities, competitive neutrality principles should be rigorously applied to ensure arrangements are in place so that third parties are given opportunities, as appropriate, to be involved in the delivery of those services; and

(b) *to the extent it wishes the public owned entity providing water and sewerage services in the ACT to also provide related services in other jurisdictions, facilitate such desired activity through its relationships with, for example, the NSW Government and local governments.*

Potential opportunities to provide services outside the ACT include the provision of water supply services to surrounding regions such as Goulburn and Yass (to the extent desired by those regions), and sewage treatment facilities for Queanbeyan (to the extent desired by that region).

Recommendation 3.1

The ACT Government should review the TOC Act to establish a common corporate framework covering both public owned Corporations Act companies and corporations created by ACT statute that are significant business enterprises. To ensure consistency across the ACT Government, this review should encompass the regulatory framework that operates with respect to the governance of all current ACT territory authorities.

In undertaking this review, particular emphasis should be given to ensuring there is no conflict between Commonwealth and ACT legislation as it applies to any publicly owned Corporations Act entity.

Recommendation 3.2

Having regard to ACTEW's decision to take direct responsibility for the provision of water and sewerage services, the ACT Government should:

(a) establish separate entities to be responsible for (i) the provision of water and sewerage services in the ACT, and (ii) holding and managing the ACT's interest in the ActewAGL joint venture. However, prior to the ACT Government determining to do so, it needs to ensure that any legitimate concerns of the ActewAGL joint venture partners are able to be appropriately addressed;

(b) in the first instance, each entity should be established as a Corporations Act company, subject to the TOC Act. However, once a common statutory framework is established in the ACT for territory authorities, corporations created by ACT statute that are significant government business enterprises and TOCs (see Rec. 3.1), it would be appropriate to restructure the entity responsible for the provision of water and sewerage services as a corporation created by ACT statute under such a framework;

(c) each of these two entities should have separate boards and management to enable them to have independent focus. It is possible, and maybe preferable, given the skill base and corporate knowledge of current ACTEW board members that there be some common board membership. As is currently the case, any conflicts would need to be managed on a case by case basis. However, it is important that management of the two entities are separated to provide each with the opportunity to have clarity of focus on their particular entity's business activities. In making this recommendation it is recognised that this may involve some additional ongoing costs; and

(d) separation would necessarily result in a name change – at least for the entity responsible for the provision of water and sewerage services.

Recommendation 3.3

In establishing new institutional arrangements, the ACT Government should ensure:

(a) where objectives are set out in the TOC Act that this be done in the Schedule to that Act and be drafted specifically in relation to each entity. This is because the objectives relevant to an entity holding interests in the ActewAGL joint venture partnership may differ from those relevant to the provider of water and sewerage services;

(b) the objects set out in the relevant entity's constitution are consistent with the objectives as set out in the TOC Act; and

(c) the objects in the relevant entity's constitution clearly specify the scope of activities that the Government wishes the entity to undertake.

Recommendation 3.4

The ACT Government should ensure:

(a) *any position for appointment to the boards of the relevant government owned entities should be publicly advertised;*

(b) *there are limits on the duration of each individual term of appointment for board members, being no more than three years; and*

(c) *there are limits on the overall duration of board service periods – in the first instance, this should be six years for directors, and an extended period for chairs. However, the application of this policy should be subject to waiver where there are special circumstances requiring continuation of service – for example, where a board member has specialist expertise or corporate knowledge, or where the organisation is undergoing a restructuring process. In circumstances where this waiver is exercised, the reasons for doing so should be publicly disclosed.*

Recommendation 3.5

The ACT Government should:

(a) *assess the need for the application of government policies at such time as it considers whether a stand-alone public entity responsible for the provision of water and sewerage services in the ACT should be a corporation created by ACT statute following review of general governance arrangements for publicly owned entities; and*

(b) *ensure that in making any changes to institutional arrangements, this should be done in a manner which ensures that the provision of water and sewerage services continues to be subject to the Human Rights Act 2004* (ACT).

Recommendation 4.1

Having regard to its water strategy 'Water for the future: striking the balance', the ACT Government should:

(a) *further specify the responsibilities of participants with respect to supply augmentation decisions. While primary responsibility for such operational decisions should rest with the publicly owned water utility, any ongoing role for government should also be clearly specified having regard to its broader policy responsibilities and its potential exposure as the utility's owner and provider of debt financing; and*

(b) *specify the adaptive processes to be applied by the water utility in relation to supply augmentation decisions. These processes should incorporate periodic reviews having regard to issues associated with uncertainty in investment decisions in the water sector.*

Recommendation 4.2

Having regard to its water strategy 'Water for the future: striking the balance', the ACT Government should:

(a) allocate responsibility for the imposition of water restrictions to the relevant Minister, to be made based on advice provided by the ACT's publicly owned water utility as well as the relevant ACT Government directorate;

(b) clearly specify and periodically update the ACT's water security objective having regard to water consumption trends, water supply capacity and any variations in long-term climatic and rainfall patterns; and

(c) ensure a single public owned entity is responsible for implementing decisions made with respect to water conservation measures, temporary restrictions and water efficiency measures.

Recommendation 4.3

For the purposes of independent pricing processes, the Government should ensure:

(a) that any new technical regulatory requirement on a utility providing water and sewerage services in the ACT is subject to an assessment of its likely cost impact prior to its implementation; and

(b) there are transparent processes by which the ICRC is able to clarify any uncertainty as to the obligations the publicly owned entity providing water and sewerage services is required to meet under the ACT Government's regulatory and policy framework.

Recommendation 4.4

The ACT Government should assess the effectiveness of provisions with respect to technical regulation under the Utilities Act with a view to reform, having regard to a range of factors including but not limited to the need to clearly state the objectives of technical regulation.

Recommendation 4.5

The ACT Government should work towards better integrating Acts governing the provision of water and sewerage services in the ACT. However, this will best occur following a review of the overarching legislative framework for all territory entities (see Rec. 3.1). This is because the manner in which regulatory arrangements may be structured may differ if the public entity providing water and sewerage services is a corporation created by ACT statute as compared to being a Corporations Act entity.

Recommendation 5.1

Depending on the outcome of the appeal to the ICRC's pricing decision with respect to ACT water and sewerage prices, and the ACT Government's responses to other recommendations, the ACT Government should review the rates at which publicly owned utilities are charged for borrowings undertaken by the ACT Government on their behalf, with a view to charging commercial rates – particularly where borrowings relate to the provision of energy services.

Recommendation 5.2

As the ACT Government is borrowing on behalf of public owned utilities to fund their investments in major capital works, the ACT Government should require such entities to put a detailed business case to the Treasurer for approval for new capital projects where the total project cost exceeds a materiality threshold established by the Treasurer.

Recommendation 5.3

The ACT Government should review the dividend policy as it currently applies to ACTEW to ensure that any public owned entity directly or indirectly involved in the provision of utility services in the ACT is able to cover its operational requirements and manage its debt profile on an ongoing basis. This may impact on the dividends that would otherwise be payable to the ACT Government under the current dividend policy. Gifted assets should be excluded from calculations of profitability for the purposes of determining dividends.

Recommendation 5.4

The ACT Government should ensure any reforms to institutional arrangements have regard to and do not inadvertently result in adverse financial impact to the ACT given the operations of the National Tax Equivalent Regime.

Recommendation 6.1

The ACT Government should streamline internal business reporting processes to government by public entities providing utility services, so that:

(a) a short monthly summary of key matters for the entity is provided by the Managing Director to the Voting Shareholders following Board meetings;

(b) quarterly performance reports are provided to the Voting Shareholders;

(c) the Managing Director and the Chair meet periodically with the Voting Shareholders to discuss key matters; and

(d) the provision of board papers to the ACT Government is discontinued.

Other information needs should be assessed on a case-by-case basis as specific issues arise.

Recommendation 6.2

To facilitate the coordination of advice to Voting Shareholders and the Portfolio Minister with advice being provided to the Treasurer, corporate governance support should be provided through the Chief Minister and Treasury Directorate (CMTD).

Recommendation 6.3

The recently introduced enhanced Statement of Corporate Intent processes for ACTEW should be allowed to operate and be reassessed at a future date, possibly either at the time of completion of review of the TOC Act and related governance arrangements for territory authorities (see Rec 3.1) or in the process of determining whether the ACT publicly owned entity providing water and sewerage services should be established as a corporation by ACT statute following that review.

Recommendation 6.4

The ACT Government should require publicly owned entities subject to the TOC Act to submit their draft Statements of Corporate Intent at the same time as their draft budgets, and for the Statements of Corporate Intent to be finalized and tabled in time for the Legislative Assembly committee hearings on the Budget.

Recommendation 6.5

The ACT Government should ensure that the annual report as required under the Territory-owned Corporations Act 1990 (ACT) *and the Annual Reports (Government Agencies) Act 2004* (ACT) *is available at the time of the scheduled annual general meeting for any publicly owned entity subject to the TOC Act.*

Recommendation 6.6

The ACT Government should ensure:

(a) that any relevant entity involved in utility service provision is consulted in relation to any policies or proposed new regulation that may materially impact upon it, prior to the measure's adoption; and

(b) the publicly owned entity providing water and sewerage services in the ACT maintains priority working relationship with relevant government bodies with respect to land development and other major civic projects.

1 ACTEW – its structures, operations and performance

1.1 Introduction

ACTEW Corporation Limited (**ACTEW**) is the Australian Capital Territory's (**ACT**) largest publicly owned entity. It is involved, directly or indirectly, in two significant areas of business – the provision of water and sewerage services, and the supply of gas and electricity services. Practically every household and business operating in the ACT interacts with ACTEW, or the ActewAGL joint venture in which it is a key participant, on a daily basis.

The purpose of this chapter is four-fold:

- to briefly set out the history of ACTEW's development through to the current day;
- to set out the nature of its current activities and operations;
- to detail key aspects of its operational and financial performance since its inception in 1995; and
- to consider what implications, if any, these matters have for ACTEW's institutional arrangements.

1.2 History of ACTEW's development

For just over a century, responsibility for the delivery of water and sewerage services, and the provision of gas and electricity services, to the ACT has developed iteratively, just as the ACT has itself evolved.

In the early years of the ACT's development, and indeed for the four decades following World War II, the provision of these utility services was undertaken by a variety of Commonwealth Departments (with the exception of gas, which was first provided by the Australian Gas Light Company (AGL) in 1981 (in concert with the then publicly owned Commonwealth Pipeline Authority)).

While initially all services were the responsibility of a single department, from 1930 until the mid-1980s the tasks of providing water and sewerage, and that of providing electricity, were undertaken separately. Only from 1985, just a few years prior to the ACT becoming self-governing, was responsibility allocated to a single Commonwealth department, the Department of Territories (Central Office). However, even then responsibility for service delivery was still split, with electricity services provided by the ACT Electricity Authority (**ACTEA**), a separate corporate body established on 1 July 1963 under the *Australian Capital Electricity Supply Act 1962* (Cth) (see Table 1.1).

During this period, the physical development of the ACT's utility services saw first the initial construction of the first Cotter Dam in 1912 and the Kingston Power Station shortly thereafter; then the expansion of both water reticulation and sewerage transfer systems; periodic upgrades of the ACT's water supplies; the completion of the Lower Molonglo sewerage treatment facility in 1978 and the integration of the gas and electricity systems into the regional and interstate networks.[1]

Table 1.1: Entities responsible for ACT infrastructure service provision

Years	Water and sewerage services	Electricity services	Years
1911-16	Department of Home Affairs, Central Office		1911-16
1916-30	Department of Works and Railways, Central Office (1925-30 Federal Capital Commission)		1916-30
1930-32	Department of Works and Railways, Central Office	Department of Home Affairs, Central Office	1930-39
1932-38	Works and Services Branch, Canberra	"	
1938-39	Department of Works, Central Office	"	
1939-41	Works and Services Branch, Canberra	Department of Interior, Central Office (Canberra Electricity Supply)	1939-63
1941-74	Works Director, ACT	"	
	"	Department of Interior, Central Office (ACTEA)	1963-72
	"	Department of the Capital Territory, Central Office (ACTEA)	1972-83
1974-75	Director of Housing and Construction, ACT	"	
1975-78	Director of Construction, ACT	"	
1978-82	Director of Housing and Construction, ACT	"	
1982-83	Department of Transport and Construction, ACT Regional Office	"	
1983-85	Department of Housing and Construction, ACT Regional Office	Department of Territories and Local Government, Central Office (ACTEA)	1983-84
	"	Department of Territories (Central Office) (ACTEA)	1984-87
1985-87	Department of Territories (Central Office)	"	
1987-88	Department of the Arts, Sport, the Environment, Tourism and Territories (ACT Administration), Central Office	Department of the Arts, Sport, the Environment, Tourism and Territories (ACT Administration), Central Office (ACTEA)	1987-88
1988-95	Australian Capital Territory Electricity and Water Authority (ACTEWA)		1988-95
1995-	Australian Capital Territory Electricity and Water Corporation (ACTEW)		1995-
2000	Australian Capital Territory Electricity and Water Corporation (ACTEW) (through ActewAGL joint venture arrangements)*		2000
2012	Australian Capital Territory Electricity and Water Corporation (ACTEW)	Australian Capital Territory Electricity and Water Corporation (ACTEW) (through ActewAGL joint venture arrangements)*	2012

*Source: Donovan (1999), Appendixes; * joint venture arrangements also incorporated provision of gas services*

While responsibility for water and sewerage, as well as electricity, service provision was combined in a single Commonwealth agency from 1985, it was only in 1988 that a single purpose authority, the Australian Capital Territory Electricity and Water Authority (**ACTEWA**) was formed. As Roger Broughton notes in his submission

[1] For a detailed account of the history of the ACT water, sewerage and electricity services provision, see Donovan (1999).

(at pp.1-2), the establishment of ACTEWA occurred at a time when the Commonwealth Government was seeking to rationalize statutory bodies. It was considered that ACTEWA's expertise and infrastructure would provide a sound basis for the provision of water and sewerage services on a commercial basis. The creation of ACTEWA followed the precedent set by the Northern Territory Government which had created the Power and Water Authority in 1987.

Control of ACTEWA was transferred to the ACT Government in 1989 following the granting of self-government, and continued to operate until 1995.

In 1995, ACTEW was established as the successor body to ACTEWA. ACTEW was created as a wholly publicly owned corporation incorporated by and subject to the *Corporations Act 2001* (Cth) (**Corporations Act**).[2] It was also prescribed as a corporation subject to the provisions of the *Territory-owned Corporations Act 1990* (ACT) (**TOC Act**). ACTEW has two issued shares, which are currently held respectively by the Chief Minister and the Treasurer on behalf of the ACT (**Voting Shareholders**).

The introduction of the TOC Act and the corporatisation of ACTEW were consistent with the prevailing regulatory trends, in particular the National Competition Policy (**NCP**) reforms which had been instituted in Australia through the Council of Australian Governments (**COAG**).

The NCP reforms aimed to harness competitive forces to increase efficiency and community welfare in response to concerns about Australia's overall economic performance and productivity (Commonwealth of Australia, 1993). As the National Water Commission (**NWC**) (2011:12) notes, a key aspect of these reforms was the COAG water reform agenda, which in 1994 incorporated a range of measures including institutional separation of policy setting, service delivery and regulatory enforcement, as well as pricing and market-oriented water resource allocation reforms. Under the new model:

> *"… governments were to articulate clear, measurable and coherent policy objectives and provide water service providers with the autonomy and incentive to deliver. In return, service providers were to be transparent and accountable in clearly demonstrating performance to customers, government, regulators, shareholders and the community."*

The TOC Act followed similar legislation in NSW – the *State Owned Corporations Act 1989* (NSW) – which provided for the establishment and operation of Government enterprises as State owned corporations. Initially this NSW legislation only covered Corporations Act type entities; subsequently it was amended to also cover statutory corporations established under NSW legislation.[3]

These drivers of reform and the broader regulatory context were reflected in the second reading speech of the then Minister for Urban Services, Mr De Domenico

[2] More correctly, its predecessor legislation.
[3] As to related legislation in other jurisdictions, see Appendix A.

(ACT Legislative Assembly Hansard, 1995:687) for the legislation establishing ACTEW,[4] who said:

> *"In recent years, Commonwealth and State governments have embraced corporatization as an important means of effecting micro-economic reforms in government business activities. The need for reform in the Territory is particularly pressing in view of our very tight budgetary position and the reforms happening nationally in the utilities industry, including the electricity industry. We have to ensure that ACTEW is ready for competition and meets all the requirements that the ACT Government has agreed to as part of the Council of Australian Governments agreement on national competition policy.*
>
> *… the principal objectives in corporatizing ACTEW are to provide incentives to improve efficiency within ACTEW by setting appropriate performance and accountability targets; to separate regulatory functions from the company, as it is not acceptable for an organization to compete in an industry while regulating parts of that industry; to identify and fund accordingly the Government's community service obligations; to allow the corporate body to set itself up along company lines, in line with the Corporations Law, and put it on a comparable footing with other commercial enterprises to become competitive; and to allow the Government and the community to maximize the returns on their investment in such enterprises."*

Between 1995 and 2000, ACTEW was responsible for the provision of water, sewerage and electricity services to the ACT. During this period, ACTEW also established a range of subsidiary businesses including:

- Ecowise Services Ltd, which provided electrical services including roadway lighting, traffic signals maintenance, and commercial and industrial electrical contracting;
- Ecowise Environmental Ltd, which provided hydrology, water monitoring and laboratory services; and
- ACTEW Investments Pty Ltd, which aimed to market ACTEW's expertise overseas and in Australia and to manage and develop investment opportunities.[5]

At the same time ACTEW also commenced its involvement in TransACT Communications Pty Ltd (**TransACT**), a company whose objective was to provide optical fibre based communication services to the ACT.

Save to note that ACTEW does not now retain an interest in any one of these entities, it is beyond the scope of this Review to examine further the activities of these subsidiaries, or to assess their success or otherwise.

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4 Electricity and Water (Corporatisation) (Consequential Amendments) Act 1995 (ACT).

5 In addition, ACTEW created ACTEW China Pty Ltd in 1997, which undertook work as part of Australia China Holdings Joint Venture with other members of Austemex. The company was not successful and became inactive in 2001-02. It was deregistered in 2009 (see ACT Legislative Assembly Hansard, 2009:1496 (26 March)).

Following ACTEW's corporatisation, the potential privatization of ACTEW became a key issue for the ACT Government. In part this was driven by the potential to return significant funds to government given ACTEW's profitability and low gearing. Concerns regarding the possible impact of increased competition in the electricity sector on ACTEW's value, and the financial risks associated with purchasing electricity on the wholesale electricity market following the disaggregation of the sector were also factors.[6]

In October 1998, the Government announced its intentions for the whole of ACTEW's businesses to be sold by way of a trade sale. While retaining ownership of assets such as dams, treatment plants and infrastructure, the government proposed to franchise the water and sewerage assets and sell the electricity and other assets (Donovan, 1999:284).

The proposed sale was the subject of considerable debate, both in and outside the Legislative Assembly. Competing arguments were put forward regarding taxpayers' potential financial exposure should ownership be retained, the monopoly characteristics associated with many aspects of ACTEW's businesses, as well as the need to manage the ACT's unfunded superannuation liability.

In December 1998 the passage of facilitating legislation was refused, and debate was adjourned to the following year. On 1 February 1999, the Legislative Assembly voted against the proposed sale.

While full privatization did not occur, following a short-lived proposal to merge with Great Southern Energy, detailed negotiations with AGL and a series of parliamentary debates, in 2000 agreement was reached for ACTEW to enter into a joint venture arrangement with AGL which combined the respective gas[7] and electricity businesses into two separate partnerships – one responsible for distribution services – that is, the passage of electricity and gas through poles and wires, and pipelines; the other retail services – that is, the actual provision and billing of electricity and gas to consumers. The joint venture also became responsible for managing ACTEW's water and sewerage assets and the delivery of related services under a contractual agreement.

To give effect to these arrangements, ACTEW entered into two partnerships:

- *ActewAGL Distribution* – a partnership initially between ACTEW Distribution Ltd, which is wholly owned by ACTEW, and AGL. Following a series of sales and corporate restructures, AGL's interest is now held by Jemena Networks (ACT)

[6] These concerns were highlighted in a Fay Richwhite report provided to the ACTEW board in April 1998 (see Donovan, 1999:283).

[7] Following the construction of the Moomba to Sydney Gas pipeline in the mid 1970s, the Commonwealth negotiated with AGL to reticulate gas in the ACT. As a result, the Commonwealth Pipeline Authority built a lateral pipeline to the ACT from the Moomba to Sydney pipeline. By 1980 AGL began installing mains to bring the gas to Canberra. The Authority owned and managed the pipeline to Canberra with AGL managing the consumer connections. The Authority was privatised in 1994 and taken over by a new entity 51 per cent owned by AGL.

Pty Ltd, a subsidiary of SPI (Australia) Assets Pty Ltd (through its interest in Jemena Ltd); and

- *ActewAGL Retail* – a partnership between ACTEW Retail Ltd, which is wholly owned by ACTEW, and AGL ACT Retail Investments Pty Ltd, a subsidiary of AGL Energy Ltd.

The terms of these partnerships and the joint venture arrangements are set out in a series of commercial agreements, including:

- the ***ACTEW/AGL Completion Agreement*** – which dealt with the terms upon which ACTEW and AGL agreed to establish the ActewAGL partnerships between their subsidiaries and the vesting of assets in those partnerships (including relevant gas and electricity assets);
- the ***ACTEW/AGL Umbrella Agreement*** – which governs the ongoing management arrangements of ActewAGL, including matters in relation to the establishment and operation of the Joint Venture Board (see further below);[8]
- the ***ActewAGL Management Agreement*** – which governs the manner in which AGL and Jemena cooperate to give effect to certain provisions of the Umbrella Agreement, namely in relation to the appointment and removal of the private sector members to the Joint Venture Board and those members' decision making and voting on the business of the ActewAGL partnerships;
- ***Partnership Agreements*** between:
  - ACTEW Distribution Ltd and Jemena Networks (ACT) Pty Ltd in respect of ActewAGL Distribution; and
  - ACTEW Retail Ltd and AGL ACT Retail Investments Pty Ltd in respect of ActewAGL Retail.

  The Partnership Agreements place certain governance and management requirements on each partner, but also operate in conjunction with the Umbrella Agreement to establish the partnerships that make up the ActewAGL joint venture. ACTEW is not a party to either Partnership Agreement;
- the ***Wholesale Electricity Sale Agreement***, under which AGL Electricity (a wholesale provider of electricity) sells electricity to ActewAGL Retail for subsequent resale;
- the ***Wholesale Gas Sale Agreement***, under which AGL Wholesale Gas (a wholesale provider of gas) sells gas to ActewAGL Retail for subsequent resale;
- ***Corporate Services Agreements*** between ActewAGL and ACTEW, being:
  - the ***Corporate Services Agreement (CSA)*** between ACTEW and ActewAGL Distribution, which sets out the terms under which ActewAGL Distribution provides corporate services to ACTEW for a fee. These services are wide ranging and include accounts payable, business systems, human resources, tax and accounting, and legal services; and

[8] The name of this body in the relevant agreements is the "Partnerships Board".

- the ***Customer Services and Community Support Agreement*** (CSCSA) between ACTEW and ActewAGL Retail, which sets out the terms under which ActewAGL Retail provides retail services to ACTEW in relation to its water and sewerage business.

To give effect to the initial joint venture arrangements, the ACT also put in place a legislative framework which included both specific legislation to facilitate the establishment of the joint venture (the *ACTEW/AGL Partnership Facilitation Act 2000* (ACT)), and generic legislation required for the regulation of the industries in which the joint venture operates (e.g. *Utilities Act 2000* (ACT) (**Utilities Act**)) (for further discussion of the regulatory environment in which ACTEW operates, see Chapter 4).

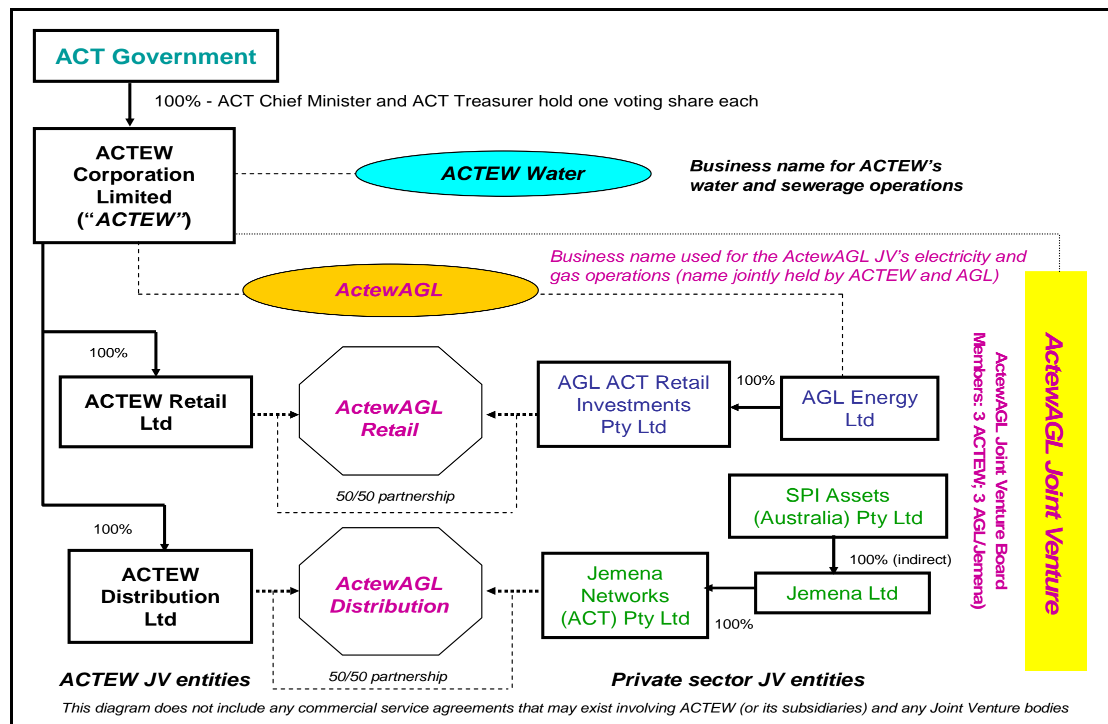
Amongst other things, the *ACTEW/AGL Partnership Facilitation Act 2000* (ACT) provides for:

- the removal of uncertainty about the ownership of certain network facilities used by the joint venture (Pt 2);
- the vesting of assets and liabilities at the commencement (and end) of the joint venture (Pt 3);
- the secondment of ACTEW employees to the joint venture (Pt 4);
- a range of public accountability provisions (Pt 5), including:
  - that ACTEW must not, without prior approval of the Legislative Assembly, dispose of its beneficial interests in either of its joint venture partnerships that would result in its beneficial interest being reduced to less than 50 per cent of the total equity of the partnership (s.27);
  - that a company is not eligible to become a joint venture entity to represent the interests of ACTEW in a partnership unless the full beneficial interests in all its shares vests in ACTEW (s.28(1));
  - that ACTEW may reduce its beneficial interests in a company that is a joint venture entity only in accordance with a resolution of the Legislative Assembly (s.28(2));
  - a company is not eligible to become an agent company (see s.34) unless at least 50 per cent of the beneficial interests in its shares vests in ACTEW (s.29);
  - an agent company may not dispose of any of its main undertakings unless the Legislative Assembly has, by resolution, approved the disposal (s.30); and
  - public interest safeguards in partnership agreements, with respect to prior approval by ACTEW of disposals by AGL and the appointment of 50 per cent of any directors under any partnership agreement (s.31); and
- various miscellaneous provisions, including requirements with respect to auditing jointly by the auditor-general and an auditor appointed by AGL (who must be a person who is qualified to audit accounts under the Corporations Act)

(ss.32, 33), and in relation to regulation of prices, access and other matters by the Independent Competition and Regulatory Commission (**ICRC**) (s.36).

Figure 1.1 below shows ACTEW's current corporate structure including the joint venture arrangement and the two energy partnerships.

Figure 1.1: ACTEW's corporate structure including ActewAGL joint venture relationships



While the overall structure of the joint venture has remained constant over the more than a decade that has passed since its creation, there have been various changes with respect to both the parties involved in the joint venture and the scope of its activities.

The most significant change in terms of participation occurred in 2006, when a broader corporate restructure of AGL saw the transfer of its interests in the ActewAGL Distribution partnership to Alinta. In August 2007 a consortium including Singapore Power purchased Alinta. In August 2008 Alinta changed its name to Jemena. As a result, the distribution partnership is currently effectively owned equally by Singapore Power (Jemena's parent company) and ACTEW, while the retail partnership is owned equally by AGL and ACTEW. In May 2013, Singapore Power International Pty Ltd and State Grid International Development Limited entered into an agreement for the latter to purchase a 60 per cent shareholding in SPI (Australia) Assets Pty Ltd. As at 14 November 2013 this transfer of ownership had not yet been finalised.

In relation to changes in the scope of the joint ventures activities, the most significant change to have occurred has been in relation to the provision of water

and sewerage services. From 2000 until 2012, while ACTEW retained ownership of the water and sewerage assets, the actual task of providing water and sewerage services to the ACT was contracted out to the ActewAGL joint venture. This task was initially undertaken under the Water and Sewerage Managing Contractor Alliance Agreement, and then subsequently pursuant to the Utilities Management Agreement. These arrangements have now been terminated, and from 1 July 2012 ACTEW has been providing water and sewerage services directly, operating under the business name ACTEW Water. In doing so, ACTEW maintains some ongoing service contracts with the ActewAGL joint venture to facilitate the provision of these services. These contracts relate to corporate services (see CSA), and customer service and community support functions (see CSCSA).

In addition to these changes, the joint venture partners also divested their interests in Ecowise Environmental Ltd in 2009. In 2011 ACTEW also sold its 18 per cent interest in TransACT to iiNet. ACTEW, through ACTEW Retail Limited, entered into a joint venture with AGL ACT Retail Investments Pty Ltd to form ActewAGL Generation Pty Ltd in April 2012 in order to participate in the ACT Government's Solar Auction process. However, their bid was not successful.

1.2.1 Governance roles and responsibilities[9]

Under the current regulatory framework and ACTEW's corporate structure, there are various parties involved in ACTEW's governance arrangements, being:

ACT Legislative Assembly

While the ACT Legislative Assembly does not have direct responsibilities with respect to ACTEW's day to day activities, under the TOC Act and ACTEW's Constitution (ACTEW, 2012) (and *ACTEW/AGL Partnership Facilitation Act 2000* (ACT) (see previously)) it has a number of general governance responsibilities having regard to ACTEW's status as a wholly owned government entity. These include:

- the Legislative Assembly having to be provided with a statement by the Portfolio Minister, within 15 sitting days, of a change in the names of the shareholders or the description of the principal activities carried out by the company, and a summary of changes in its constitution (see s.9 TOC Act);
- that the Legislative Assembly may approve a provision in ACTEW's constitution or a subsidiary that is inconsistent with the TOC Act, but if such a provision has not been approved by the Legislative Assembly it is of no effect to the extent of the inconsistency (see s.11 TOC Act; see also Sch 2 TOC Act, cl.4 ACTEW Constitution);
- a requirement that there be consultation with a committee of the Legislative Assembly with respect to appointments of directors (see s.12 TOC Act);

9 Internal governance arrangements are not considered in this section as they are outside the scope of the Review's Terms of Reference.

- a role with respect to authorizing transfers of shares (see s.13 TOC Act);
- a role with respect to authorizing the acquisition and disposal of subsidiaries and undertakings (see s.16 TOC Act);
- a requirement that a copy of a direction made to ACTEW be presented to the Legislative Assembly by the Portfolio Minister, together with a statement setting out the estimated net reasonable expense of complying with it, within 15 sitting days of the issue of the direction (s.17(4) TOC Act);
- a requirement that the Statement of Corporate Intent (**SCI**), and any modification to a SCI, be presented to the Legislative Assembly by the Portfolio Minister within 15 sitting days after receiving it (see ss.19, 21 TOC Act);
- a requirement that the audited annual report prepared under the TOC Act be presented to the Legislative Assembly by the Portfolio Minister within the prescribed period (see s.22 TOC Act);[10] and
- a requirement that performance audits undertaken with respect to ACTEW by the Auditor-General are given to the Speaker (see ss.4, 12 *Auditor-General Act 1996* (ACT)).

These responsibilities are in addition to the general functions of members of the Legislative Assembly in the oversight of publicly owned entities and institutions. Such powers may be exercised through the Legislative Assembly, for example, by question without notice and question on notice, instigating a matter of public importance and also through other fora, such as Legislative Assembly committees (e.g. during the Budget Estimates process).

<u>Voting Shareholders</u>

ACTEW's governance framework is established under the Corporations Act and the TOC Act. Pursuant to section 13 of the TOC Act, a minister may be authorised by the Chief Minister to hold voting shares in ACTEW. Currently, the two holders of voting shares in ACTEW are the Chief Minister and the Treasurer. These Voting Shareholders hold the shares in ACTEW on trust for the ACT (see s.13(5) TOC Act).

A key governance responsibility of Voting Shareholders is the appointment of board members, which vests with the Voting Shareholders pursuant to the Corporations Act, the TOC Act and ACTEW's Constitution.

Generally, the Corporations Act sets out a range of provisions which relate to the appointment of directors (see Pt 2D.3, Div 1 – Appointment of Directors). Some of these provisions are replaceable rules, which can be displaced or modified by a company's constitution (see s.135 Corporations Act). ACTEW's Constitution (cl.8) specifically provides that the Replaceable Rules contained in the Corporations Act[11]

[10] In preparing its annual report ACTEW is also required to comply with the requirements of the *Annual Reports (Government Agencies) Act 2004* (ACT).

[11] Actual reference is to "Corporations Law".

shall not apply to ACTEW. Further, ACTEW's Constitution sets out specific arrangements with respect to the appointment and removal of directors, including:

- the power of appointment and removal of directors shall at all times vest in the Voting Shareholders (cl.47(2));
- a general requirement that Voting Shareholders not appoint a director or consent to the appointment of a director of a subsidiary unless, before so doing, they have consulted with a standing committee of the Legislative Assembly nominated by the Speaker of the Legislative Assembly, or if no nomination has been made, the standing committee responsible for the scrutiny of public accounts (save for where the number of directors has fallen below the minimum required by ACTEW's Constitution) (cl.47(3));
- the capacity for Voting Shareholder to appoint directors without consulting the relevant committee of the Legislative Assembly where the number of directors has fallen below the minimum required by ACTEW's Constitution, provided however that the appointment is for no more than 90 days from the day of appointment (see cl.47(4)); and
- a requirement that Voting Shareholders consider that the person to be appointed as a director has the qualifications set out in section 12 of the TOC Act (cl.48(1)).

ACTEW's Constitution further provides that the provisions of the TOC Act prevail over any inconsistent clauses of the Constitution that have not been approved by the Legislative Assembly (cl.5). In relation to the appointment of directors, the TOC Act imposes obligations with respect to expertise or skills of directors necessary to assist the corporation to achieve its principal objective (s.12(1)) and broadly equivalent obligations to consult with and consider any recommendations made by the relevant committee of the Legislative Assembly (save for where the number of directors has fallen below the minimum required by the corporation's Constitution or by the Corporations Act (s.12(2),(3)).

Having regard to the requirements of the Corporations Act, TOC Act and the ACTEW Constitution, the processes taken by the ACT Government with respect to the appointment of directors to ACTEW include:

- the Voting Shareholder satisfying themselves that the candidate is suitable;
- the Voting Shareholders considering any names that may have been provided to them by the ACTEW Board's Nomination Committee;
- a requirement for consultation with the Office of Women, and that the outcomes of that consultation be reported to Cabinet on the appointment paper;
- the Voting Shareholders ensuring that the appointment is undertaken consistent with the ACT Government's commitment to:
  - achieving 50 per cent representation of women on its boards and committees;

- encouraging greater participation of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with a disability; and
  - promoting representation from a broad cross section of the community, including community organisations; and
- the Voting Shareholder taking any proposed appointment to Cabinet for endorsement. In the case of an appointment to ACTEW, this would generally occur prior to consultation with the Public Accounts Committee.

There is currently no general requirement that positions on the ACTEW Board be publicly advertised.

ACTEW's Constitution and the TOC Act also set out additional roles and responsibilities of Voting Shareholders in relation to any board appointments and in particular provides that they:

- determine the number of directors to be appointed, the terms of their appointments and their remuneration (see cll.47, 49, 50, 58 ACTEW Constitution);
- are responsible for appointing the Chair and Deputy Chair (see cl.50 ACTEW Constitution);
- must be satisfied that a candidate has the expertise or skills necessary to assist the TOC to achieve its principal objective (s.12(1) TOC Act);[12]
- before any person is appointed as a director, consult with the Public Accounts Committee of the Legislative Assembly, which has 30 days to comment (s.12(2) TOC Act);[13] and
- if they consider that the Chief Executive Officer has the qualifications to be a Director, they must appoint him or her as a director (see cl.48(2) ACTEW Constitution).

The Corporations Act, ACTEW's Constitution and the TOC Act also establish a range of other roles for Voting Shareholders, including but not limited to:

- providing input into the preparation of its SCI (see s.19 TOC Act, see further Chapter 6);

[12] The term "principal objective" is not defined in the TOC Act, and differs from the term "main objectives" which is used in section 7 of the TOC Act. While the *Legislation Act 2001* (ACT) provides that in an Act words in the singular number include the plural and words in the plural number include the singular (s.145), the use of this term is confusing, particularly as section 7 of the TOC Act provides that all of the main objectives are of equal importance. The TOC Act should be amended to remove this potential confusion.

[13] The TOC Act and ACTEW's Constitution also makes provisions with respect to the appointment of directors to ACTEW's subsidiary including requirements with respect to consultation with the Public Accounts Committee prior to consenting to the appointment of such a director by ACTEW (see s.12 TOC Act; cl.47 ACTEW Constitution).

- with respect to the modification of ACTEW's SCI, which may only occur with their agreement (see s.21 TOC Act); and
- that business at a general meeting of ACTEW can only be transacted when the Voting Shareholders are present either in person or by proxy (see cl.32 ACTEW Constitution).

ACTEW Board

The ACTEW Board exercises a governance, strategic and oversight role in relation to the operation of ACTEW water and sewerage business, and ACTEW's investments in the ActewAGL joint venture. The ACTEW Board consists of up to seven non-executive members and the Managing Director.

ACTEW normally holds eight to ten Board meetings each year. It also holds an Annual General Meeting (AGM) as required under section 250N(2) of the Corporations Act (see cl.27 ACTEW Constitution). ACTEW's Constitution provides that additional general meetings may be held at the request of the Board (see cl.27, 28) or the Voting Shareholders (see cl.29).[14]

As ACTEW is a company registered under the Corporations Act, each member of the ACTEW Board is subject to the duties and obligations imposed by that Act. In particular, Pt 2D.1 of the Corporations Act sets out the statutory duties and powers of officers and employees of corporations. For ACTEW Board members these duties include, but are not limited to:

- exercising their powers and discharging their duties with care and diligence;
- making business decisions in good faith and for a proper purpose;
- ensuring they do not have any material personal interest in any material decision;
- being properly informed about the business and decisions being made; and
- acting in the best interests of the company.[15]

In addition to these duties, the TOC Act also imposes a set of specific obligations on directors – separate from obligations on the corporation itself[16] – including:

- as soon as practicable after becoming aware of a 'significant event' affecting the ACTEW group, to tell the Voting Shareholders about the event (s.16A);[17]

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[14] Separately the Corporations Act also contains provisions with respect to meetings of members of companies (see Pt 2G.2). No business is able to be transacted at a general meeting for ACTEW unless the voting shareholders are present either in person or by proxy (see cl.32 ACTEW Constitution).

[15] As to directors' duties, including common law duties, see further Chapter 3.

[16] As to obligations imposed on TOCs as compared to directors, see for example, section 15 of the TOC Act (Provision of Information) and section 16 of the TOC Act (Acquisition and disposal of subsidiaries and undertakings).

[17] Pursuant to s.16A TOC Act reportable significant events are those that affect, or are likely to affect the overall value and performance of the corporation, a significant part of the assets of the

- ensure that the applicable ACT Government policies advised to it by the Voting Shareholders are, as far as practicable, complied with by ACTEW (s.17A(2));
- a requirement to establish an audit committee (s.18A(1));
- a requirement to prepare and submit a SCI (ss.19, 20); and
- give the Voting Shareholders, within the prescribed period after the end of each financial year, an annual report on the operations of ACTEW (s.22).

These obligations that exist under the TOC Act are in addition to, and in some instances vary from, the obligations operating with respect to ACTEW, its directors and officers under the Corporations Act including, for example, the requirement to prepare annual financial reports and directors' reports (see Pt 2M.3, see further Chapter 6). Key aspects of the relationship between the Corporations Act and the TOC Act are considered in greater detail in Chapter 3.

To assist in fulfilling its obligations, the ACTEW Board has established a number of committees:

- the *Audit and Risk Management Committee*, which has been established to oversee risk management and review ACTEW's risk register, review the outcomes of external and internal audits and ensure the accepted recommendations are addressed, and review and endorse financial statements;
- the *Safety and Environment Committee*, which has been established to review and endorse standards, work practices and behaviours that promote safety and environmental performance and review investigations of major safety or environmental incidents;
- the *Remuneration Committee*, which has been established to set the remuneration and employment terms and conditions for the Managing Director and to monitor and review his performance; and
- the *Nomination Committee*, which has been established to advise on the composition and performance of the ACTEW Board, to assist in ensuring the Board is comprised of the right mix of skills and to develop succession plans for the Chairman and the Managing Director.

ActewAGL Joint Venture Board

The ActewAGL joint venture is governed by the ActewAGL Joint Venture Board (**Joint Venture Board**). The structure and functions of the Joint Venture Board are set out in the joint venture agreements (see above).

Under these agreements, the Joint Venture Board consists of six members – three members appointed by ACTEW,[18] and three members appointed by the other joint

corporation, the performance of the corporation or the carrying out of a significant activity of the corporation (see also s101 *Financial Management Act 1996* (ACT) re: territory authorities).

[18] Appointment is by the ACTEW Partners, which are ACTEW's wholly owned subsidiaries ACTEW Retail Ltd and ACTEW Distribution Ltd.

venture partners. The Chair of the Joint Venture Board is appointed by ACTEW or the AGL/Jemena partners on an alternating basis generally for a two year period.

In making decisions with respect to the joint venture, Joint Venture Board members are required to perform their duties in good faith, manage the business of the Partnerships[19] on behalf of the partners and in the interest of the business of both Partnerships as a whole and comply with all laws and requirements which affect the business of the Partnerships. Although the ActewAGL Joint Venture Board members are not "Directors" in Corporations Act terms, they adhere to the standards required of directors under that Act (ActewAGL, 2012:12).

Where the Joint Venture Board is required to deal with issues involving related party transactions, full details of the related party agreement are to be disclosed to the other Partnership party and the agreement is not entered into unless and until it has been approved by the approving party nominated by each partner.

Boards of ACTEW subsidiaries

Under the ActewAGL joint venture arrangements, ACTEW has two wholly owned subsidiaries – ACTEW Retail Pty Ltd and ACTEW Distribution Pty Ltd -- each of which hold 50 per cent interests in their respective retail and distribution partnerships. Both of these subsidiaries are companies registered under the Corporations Act, and each has a board of directors. In both instances, board members are appointed by ACTEW, subject to approval by the Voting Shareholders, and have historically been members of ACTEW's executive team appointed for the term of their employment or unless otherwise terminated. At present, the directors of both companies are the Managing Director, the Chief Financial Officer and the Deputy Chief Executive Officer. These board members are subject to the duties and obligations under the Corporations Act, including those specifically relating to directors of wholly owned subsidiaries (see s.187).

1.3 ACTEW's current activities and operations

1.3.1 Water and sewerage

1.3.1.1 Key services

ACTEW is the primary provider of water and sewerage services to the ACT. It currently services around 155,000 household and business customers. In 2012-13, water extracted for consumption was 47.8 gigalitres (**GL**), and approximately 29.7 GL of sewage was treated (see Table 1.2). There has been significant change in the volume of water supplied over the past decade. In the face of drought, government policy and changed customer behavior, the volume of water supplied has fallen from around 65.9 GL in 2001-02. At its lowest point in 2010-11 total water supplied by

[19] The ActewAGL Distribution Partnership and the ActewAGL Retail Partnership.

ACTEW fell to just 40.9 GL. This reduction in aggregate consumption has occurred as the number of customers has grown (by around 2.17 per cent annually between 2008-09 and 2012-13) (see ICRC 2013b:116). In addition to the core water and sewerage services supplied to the ACT and its investment in the ActewAGL joint venture, other key activities that ACTEW is involved in directly or indirectly include:

- providing water services to surrounding regions, in particular Queanbeyan (which is ACTEW's largest single customer);
- servicing ACT's stormwater assets under contract with the Territory and Municipal Services Directorate (**TAMS**), which owns the assets;
- providing approvals with respect to new developments;
- installing new water and sewerage infrastructure for new developments;
- the provision of community service obligations (**CSOs**), including concessions to selected classes of customers, and infrastructure projects that are outside the regulatory process (see further Chapter 5);
- the acquisition of new businesses or assets which are complimentary to or overlap with ACTEW's core activities;
- the utilisation of existing resources in the provision of new, unregulated services; and
- contributing to the community through cultural and social development activities including by sponsorships of community organisations and support to those in need through donations to charitable organizations[20]

While ACTEW is the primary provider of the water and sewerages services in the ACT, it is not the only government entity involved in this area. In particular, TAMS has primary ownership and responsibility for the ACT's stormwater system, and as a result also has involvement in the provision of secondary water. In addition to its regulatory responsibilities, the Environment and Sustainable Development Directorate (**ESDD**) also plays a role in the provision of water efficiency measures.

[20] Both ACTEW and the ActewAGL joint venture support the ACT community through sponsorships and other activities. This has produced some controversy regarding the nature of these sponsorships, and also confusion as to which entity was paying for particular sponsorships (see further Chapter 3). In 2012-13, the total level of sponsorship provided directly by ACTEW was $506,000 to 67 recipient organisations. Decisions with respect to sponsorships are made in accordance with the ACTEW Sponsorships and Donations Policy and the Board approved budget for sponsorships. Senior employees will make recommendations, which are then assessed by the Company Secretary who makes a recommendation for approval by the Managing Director. These are reported quarterly to the Board and published in the annual report.

Table 1.2: ACTEW key statistics

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Water																			
Customers	113,371	116,008	117,343	118,856	120,349	122,760	124,570	126,750	129,114	131,893	134,020	136,890	138,917	141,046	143,741	146,608	150,310	154,210	159,593
No. of dams	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4	4
Capacity of dams (GL)	215.4	215.4	215.4	215.4	215.4	215.4	215.4	215.4	215.4	215.4	215.4	211.6	207.4	207.4	207.4	207.4	207.4	207.4	277.8
Number of Reservoirs	43	44	44	44	44	42	44	44	44	44	44	44	44	44	44	46	46	46	47
Capacity of reservoirs (ML)	950	950	912	912	912	912	912	912	891	891	891	891	891	891	891	917	917	932	932
No of pumping stations	18	18	17	17	17	17	21	21	21	21	23	23	23	23	23	24	25	25	25
Length of mains (km)	2,830	2,877	2,895	2,901	2,907	2,921	2,933	2,948	2964	2,985	3,013	3,057	3,007	2,980	3,059	3,096	3,134	3,179	3,219
Max daily demand (ML)	332	296	349.5	406	371	331	392	415.7	366.7	323	267	309	266	195	220	213	213	177	228
Total consumption (ML)	60,572	53,254	61,810	73,009	60,361	57,929	62,834	65,904	65,567	52,262	51,719	54,340	51,060	43,556	44,955	45,133	40,914	41,629	47,815
Consumption per person per annum (kL)	199.2	174	187	220	182	175.5	185.6	193.7	206.2	156	144	149	136	115	116	114	101	101	114
Rainfall (mm)	586.6	645	674.6	438.6	688.6	666	618.2	633.2	340.2	463	593	629	428	455	511	612	866	788	470
Sewerage																			
No of customers	113,371	116,008	115,083	116,268	117,648	119,846	121,618	123,641	125,784	128,446	130,355	133,217	135,241	137,262	139,794	142,577	146,231	150,065	155,322
No of pumping stations	29	29	28	28	28	28	28	28	28	26	26	27	27	27	27	26	26	26	26
Quantity of sewage treated (ML)	30,065	32,200	33,704	31,524	32,718	32,585	30,277	30,645	28,313	27,959	27,293	29,019	26,957	25,707	28,963	26,769	32,243	31,264	29,659
Max daily load (ML)	256.9	182	152	138	235	137	151.4	190.6	116	116	111	113	153	92	81	101	212	386	472
Sewage treated per person pa (kL)	98	105	109	101	106	105.2	97	97.6	89.2	87	84	88	81	75	83	75	89	84	78
Length of mains (km)	2,774	2,784	2,806	2,812	2,817	2,836	2,852	2,875	2,897	2,921	2,948	2,985	2,993	3,014	3,059	3,094	3,134	3,174	3,206

Sources: ACTEW Annual Reports 2002-03; 2008-09; 2011-12, ACTEW, for year ending 30 June

1.3.1.2 Key assets

The key physical assets utilised by ACTEW to supply water and wastewater services to the ACT (see Figure 1.2) include:

- **the Googong, Cotter, Bendora and Corin Dams**

  The main water supply for the ACT comes from the Cotter River catchment, in which the Cotter, Corin and Bendora Dams are located. The Corin Dam has a capacity of 70.8 GL, and the Bendora Dam a capacity of 11.4 GL. Water from the Corin and Bendora Dams are carried by gravity to the Mount Stromlo treatment plant (see below) via the Bendora Gravity Main, a 20 kilometre long pipe constructed in 1967 with a capacity to carry 310 megalitres (**ML)** per day. The Cotter Dam, which was originally built in 1915, and raised in 1951 with a capacity of 3.9 GL, was a concrete gravity dam which was replaced by a larger dam completed in 2013. The new dam has a storage capacity of 76.2 GL. Water from the enlarged Cotter Dam must be pumped to the treatment plant via the historic Cotter Pumping Station.

  Water supply is also available to the ACT from the Googong Dam, which is located in the Queanbeyan River catchment. The Googong Dam is an earth and rockfill embankment dam. Its construction was completed in 1970, and is the largest dam supplying the ACT with a capacity of 119.4 GL.

  With the construction of the Enlarged Cotter Dam now complete, the total capacity of the ACT's dams is around 280 GL.

- **the Murrumbidgee to Googong Water Transfer Pipeline**

  The Murrumbidgee to Googong Water Transfer Pipeline (**M2G Pipeline**) which was completed in 2012 is a 12 kilometre pipeline which enables the transfer of water from the Murrumbidgee River to the Googong Dam via Burra Creek in NSW.

  The M2G Pipeline has a maximum transfer capacity of 100 ML of water per day. However, the amount of water that can be transferred each day depends on the availability of water in the Murrumbidgee River, maintenance of Murrumbidgee River environmental flows and the available storage capacity in Googong Reservoir. The M2G Pipeline is also available to facilitate the transfer of water which is held in the Tantangara Dam. ACTEW currently holds rights to some 22 GL of water security entitlements (12.5 GL of general and 9.7 GL of high level entitlements).[21]

[21] ACTEW paid $40.6 million for the licences over the period 2008-2012. The value of these assets has been written down by $14.1 million over the period 2009-2013 giving a net value of the current licences of $26.5 million.

- **water treatment plants at Mount Stromlo and Googong**

  The Mount Stromlo treatment plant was originally commissioned in 1967. Following the 2003 bushfires, the plant was upgraded – initially in 2004 to provide for two methods of treatment (direct filtration, and dissolved air floatation and filtration) and further in 2007 to provide for ultraviolet (UV) light disinfection. The plant has a production capacity of 250 ML per day.

  The Googong Treatment plant was built in 1979 and augmented in 2004. It provides for treatment using both a clarification and filtration system, and also a dissolved air flotation and filtration process. Its production capacity is 270 ML per day.

Figure 1.2: Key water and sewerage assets in the ACT region

Source: ACTEW Submission

- **water supply and distribution network**

  From the water treatment plants, water is supplied to Canberra via a network of 47 service reservoirs, 25 pumping stations and 3,219 kilometres of pipes.

- **sewage transfer network**

  Sewage is collected and transferred via a network of 3,206 kilometres of pipes and 26 pumping stations.

- **the Lower Molonglo Water Quality Control Centre** (**LMWQCC**)

  Located one kilometre upstream from the junction of the Murrumbidgee and Molonglo Rivers, the LMWQCC is the main sewage treatment facility for Canberra and the largest inland treatment centre in Australia.

  The LMWQCC treats more than 90 ML of Canberra's sewage each day. Treatment includes physical, chemical, and biological processes before the water is discharged into the Molonglo River. During the treatment process all of the solid material is removed and incinerated in a high temperature furnace, the only major sewage treatment facility in Australia utilising such technology.

- **the Fyshwick Sewage Treatment Plant**

  The Fyshwick Sewage Treatment Plant was built in the 1960s and is located on approximately 32 hectares alongside the Jerrabomberra Wetlands and in the vicinity of the commercial and industrial areas at Fyshwick. The plant treats sewage from the Majura, Fyshwick, Hume, Jerrabomberra and Narrrabundah catchments, releasing the treated effluent either to the LMWQCC or the North Canberra Water Reclamation Plant for further treatment and subsequent use as high quality recycled water for irrigation.

1.3.2 Energy

ACTEW's interests in the energy industry are through its investment in the ActewAGL joint venture, specifically its 50 per cent ownership interests in both the ActewAGL Distribution partnership and the ActewAGL Retail Partnership.

Generally, electricity and gas retail services are contestable, whereas the distribution services are not. Overall, ActewAGL Retail is the dominant energy retailer in the ACT with more than 90 per cent market share of the electricity and gas domestic retail markets. However, its retail activities extend beyond the ACT, and encompass surrounding areas including Goulburn, Boorowa, Yass, Young and Shoalhaven. ActewAGL Retail also provides a range of retail services to ACTEW in relation to its water and sewerage operations.

ActewAGL Distribution's owns and operates the electricity network in the ACT and the gas network in the ACT, Shoalhaven and Queanbeyan regions. In the ACT as at 30 June 2013, the electricity network assets serviced just under 183,000 customers and included:

- 2,406 km of overhead wires;
- 2,720 km of undergrounds cables;
- 51,375 power poles;
- 14 zone substations; and
- 4,506 distribution substations,

while the gas network serviced around 116,000 customers and its assets comprised:

- 3,880 km of medium high pressure mains;
- 5 receiving and primary regulatory stations; and
- 82 secondary district regulator sets.[22]

ActewAGL Distribution is also the entity through which the ActewAGL joint venture provides corporate and other services to ACTEW.

1.4 ACTEW's operational and financial performance

The purpose of this section is to set out briefly key aspects of ACTEW's operational and financial performance. Given the scope of this Review, the primary focus of this analysis is ACTEW's water and sewerage operations.

1.4.1 Operational performance

1.4.1.1 Water

Data from the NWC's '*National Performance Report 2011-12*'(NWC, 2013) provide an overview of ACTEW's operational performance over the past five years in the areas of asset management, customer response, environment, health and pricing. For the purposes of this Review, generally only the most recent data is reported together with commentary on historical performance where appropriate.

Asset management

In 2011-12, ACTEW generally performed slightly worse than the industry average on matters such as the number of water and sewerage main breaks (per 100 kilometres of mains); however the volume of water losses was below average amongst major utilities (Table 1.3). As shown in Table 1.5, these divergent results are consistent with the fact that customer response times in the ACT are better than average. Further, it should also be recognised that performance against these (and other) measures varies from year to year.

[22] Information provided by ACTEW. As to information as at 30 June 2012, see ICRC (2013c).

Table 1.3: Asset management performance, major water utilities > 100,000 customers, 2011-12

	Water main breaks (per 100 km of water main)	Sewerage mains breaks and chokes (per 100km sewer main)	Real losses (L/service connection /d)	Real losses (kL/ km water main /d)	Property connection sewer breaks and chokes (per 1000 properties)
ACTEW	**25**	**42**	**59**	**2.1**	**8**
Barwon Water	17	24	61	1.8	0
City West Water	33	15	65	4.0	11
Hunter Water Corporation	25	47	75	3.2	9
Queensland Urban Utilities	18	15	96	na	3
SA Water – Adelaide	17	51	73	3.8	33
South East Water Ltd	15	12	74	4.2	7
Sydney Water Corporation	22	48	85	5.5	0
Water Corporation – Perth	12	19	91	4.3	na
Yarra Valley Water	40	26	50	2.9	10
Average	**22**	**30**	**73**	**4**	**9**

Source: NWC National Performance Report 2011-12

Customer response

Tables 1.4 and 1.5 detail ACTEW's performance on a range of customer related measures. As Table 1.4 shows, in 2011-12 the number of water and sewerage service complaints (per 1,000 properties) was above the industry average, while billings and account, and water quality complaints were below average.

Table 1.4: Customer complaints, major water utilities > 100,000 customers, 2011-12

	Water service complaints (per 1000 properties)	Sewerage service complaints (per 1000 properties)	Billing and account complaints - water and sewerage (per 1000 properties)	Total water and sewerage complaints (per 1000 properties)	Water quality complaints (per 1000 properties)
ACTEW	**2.0**	**1.4**	**0.2**	**5.0**	**0.9**
Barwon Water	0.1	0.6	0.4	4.3	1.8
City West Water	0.1	0.4	1.5	3.7	0.7
Hunter Water Corporation	0.2	2.2	2.1	7.6	2.9
Queensland Urban Utilities	0.5	0.2	0.6	6.0	4.7
SA Water - Adelaide	0.2	0.1	0.2	1.5	1.0
South East Water Ltd	0.7	0.0	0.2	3.5	2.0
Sydney Water Corporation	0.2	0.5	2.0	3.5	0.5
Unitywater	na	na	na	na	na
Water Corporation - Perth	0.9	0.4	1.4	9.5	6.9
Yarra Valley Water	1.1	0.3	4.3	10.3	3.6
Average	**0.6**	**0.6**	**1.3**	**5.5**	**2.5**

Source: NWC National Performance Report 2011-12

Table 1.5 details customer response times for unplanned water and sewerage interruptions, and as indicated above, shows that response times in the ACT are generally better than average. Table 1.5 also shows that ACTEW has a very low level of restrictions, but has a greater than average propensity to take legal action to recover for non-payment of water bills. This relates to the fact that water bills run with ownership of the land to which the water has been supplied in the ACT and if not paid the debt stays with the land and is settled when the land is sold.

Table 1.5: Customer response times, major water utilities > 100,000 customers, 2011-12

	Average duration of unplanned interruption-water (minutes)	**Average frequency of unplanned interruptions - water (per 1000 properties)**	**Average sewerage interruption (minutes)**	**No. of restrictions applied for non-payment of water bill (per 1000 properties)**	**No of legal actions applied for non-payment of water bill (per 1000 properties)**
ACTEW	**119**	**63**	**37**	**0.0**	**1.5**
Barwon Water	114	127	154	1.7	0.1
City West Water	131	117	122	0.0	1.5
Hunter Water Corporation	122	206	156	1.5	0.1
Queensland Urban Utilities	169	47	na	0.0	0.0
SA Water - Adelaide	201	63	219	1.7	2.0
South East Water Ltd	87	181	116	0.9	0.0
Sydney Water Corporation	155	147	261	3.3	0.4
Unitywater	na	na	na	0.0	0.2
Water Corporation - Perth	118	105	159	2.0	1.0
Yarra Valley Water	101	210	186	0.3	0.0
Average	**132**	**127**	**157**	**1.0**	**0.6**

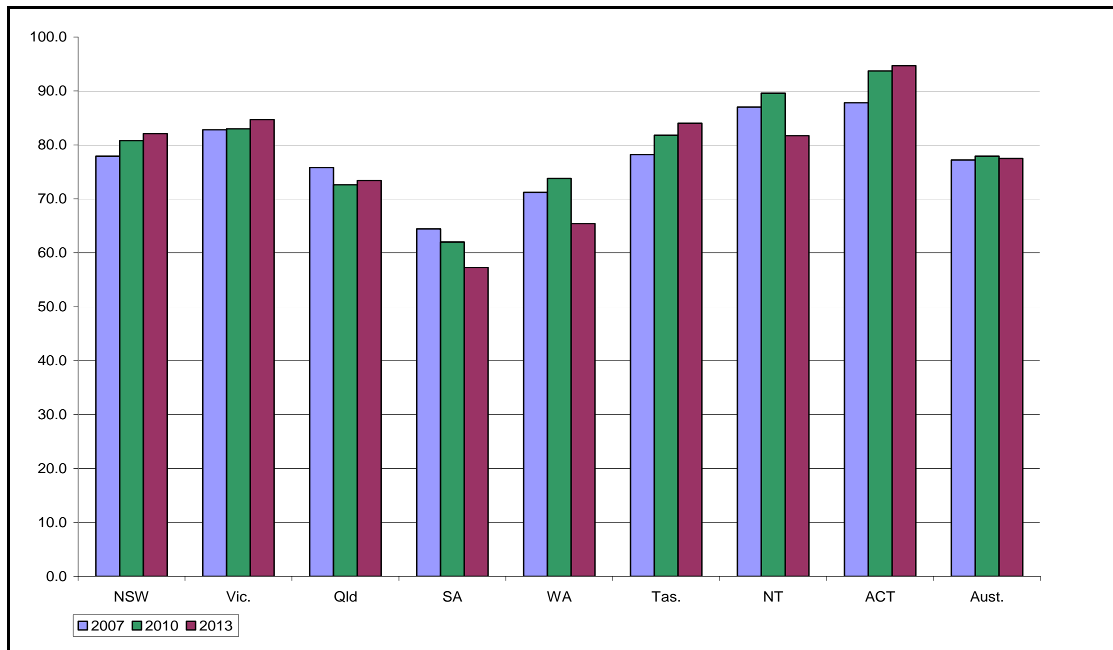
Source: NWC National Performance Report 2011-12

Health and environment

In 2011-12, ACTEW was fully compliant with all measures in relation to health aspects of water and sewerage service provision including maintaining 100 per cent coverage of population where microbiological compliance was achieved.

This performance is reflected in data compiled by the Australian Bureau of Statistics (**ABS**) which found customer satisfaction with the quality of water for drinking in 2007, 2010 and 2013 was higher in the ACT than in any other jurisdiction in Australia (see ABS 2013) (see Figure 1.3).

Figure 1.3: Satisfaction with quality of water for drinking, by State or Territory, 2007, 2010, 2013



Source: ABS Cat. No 4602.0.55.003, Environment Issues 2013

Table 1.6 details aspects of ACTEW's environmental performance, and in particular the high proportion of sewage treated to a tertiary or advanced level, together with the high percentage of biosolids reused. In considering this reuse level, it should be recognised that ACTEW maintains the only major sewage treatment facility in Australia that burns its sludge prior to reuse.

Table 1.6: Environmental performance, major water utilities > 100,000 customers, 2011-12

	Sewage treated to a primary level (%)	Sewer overflows reported to the environmental regulator (no per 100km of sewer main)	Sewage treated to a secondary level (%)	Sewage treated to a tertiary or advanced level (%)	Sewage volume treated that was compliant (%)	Biosolids reused (%)
ACTEW	**0**	**1.9**	**0**	**100**	**100**	**100**
Barwon Water	0	0.4	92	8	100	151
City West Water	0	0.4	0	100	100	100
Hunter Water Corporation	0	0.0	56	44	99	86
Queensland Urban Utilities	0	0.4	2	98	98	100
SA Water – Adelaide	0	0.5	0	100	100	148
South East Water Ltd	0	0.1	21	79	100	110
Sydney Water Corporation	74	0.8	5	23	100	100
Unitywater	2	0.4	3	95	na	na
Water Corporation - Perth	5	0.1	Na	95	100	100
Yarra Valley Water	0	0.2	6	94	100	0
Average	**7**	**0**	**19**	**76**	**100**	**100**

Source: NWC National Performance Report 2011-12

Pricing

Water and sewerage prices in the ACT are generally determined in accordance with the *Independent Competition and Regulatory Commission Act 1997* (ACT) (**ICRC Act**). Under the ICRC Act, a referring authority, currently the Treasurer, may give the ICRC an industry reference in relation to the pricing of regulated services (see s.15(1)(a) ICRC Act). The referring authority may also determine the terms of reference for such an investigation (see s.16 ICRC Act).

Where a reference is given to the ICRC to make a price direction in a regulated industry, the ICRC must decide on the level of prices for services in relation to the period specified in the reference. In doing so the ICRC must have regard to a range of factors, including but not limited to the protection of consumers from abuses of monopoly power, standards of quality, reliability and safety, the need for greater efficiency in the provision of regulated services to reduce costs, and an appropriate rate of return on any investment (see s.20 ICRC Act).

Over the last seven years, ACTEW's water and sewerage prices have tended to be in the middle of the range of prices in capital cities. This is illustrated in Tables 1.7 and 1.8 below, which respectively detail water and sewerage prices for an average customer (using 200 kL/a) for major utilities supplying more than 100,000 customers. As Table 1.7 also shows, whereas ACTEW was a relatively high priced water supplier in 2007-08, it has had the lowest increase in water prices over the intervening six years. As Table 1.8 shows, increases in sewerage prices have been relatively modest.

Table 1.7: Annual water bill based on 200 kL/a, major water utilities > 100,000 customers

Entity	2007-08	2008-09	2009-10	2010-11	2011-12	% increase 2007-08 to 2011-12
ACTEW (ACT)	**498.07**	**491.40**	**505.93**	**504.38**	**561.68**	***13%***
Barwon Water (VIC)	386.21	426.36	474.12	507.09	546.63	***42%***
City West Water (VIC)	316.09	365.68	425.20	488.07	543.41	***72%***
Hunter Water Corporation (NSW)(	309.68	319.10	373.41	369.82	398.84	***29%***
Queensland Urban Utilities (QLD)	na	na	na	641.79	679.09	***na***
SA Water – Adelaide (SA)	341.58	381.24	463.78	543.66	723.60	***112%***
South East Water Ltd (VIC)	259.33	287.95	345.06	404.13	452.46	***74%***
Sydney Water Corporation (NSW)	361.18	429.52	501.70	540.82	565.39	***57%***
Unitywater (QLD)	na	na	na	638.03	690.92	***na***
Water Corporation – Perth (WA)	319.60	343.82	372.73	405.64	442.15	***38%***
Yarra Valley Water (VIC)	266.01	308.88	370.28	435.74	491.26	***85%***

Source: NWC National Performance Report 2011-12

Table 1.8: Annual sewerage bill based on 200 kL/a, major water utilities > 100,000 customers

Entity	2007-08	2008-09	2009-10	2010-11	2011-12	% increase 2007-08 to 2011-12
ACTEW (ACT)	**480.55**	**479.33**	**510.88**	**529.01**	**555.39**	***16%***
Barwon Water (VIC)	376.19	389.39	433.01	463.15	499.59	***33%***
City West Water (VIC)	270.46	324.08	346.21	380.21	419.74	***55%***
Hunter Water Corporation (NSW)(	388.25	397.62	522.92	536.30	556.11	***43%***
Queensland Urban Utilities (QLD)	na	na	na	484.15	484.53	***na***
SA Water – Adelaide (SA)	470.82	468.99	468.34	468.73	479.03	***2%***
South East Water Ltd (VIC)	342.80	402.93	455.59	518.30	569.15	***66%***
Sydney Water Corporation (NSW)	453.89	518.74	528.66	530.12	539.53	***19%***
Unitywater (QLD)	na	na	na	651.67	660.02	***na***
Water Corporation – Perth (WA)	566.64	571.42	584.11	592.52	608.63	***7%***
Yarra Valley Water (VIC)	343.92	398.52	456.92	525.03	609.76	***77%***

Source: NWC National Performance Report 2011-12

In its most recent decision, the ICRC determined an increase in water prices of 4.9 per cent and a decrease in sewerage prices of 18 per cent. For the average household, it has been estimated that this determination would result in a 7 per cent reduction in the annual water and sewerage bill in 2013-14. ACTEW has appealed this decision.

1.4.1.2 Energy

Since its establishment, the ActewAGL joint venture has been, and remains, the dominant energy retailer in the ACT with more than 90 per cent of small retail customers (see AEMC, 2010:23; AER, 2013:5).

According to ActewAGL's 2011-12 Annual Report (ActewAGL, 2012:11), since its formation the joint venture has consistently:

- operated and maintained the most reliable distribution networks in Australia;
- led the Australian market by offering the lowest cost electricity rates; and
- achieved an extremely high overall customer approval rating.

As the ActewAGL joint venture is subject to industry licensing requirements pursuant to the Utilities Act, its performance is subject to review by the ICRC. In its most recent '*Compliance and performance report for 2011-12*' (ICRC, 2013c:viii), the ICRC concluded, inter alia, that in 2011-12:

- the ActewAGL joint venture satisfied the service standard specified in the Consumer Protection Code for customer connection times;

- the number of complaints in relation to gas distribution increased compared to those reported in 2010-11, while electricity distribution experienced a substantial decrease in the number of complaints (see Table 1.9); and

Table 1.9: Customer complaints, electricity distribution, ActewAGL Distribution, 2007–08 to 2011–12

Complaint item	2007–08	2008–09	2009–10	2010–11	2011–12
Reliability of supply	7	26	10	26	25
Technical quality of supply	7	5	9	1	35
Administrative process or customer service	253	181	259	256	34
Property damage/restoration of property	139	86	75	43	36
Connections	17	12	11	8	10
Metering/meter reading	14	15	13	6	19
Failure to provide notice or provision of insufficient notice	225	209	183	196	158
Other network operations	na	26	1	24	0
Other	98	51	75	136	136
Total	**760**	**611**	**636**	**696**	**453**

Source: ICRC (2013c) Table A6.12

- the number of planned interruptions to gas services increased compared to the number in 2010-11, while over the same period the number of planned and unplanned interruptions to electricity services decreased (see Tables 1.10, 1.11).

Table 1.10: Planned interruptions, performance indices, electricity distribution, ActewAGL Distribution, 2006–07 to 2011–12

Index	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12
SAIDI (average minutes per customer per year without power)						
Urban	52.2	64.6	59.4	51.5	53.4	48.0
Rural	31.6	38.8	35.9	45.3	56.7	15.6
Network total	51.4	63.6	58.6	51.3	54.3	45.9
SAIFI (average number interruptions per customer per year)						
Urban	0.21	0.25	0.25	0.24	0.24	0.20
Rural	0.14	0.16	0.17	0.20	0.24	0.10
Network total	0.21	0.25	0.25	0.24	0.24	0.22
CAIDI (average duration in minutes per interruption)						
Urban	243.4	255	235.6	215.6	222.2	212.2
Rural	225.3	247	205.8	229.7	241.6	205.2
Network total	243.0	254.8	234.8	216.1	222.9	212.1

Source: ICRC (2013c) Table A6.23

Table 1.11: Unplanned interruptions, performance indices, electricity distribution, ActewAGL Distribution, 2006–07 to 2011–12

Index	2006–07	2007–08	2008–09	2009–10	2010–11	2011–12
SAIDI (average minutes per customer per year without power)						
Urban	30.7	26.2	33.7	29.7	45.5	33.2
Rural	70.7	10.5	17.0	26.1	92.5	22.7
Network total	32.2	25.6	33.0	29.6	47.7	32.52
SAIFI (average number of interruptions per customer per year)						
Urban	0.60	0.50	0.63	0.66	0.78	0.61
Rural	0.60	1.80	0.27	0.78	0.83	0.43
Network total	0.60	0.60	0.62	0.67	0.80	0.60
CAIDI (average duration in minutes per interruption)						
Urban	52.3	51.0	53.5	45.0	58.3	54.2
Rural	113.5	5.9	62.5	33.4	111.1	52.3
Network total	54.7	45.7	53.5	44.5	60.0	54.1

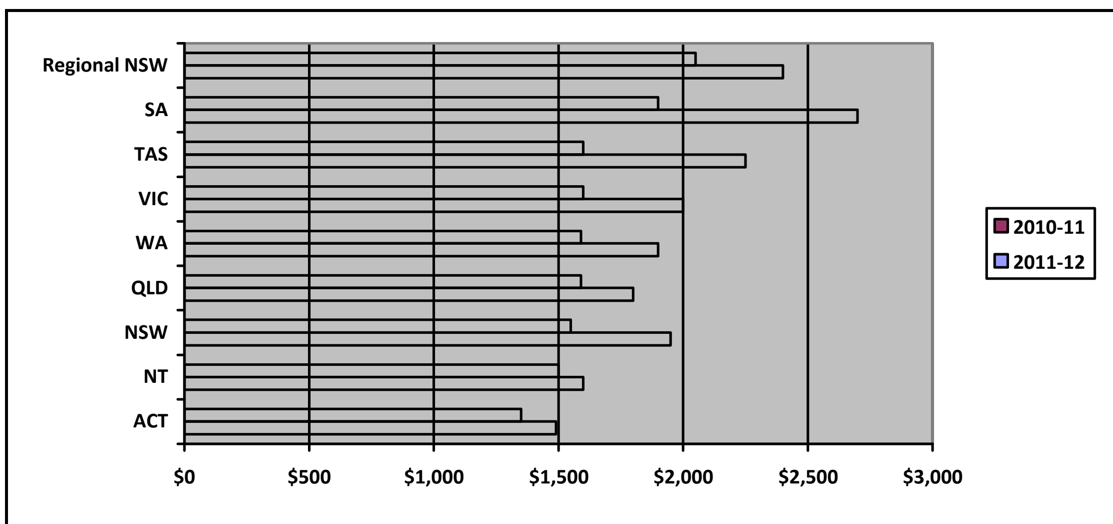
Source: ICRC (2013c) Table A6.24

Noting the scope of the Review's Terms of Reference, for further information as to ActewAGL's operational performance, readers are directed to the ICRC's full '*Compliance and performance report for 2011-12*' (ICRC, 2013c), and the Australian Energy Regulator's (AER) '*State of the energy market, 2012*' (AER, 2012) and '*Retail Energy Market Update Performance – January to March 2013*' (AER (2013).

Pricing

The ACT has historically enjoyed the lowest retail electricity prices in Australia (see Figure 1.4).

Figure 1.4: Domestic electricity bill comparison for annual consumption of 7,000 kWh (GST-inclusive)



Source: 2011-12 ActewAGL Annual Report p 45

Between 2007-08 and 2011-12 residential electricity prices have risen nationally by 91 per cent (66 per cent in real terms) and gas prices by 62 per cent (40 per cent in

real terms) (AER, 2012:128). By comparison, in the ACT unit prices for electricity and gas have increased nominally by 30 and 39 per cent respectively (see Table 1.12). However, in 2012-13 the ACT experienced an increase in electricity prices of almost twenty per cent. This movement has been attributed to the impact of climate change policies, specifically the adoption of carbon pricing in 2012 (AER, 2012:130).

Table 1.12: Average unit charge for residential customers, 2007–08 to 2011–12

	2007-08	2008-09	2009-10	2010-11	2011-12	% change
Electricity ($/MWh)	132.6	145.4	152.4	164.7	172	29.7%
Gas ($/GJ)	17.3	19.9	21.6	22.3	24	38.7%

Source: ICRC Compliance and Performance Report (2013c) Tables A6.7, A6.8

1.4.2 Financial performance

As the ACT's largest publicly owned entity, ACTEW's financial performance is of significant importance to the community. In considering this performance, regard needs to be given to a range of financial measures including revenues and profitability, asset levels, borrowings and gearing levels, and dividend and tax equivalent returns to the ACT.

1.4.2.1 Revenues

With variability in the volume of water sold (see Table 1.2 above) has come variability in revenue. This is detailed in Table 1.13, which shows water revenue rising from $46.7 million in 1999-20 to $167.7 million in 2012-13. However, for each year between 2007-08 and 2011-12, these water revenues were below $135 million, and averaged just under $120 million annually over this period.

Table 1.13: Revenues ($m)

Year	Water revenue	Sewerage revenue	JV revenue
1995-96	36.7	43.6	na
1996-97	40.8	45.3	na
1997-98	52.6	48.4	na
1998-99	44.7	48.5	na
1999-2000	46.7	52.9	na
2000-01	56.9*	53.2	25.3
2001-02	62.8*	56.8	42.0
2002-03	66.5*	60.5	43.0
2003-04	62.5*	64.2	51.9
2004-05	65.5*	68.7	52.8
2005-06	67.9*	73.1	52.7
2006-07	66.6*	75.6*	54.2
2007-08	101.2	84.2	69.3
2008-09	120.4	88.0	80.5
2009-10	126.1	98.4	93.4
2010-11	114.5	106.8	83.8
2011-12	133.9	118.1	81.8
2012-13	167.7	132.2	97.8

*Source: ACTEW Annual Reports * Does not include government charges (i.e. Water Abstraction Charge and Utilities Network Facilities Tax; est. 2005-06 - $13.1 m; 2006-07 - $25.4 m).*

As Table 1.14 also illustrates, in recent years ACTEW's water revenues were considerably below the levels which had been forecast under the previous regulatory process.

Table 1.14: ACTEW water revenues, 2008-09 to 2012-13 ($m)

	2008-09	2009-10	2010-11	2011-12	2012-13
Revenue forecast	137	162	171	186	195
Revenue earned	108	116	105	125	153

Sources: ICRC (2013a) Table 4.4; ACTEW provided revenue earned for 2012-13. Table 1.14 differs from Table 1.13 as it excludes unregulated income.

1.4.2.2 Assets and investments

Since its creation in 1995, the reported value of ACTEW's total assets has grown from around $1.5 billion to just over $2.8 billion – an increase of more than $1.3 billion (see Table 1.15).

Table 1.15: Assets ($m)

Year	Assets ($m)
1995-96	1,460.7
1996-97	1,472.5
1997-98	1,422.2
1998-99	1,438.8
1999-2000	1,434.5
2000-01	1,320.9
2001-02	1,326.0
2002-03	1,333.9
2003-04	1,354.4
2004-05	1,380.6
2005-06	1,394.0
2006-07	1,750.6
2007-08	2,009.0
2008-09	2,112.5
2009-10	2,286.8
2010-11	2,571.3
2011-12	2,698.3
2012-13	2,809.8

Source: ACTEW Annual Reports

This increase in total assets largely relates to ACTEW's investments in major water supply infrastructure, including the upgraded Cotter Dam, the Murrumbidgee to Googong Water Transfer Pipeline and the water treatment plant at Mt Stromlo.

However, this increase also reflects some increase in the value of ACTEW's interests in the ActewAGL joint venture. In 2012-13, these interests had a book value of just over $630 million, consisting of around $39 million for its interest in the ActewAGL Retail Partnership, $579 million for its interest in the ActewAGL Distribution partnership and around $18 million arising from the accounting treatment of a $24 million profit on sale from the creation of the joint venture in 2000 which is unwound annually over a fifty year life expectancy period of the joint venture.

This valuation is made in accordance with Australian accounting standards, and is audited by the ACT Auditor-General. However, it is noted that by operation of AASB 1013 - Accounting for Goodwill, it does not appear to be permissible for ACTEW to unilaterally revalue its interests in the joint venture. While it is beyond the scope of this Review to undertake an estimate of the value of these assets, in 2012-13 the joint venture generated income of around $98 million[23] for ACTEW (accounted for using the equity method), while actual cash distributions were somewhat lower. This suggests the potential value of ACTEW's interests in the ActewAGL joint venture is likely to be greater than the figure reported, particular with respect to the valuation placed on ACTEW's interest in the ActewAGL Retail partnership**.**

1.4.2.3 Borrowings and gearing

ACTEW borrows through the ACT Government. It is required to do so by virtue of the operation of Part 4 of the TOC Act (see further Chapter 5).

ACTEW's borrowings take the form of a mix of debt products, including indexed annuity bonds, capital indexed bonds and fixed rate nominal bonds. Since corporatisation, its gearing levels have risen – from under 5 per cent at corporatisation to just under 60 per cent in 2013. In part, this increase in gearing levels reflects government policies aimed at ensuring ACTEW has a gearing level more consistent with commercial entities. More recently, increases in gearing levels have been driven by the need to fund investments in water security infrastructure such as the Enlarged Cotter Dam and the M2G Pipeline. Another contributing factor has been the ACT Government's dividend policy, which requires ACTEW to pay dividends equivalent to 100 per cent of net profit after tax (NPAT). As ACTEW is required to fund capital investments needed for the ActewAGL joint venture out of cashflow, and ACTEW's profitability is assessed having regard to revenues received from the joint venture on an equity accounting basis as compared to a cash measure, this has meant it has been necessary for ACTEW to borrow to fulfil its dividend requirements (see further Chapter 5).

[23] This amount included the apportionment of a one-off payment relating to ACTEW's decision to take back responsibility for the provision of water and sewerage services.

Table 1.16: Debt and gearing levels

Year	Debt ($'000)	Equity ($'000)	Gearing ratio (Debt/(Debt + Equity)) %
1996	64,155	1,295,233	4.8
1997	56,872	1,304,831	4.2
1998	105,365	1,191,904	8.1
1999	101,273	1,191,244	7.8
2000	362,304	891,244	28.9
2001	363,661	796,243	31.4
2002	360,022	796,184	31.1
2003	351,321	791,865	30.7
2004	342,267	804,041	29.9
2005	357,927	794,447	31.0
2006	373,154	776,492	32.5
2007	378,380	1,013,231	27.2
2008	601,807	1,013,814	37.2
2009	690,177	998,760	40.9
2010	921,433	942,042	49.4
2011	1,218,723	943,010	56.4
2012	1,359,118	943,020	59.0
2013	1,352,497	994,828	57.6

Source: ACTEW Annual Reports, as at 30 June

As at 30 June 2013 ACTEW's total debt for ACTEW was $1.352 billion, consisting of $17.4 million in current borrowings and $1.335 billion of non-current borrowings, and its gearing ratio was just under 58 per cent (see ACTEW Annual Report, 2013:13). While this gearing ratio has increased over time, it should be recognised that these gearing levels are in part affected by the valuations placed on ACTEW's energy interests which appear to be below realisable values, but which are not able to be revalued given the relevant Australian accounting standards (see above). The proportion of debt which has been allocated to each segment of ACTEW's operations is shown in Table 1.17 below.

Table 1.17: ACTEW debt by segments, 2013

Type	Water ($m)	Sewerage ($m)	Investments ($m)	Total ($m)
Current debt	12.2	1.9	3.3	17.4
Non-current debt	934.6	146.9	253.7	1,335.1
Total	946.7	148.8	256.9	1,352.5

Source: ACTEW

1.4.2.4 Profitability, dividends and other financial returns to the ACT

Since its creation in 1995, ACTEW has generally been profitable. This is illustrated in Table 1.18, which shows profits rising from $29.9 million in 1995-96 to $79.6 million in 2012-13.

Table 1.18: ACTEW profitability ($m)

	Operating profit ($m)
1995-96	29.9
1996-97	37.7
1997-98	58.2
1998-99	45.0
1999-2000	65.7
2000-01	90.6
2001-02	46.8
2002-03	43.4
2003-04	12.2
2004-05	72.2
2005-06	60.5
2006-07	64.4
2007-08	75.9
2008-09	72.8
2009-10	91.4
2010-11	60.8
2011-12	73.9
2012-13	79.6

Source: ACTEW Annual Reports

However, the contribution that each element of the business makes to profitability has varied over the years and is anticipated to continue to do so. In particular, over the past six years the water business has contributed no more than a quarter of ACTEW's profits, and on average the contribution has been significantly less. In both 2010-11 and 2011-12, ACTEW's water business made a loss; in 2012-13 it just broke even. The reduction in water sales as a consequence of drought and government policy appears to have been a major contributor to this outcome; however, the profitability of ACTEW's water and sewerage operations is also significantly influenced by the nature and impact of ICRC pricing decisions.

Table 1.19: ACTEW business sector profitability (net profit after tax) ($m)

	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
Water	13.4	18.5	15.9	(16.1)	(5.7)	0.1
Sewerage	20.6	2.0	14.7	25.7	33.4	25.4
Joint venture	41.9	52.3	60.9	51.2	46.1	54.1
Total	**75.9**	**72.8**	**91.5**	**60.8**	**73.9**	**79.6**

Source: ACTEW Annual Reports, ACTEW

A comparison of ACTEW's water and sewerage profits to other major urban water utilities in Australia also shows that ACTEW has performed at the lower end in terms of its NPAT ratio, that is, the ratio of NPAT to income, over the three years from 2009-10 to 2011-12.

Table 1.20: Water and sewerage business NPAT and NPAT ratio, major water utilities > 100,000 customers

Utility	Net Profit after tax ($'000)			NPAT Ratio (%)		
	2009-10	2010-11	2011-12	2009-10	2010-11	2011-12
ACTEW	**32,238**	**9,816**	**27,765**	**13**	**4**	**10**
Barwon Water	13,386	17,075	35,391	9	11	16
City West Water	68,714	61,781	50,593	17	14	10
Hunter Water	47,448	24,604	33,153	19	10	13
Qld Urban Utilities	na	135,326	131,796	na	15	15
SA Water	200,501	185,399	222,113	18	16	18
South East Water	69,903	68,334	90,420	13	11	13
Sydney Water	470,376	280,612	367,075	21	12	14
Water Corporation (WA)	568,001	564,993	527,233	28	28	26
Yarra Valley Water	43,990	61,812	60,764	8	9	8
Unitywater	na	70,362	63,655	na	14	13

Source: NWC-National performance report 2011-12, p.71

ACTEW's profitability provides it with a capacity to pay dividends. The current policy requires ACTEW to pay 100 per cent of profits to the government. In addition, ACTEW is required to pay tax equivalent payments to the government pursuant to the National Tax Equivalent Regime (**NTER**). These NTER payments have increased from $16.4 million in 1995-96 to $41.5 million in 2012-13.

Table 1.21: ACTEW dividends and tax equivalents ($m)

	Dividends	Tax equivalents
1995-96	21.0	16.4
1996-97	23.2	18.2
1997-98	71.1	20.5
1998-99	45.7	21.7
1999-2000	65.7	8.7
2000-01	66.7	(7.2)
2001-02	46.9	26.0
2002-03	47.7	19.5
2003-04	0	29.8
2004-05	94.0	18.3
2005-06	60.5	32.6
2006-07	64.4	20.5
2007-08	75.9	33.5
2008-09	72.8	28.1
2009-10	91.4	35.9
2010-11	60.8	33.3
2011-12	73.9	30.9
2012-13	79.6	41.5

Source: ACTEW Annual Reports

In 2012-13, the total dividend and income tax equivalent payment by ACTEW was $121 million and this is estimated to increase to $172 million by 2016-17. The total ACT Government revenue is around $5 billion per annum. Whilst payments from ACTEW are substantial, they represent around 2.5 per cent of total revenue.

1.5 Implications for ACTEW's institutional arrangements

Any consideration of reform to ACTEW's institutional arrangements will necessarily have regard to ACTEW's historical performance. This is because a fundamental question with respect to these arrangements is how best can an entity be structured to fulfil the role required of it; which in relation to the provision of water and sewerage services encompasses such matters as the quality of the services being supplied so as to ensure no adverse health or safety impacts to the community, the reliability and security of that supply, the cost at which those services are provided, and the environmental impacts in undertaking those activities.

This chapter has set out the range of activities ACTEW undertakes, and key aspects of ACTEW's operational and financial performance. In light of the Review's Terms of Reference and the scope of ACTEW's current activities, primary attention was given to ACTEW's water and sewerage operations. However, regard has also been paid to the delivery of energy services given ACTEW's interests in the ActewAGL joint venture arrangements.

Various observations may be made in relation to the activities that ACTEW undertakes and the nature of its operational and financial performance.

With respect to ACTEW's current activities, while it is the primary provider of water and sewerage services, other government agencies also have operational as compared to regulatory roles, including TAMS and the ESDD. Consistent with discussion in the '*Review of ACT Public Sector Structures and Capacity*' (**Hawke Report**) (Hawke, 2011), the Review believes there is opportunity in ensuring that responsibility for water related operational activities in the ACT is given to a single publicly owned entity so that any economies of scale and scope may be exploited.[24] In doing so, however, regard would need to be given to ACTEW's monopoly characteristics. To the extent that delivery responsibilities are integrated in a single public entity, rigorous application of competitive neutrality arrangements would also be required to ensure third party providers were not inappropriately restricted from offering relevant services.

Further, over time ACTEW has been involved in a range of activities that extend beyond its core responsibilities of providing water and sewerage services to the ACT. Such activities may be a source of revenue, but inevitably they also involve some degree of risk. In considering both institutional arrangements and the scope of

[24] Subject to the views of the National Capital Authority (NCA), this could potentially extend to responsibility for management of Lake Burley Griffin.

activities undertaken under those arrangements, the Review believes there is benefit in the ACT Government annually making clear to the community its expectations and desires in relation to ACTEW's involvement in such activities.[25] Where it is supportive of such activities, it should also work to assist in their achievement.

Recommendation 1.1

To ensure transparency for the community, the ACT Government should annually enunciate the scope of activities it expects ACT's publicly owned utilities to undertake. This should be done for any entity:

(a) responsible for the provision of water and wastewater services to the ACT, including with respect to any activities which it may undertake outside the ACT; and/or

(b) that is participating, directly or indirectly, in the provision of energy services in the ACT.

Recommendation 1.2

To exploit economies and opportunities for growth, the ACT Government should:

(a) integrate responsibility for the delivery of operational water-related service activities in the ACT through a single publicly owned entity. Potential opportunities for such integration in the ACT include the delivery of stormwater services, secondary water projects and water efficiency initiatives.

However, where a single public owned entity is given such responsibilities, competitive neutrality principles should be rigorously applied to ensure arrangements are in place so that third parties are given opportunities, as appropriate, to be involved in the delivery of those services; and

(b) to the extent it wishes the public owned entity providing water and sewerage services in the ACT to also provide related services in other jurisdictions, facilitate such desired activity through its relationships with, for example, the NSW Government and local governments.

Potential opportunities to provide services outside the ACT include the provision of water supply services to surrounding regions such as Goulburn and Yass (to the extent desired by those regions), and sewage treatment facilities for Queanbeyan (to the extent desired by that region).

[25] This discussion and the related recommendation are directed towards the ACT Government's engagement with the ACT community with respect to ACTEW's activities. For completeness, it is noted that for such time as ACTEW is a TOC, and hence a Corporations Act entity, responsibility for the company's strategic direction generally lies with its directors who, inter alia, have a duty to act in good faith in the interests of the company (see further Chapter 3). Shareholders are not subject to an equivalent duty under the Corporations Act. As to the role of TOC shareholders in this context, see also ACT Auditor-General (2006); ACT Legislative Assembly (2008).

In relation to ACTEW's operational performance:

- the ACT has enjoyed a safe water supply, with high community satisfaction as to quality and no major health impacts associated with the provision of water services;
- the ACT's water and sewerage reticulation services have generally operated effectively, and while disruptions occur at a somewhat greater frequency than comparable service providers, fault rectification is generally quicker;
- there do not appear to have been major adverse environmental events associated with the provision of water and sewerage services, although periodic incidents have occurred;
- water and sewerage price outcomes in the ACT appear to be around the middle of prices charged in major urban areas around Australia. However, in the latest ICRC pricing decision, price levels appear to be lower than would otherwise be the case in part due to the low rate of return on capital that has been adopted. This decision is the subject of an appeal by ACTEW;
- like practically all major urban areas in Australia during the 2000s, the security of water supply was tested as the ACT was subjected to the effects of the Millenium Drought. The ACT was also significantly impacted by the 2003 fires, which had major negative effects on the ACT's water catchments. In response, ACTEW has undertaken substantial capital works costing in excess of $1.2 billion over the past decade. While this expenditure has significantly enhanced the security of the ACT's water supply (and stimulated the local economy and provided jobs and expertise for many hundreds of people), it has also given rise to significant and ongoing debate in relation to a range of issues, including but not limited to:
  - whether action to augment water supplies was taken in appropriately timely fashion;
  - whether appropriate major water security projects were implemented, with particular attention being placed on costing and selection processes;
  - the manner and cost of delivery of those projects; and
  - the duration and nature of water restrictions; and
- while ACTEW is not directly responsible, the ACT has enjoyed a safe and reliable supply of energy services over the past decade. Further, electricity prices have generally been the lowest in Australia, and in an environment of retail contestability, more than 90 per cent of the retail customer base continues to be supplied by the ActewAGL joint venture, which is rated consistently in the top five utilities in customer satisfaction by Customer Services Benchmarking Australia.

With respect to ACTEW's financial performance:

- it has been a significant financial contributor to the ACT Government, having providing dividends and tax equivalents of around $1.2 billion since the ActewAGL joint venture was established in 2000;

- in recent years, the majority of ACTEW's profits have derived from its holding in the ActewAGL joint venture, and the water business only just broke even in 2012-13 after two years of losses. It is relevant to note that the performance of the water business has been affected by a range of factors, such as reduced sales due to drought, and the impact of pricing decisions. However, it is also the case that the nature of ACTEW's current structure makes the financial performance of the water business opaque;
- in considering ACTEW's financial performance, regard also needs to be given to its gearing levels. In part gearing levels have increased substantially in recent years due to investments in water security projects. However, it is also a consequence of the dividend policy which applies to ACTEW, and the historical approach that capital investment in the ActewAGL joint venture's energy operations is internally funded. Potential changes in circumstances over coming years may mean it would be beneficial to highlight the funding required for the energy business, which may have structural implications in their own right. Issues with respect to dividend policy are discussed further in Ch 5; and
- as ACTEW is a government owned business the ACT Government benefits from the payments of its income tax equivalents under the NTER scheme. This income stream could be lost if a different structure were to be set up that resulted in either ACTEW or any of the ActewAGL joint venture entities becoming taxpayers to the Commonwealth. It is not necessary that reform would result in such an outcome, but it is important to ensure that any change did not inadvertently result in such a negative effect.

There is little to suggest from this assessment of ACTEW's historic performance that the supply of utility services in the ACT requires drastic and radical change. Conversely, as with all organisations, ACTEW's performance does suggest there are opportunities for improvement, including with respect to institutional and regulatory arrangements.

In considering the implications of ACTEW's performance to date, various additional matters should be recognised:

- the task for this Review is not to determine how well ACTEW has performed in times past, rather to provide recommendations as to what institutional arrangements may be most appropriate going forward. Past performance can only provide a guide as to the future, it cannot provide certainty;
- in making any assessment of the implications of ACTEW's past performance with respect to reform of institutional arrangements, attention needs to be given to the extent to which ACTEW itself has been involved in the provision of services over time. In this context, particular regard needs to be paid to ACTEW's decision to end ActewAGL's management of its water and wastewater assets, and to take back operational responsibility from 1 July 2012. This action points to two things. First, historical performance relates in large part to activities undertaken by an entity other than ACTEW. Secondly, it

indicates ACTEW itself considered there was scope for improvement by changing the arrangements by which those services were delivered;

- in considering the appropriateness of current or potential institutional arrangements, regard needs to be given to those forces likely to impact on the provision of water and sewerage services, as well as energy services, going forward. These matters are considered in Chapter 2;
- while historical performance is relevant with respect to future institutional arrangements, it is difficult to assess the extent to which current institutional arrangements have facilitated desired outcomes, as compared to other factors. It is conceptually possible, for example, that ACTEW's historical performance occurred in spite of its institutional arrangements; and is more a reflection of the capacity and expertise of the staff, management and boards involved in service provision over that time;
- in addition to historical performance, there are other factors which need to be considered in determining appropriate institutional arrangements for ACTEW, such as the benefits and costs associated with ACTEW's corporatisation and related reforms, and the economies and diseconomies associated with integration of ACTEW's water and sewerage operations and its interests in the ActewAGL joint venture. These issues are considered further in Chapter 3; and
- finally, whether or not any reform to current institutional arrangements is considered appropriate, it is not possible to guarantee how future performance will compare against past performance. Nor if reform is undertaken will it be possible to determine how an entity would have performed if that change had not occurred. For this reason, as well as it being outside the Review's Terms of Reference, this Review has not sought to consider how ACTEW may have performed if different arrangements had been in place in times past.

2 ACTEW – challenges and opportunities

2.1 Introduction

In considering potential reform to ACTEW's institutional arrangements it is necessary for regard to be given to the challenges and opportunities ACTEW faces as a provider of water and sewerage services and as the holder of interests in a joint venture providing energy services in the ACT.

To this end, this chapter:

- highlights key forces that have shaped the evolution of ACTEW's operating environment since corporatisation;
- outlines potential challenges and opportunities that may impact on ACTEW's operating environment going forward; and
- briefly considers what implications, if any, these matters have for ACTEW's institutional arrangements.

2.2 Evolution of ACTEW's operating environment

Since ACTEW was established in 1995, there have been a number of significant changes that have occurred to the environment in which it operates. These include, but are not limited to:

- increasing concerns about climate change, changing rainfall patterns and periodic reductions in inflows. The Millennium Drought in particular was a key driver of a number of initiatives in which ACTEW has participated and/or which have had major impacts on its operations. These include water conservation measures, substantial investments in water supply security infrastructure and the introduction of carbon pricing;
- COAG national urban water reforms, which since 1994 have included corporatisation, greater emphasis on volumetric pricing and full cost recovery, independent price regulation, competitive neutrality including tax equivalency regimes, and performance benchmarking;
- reform to the regulatory environment in which ACTEW operates, including the role given to, and methodology adopted by, the ICRC in its regulation of water and sewerage prices, the introduction of retail contestability in both electricity and gas markets, and the introduction of a national regulatory framework for the provision of energy services;
- changes in ACTEW's operational activities and joint venture partnership arrangements, including the contracting out and then reintegration of ACTEW's water and sewerage operations and the transition of AGL's interests in ActewAGL Distribution to Jemena/SPI;

- the initial resolution of reforms with respect to the management of the Murray Darling Basin through the *Water Act 2007* (Cth) processes;
- significant shifts in customer demand, particularly for water services, which saw annual usage decline from around 66 GL to 41 GL per annum; and
- a substantial increase in debt levels as ACTEW has funded significant capital works projects to ensure the ACT's water security. At the same time, an ongoing dividend stream has continued to be paid by ACTEW to the ACT Budget.

These changes have significantly affected the way in which water and sewerage services are delivered in the ACT. For example, ACTEW itself has gone through a number of substantial transitions, first in terms of outsourcing much of its role with respect to the maintenance and delivery of water and sewerage services to the ActewAGL joint venture as part of these arrangements, and then more recently the reintegration of this role back into its own business operations.

More broadly, drought and concerns for water supply security have led to significant changes in customer behaviour as well as major investments in new supply infrastructure; both of which have had, and can be anticipated will continue to have, significant impacts on ACTEW's operations and balance sheet.

2.3 Potential challenges and opportunities

Just as the past two decades have been a period of significant change for ACTEW, so too looking forward there appears to be a range of challenges and opportunities that may reasonably be anticipated will impact on ACTEW's future operating environment. Recognising the inherent uncertainties of such analysis, these include:

- *climate variability and climate change*

  Climate variability and climate change has been linked to a range of potential outcomes that would impact on ACTEW's operating environment, including:
  - potential reductions in water inflows, as a result of both lower rainfall levels and reduced run-offs as catchments become drier;
  - greater variability in the volume and quality of water run-offs as rainfall patterns become more volatile, including changed propensity for more extreme rainfall events; and
  - increased risk of supply interruption due to bushfire risks, with its resultant impacts on water quality through sediment run-off, and on supply due to regrowth.

  The potential scale of these impacts, and the potential uncertainty associated with them, increases the need for an entity that is flexible and resilient, and able to focus on responding to forces beyond its immediate control.

- *policy responses to climate change*

  Concerns with respect to climate variability and climate change have led to significant debate regarding the appropriate policy responses. While it is beyond the scope of this Review to set out the range of such potential responses or to consider their respective merits, it is reasonable to anticipate policy responses adopted in Australia on climate change will vary over time.

  Such change in policy settings may impact on ACTEW's operating environment in a variety of ways, including on both how, and the cost at which, water and sewerage services can be provided, and in terms of the prices likely to be borne by its customers. Having regard to ACTEW's investments in the ActewAGL joint venture, such customer price impacts will likely relate to energy services as well as for water and sewerage services.

  Moreover, policy changes may also impact on the level of support provided to renewable technologies. This in turn could affect the level of demand for energy services (e.g. electricity distribution) in which ACTEW has an interest through its investment in the ActewAGL joint venture.

- *implementation of Murray-Darling Basin reforms*

  In November 2012 the Basin Plan (MDBA, 2012) which was developed under the *Water Act 2007* (Cth) was approved by the Federal Minister for the Environment, and received bipartisan support in the Australian Parliament. The Basin Plan provides for a coordinated approach to water use across the Murray-Darling Basin's four States and the ACT. It includes:
  - an environmental watering plan to optimise environmental outcomes for the Murray-Darling Basin;
  - a water quality and salinity management plan;
  - requirements that state water resource plans will need to comply with, if they are to be accredited;
  - a mechanism to manage critical human water needs; and
  - requirements for monitoring and evaluating the effectiveness of the implementation of the Basin Plan.

  While the Basin Plan provides a framework for determining water use, there are still significant implementation steps required to be taken over the next seven years whose nature and effects are not yet certain. Again, this uncertainty suggests the need for a water service provider that is resilient and capable of flexibility.

- *growing customer environmental awareness*

  Separate from any government policy responses to climate variability and climate change, environmental awareness and concerns amongst members of the community may be also be expected to impact on ACTEW's operating environment. This may take the form of changed consumer behavior which impact on demand for both water and energy services. The potential for alternative waste treatment and recycling may also affect what sewerage services will be required to be delivered. Any such changes will need to have particular regard to public health impacts. In turn, this will require a water and sewerage utility that is innovative, customer-focused and forward looking.

- *optimising the use of and investment in a diverse portfolio of water sources*

  Recent investments in water supply infrastructure have significantly enhanced the ACT's water supply security. The expansion in the number and nature of these water supply sources, in particular their individual and overall capacities, means that there is an increased burden for the ACT's water service provider in terms of managing and optimizing water supplies from these sources. This will require a balancing of security, cost and other network constraints.

  The ACT's investment in water supply infrastructure may also provide opportunities for growth, in particular with respect to supplying water to surrounding regions. However, any such opportunities will need to have regard to any potential impacts of climate change, as well as such matters as the differences in water treatment required at different supply sources to ensure required water quality standards are met.

  Generally, ACTEW's recent investments mean the task of optimizing the use of the ACT water supplies will be more complex than was the case in times past. This will require greater emphasis being placed on this task to ensure efficient service provision.

- *technological change*

  A further factor that may impact on ACTEW, and in particular ACTEW's interests in ActewAGL, is the potential effects of technological change. One such area is the ongoing development of solar power technology and the related enhancement of battery technologies which may affect current demands for and pricing of energy infrastructure. Other examples include the ongoing development of smart meter technology and remote application devices which may result in changed usage profiles as well as some cost reductions in tasks such as meter reading.

As such, technological change poses both a threat to existing businesses, as well as an opportunity to provide new services and also existing services more efficiently in the future.

- *impact of export-driven gas development on domestic supplies*

  According to Manufacturing Australia (2013), substantial increases in natural gas exports over the next five years have the potential to result in price spikes and potential gas shortages. The likelihood of this latter outcome has been questioned (see Grattan Institute, 2013) and Manufacturing Australia itself argues that once through a transitional period increased supply may reduce pressure on domestic gas prices. However, gas shortages and increased prices would be expected to impact directly on ActewAGL gas supply operations, and also indirectly on its electricity services – for example, through increasing costs associated with gas fired generation, or by increased demand for electricity as gas becomes more expensive.

- *population growth*

  The ACT is one of the fastest growing regions in Australia. According to the ACT Government, the ACT's population is expected to increase by 46 per cent between March 2013 and 2059 – from 381,700 to 557,443 (ACT Government 2011). Population growth can be anticipated to increase the volume of energy, water and sewerage treatment services required to be delivered to the ACT community.

  At the same time, however, the population serviced in the ACT and surrounding regions will still be substantially less than is the case in urban centres in other jurisdictions (e.g. Sydney - currently over 4.6 million people; Melbourne - currently over 4.2 million people). Economies of scale and scope in the provision of water and sewerage services mean there are at best only limited prospects for more than a single integrated provider of water and sewerage services to the ACT (see further Chapter 3).

- *ACT's planning and development policies*

  The ACT's planning and development polices have the capacity to impact on ACTEW's operating environment in a variety of ways; generally by facilitating population growth (see above), and specifically by the manner in which such planning and development takes place.

  For example, to the extent that growth comes in the form of in-fill development, this is likely to create increased pressure on local water and sewerage infrastructure, raise issues as to pricing methodologies with respect to augmentation works and impact on stormwater and runoff due to reduced permeability of the urban environment.

By contrast greenfield developments may require augmentation to trunk infrastructure, or operational changes and new investment as development encroaches on existing operating infrastructure, for example, the LMWQCC.

- *management of current and future investment programs and associated cost increases*

  While there has already been significant investment in recent times in water infrastructure, there is likely to be ongoing demand for new investment in the ACT in relation to sewerage infrastructure. This pressure arises due to a range of factors, including the predicted scale of population growth, the nature of potential developments and the environmental standards applicable to sewerage treatment infrastructure located in a landlocked jurisdiction within the Murray-Darling Basin, which also operates Australia's only furnace-based sludge disposal unit.

  While it is not anticipated that major investment is required in the immediate or even near future with respect to the LMWQCC, the nature and scale of the task of renewing such an asset would involve significant planning and resourcing.

- *management of ongoing cost inputs*

  According to ACTEW (Submission, p.22), since July 2007 there has been a significant rise in electricity costs associated with retail and network charges and the pass through of the carbon price from energy companies to its customers. It has experienced a 40 per cent increase in electricity prices at its large sites and an increase of approximately 230 per cent at its small sites since 2007. ACTEW also notes forecasting by SKM-MMA which shows this price growth is expected to continue with an additional price increase of up to 60 per cent predicted by 2030.

  Such price changes can be anticipated to have a variety of impacts for ACTEW, the ActewAGL joint venture and ACTEW's shareholders. For the joint venture, there is a risk that rising prices will encourage customers to search out other suppliers, reducing its current market share. More broadly, it may result in a greater take up of alternative, renewable technologies which reduce demand for both its retail and distribution services. For ACTEW this may mean reduced profitability, and for its shareholders, lower dividends. For the ACT Government, rising costs will also place greater pressure with respect to the provision of CSOs.

- *dealing with an ageing workforce*

  Australia's water and sewerage industry has an ageing workforce (Water Industry Skills Taskforce Report, 2012). For the ACT this means there will be an ongoing task to attract and retain a workforce with the capacity to deliver the necessary water and sewerage services, a task that may be more difficult than in other jurisdictions due to the limited nature of the ACT manufacturing and industrial base. In addressing workforce issues, a further challenge is to ensure the appropriate mix of skills and expertise required for an entity that is aiming to become an increasingly customer-centric organisation. The ability to attract such staff will in part depend on the extent to which the water and sewerage utility is able to offer opportunities for skills development.

- *community perceptions*

  Anecdotally it appears that while both ACTEW and ActewAGL enjoy high name recognition in the ACT, there is often confusion regarding the nature and scope of the roles and activities undertaken under each name. Such confusion may contribute to, and even exacerbate, community concerns when issues arise that are the subject of public debate, as has occurred in the ACT in recent years in relation to sponsorships and executive remuneration.

- *an evolving operational regulatory environment*

  Generally, responsibility for the development of water policy in the ACT is vested in the Environment and Sustainable Development Directorate (**ESDD**), which is currently finalising the '*Water for the Future: striking the balance*' (ACT Government, 2013a) to replace the '*Think water; act water*' policy (ACT Government, 2004).

  In part, this process reflects the greater emphasis that the ACT has placed on the separation of policy and regulatory making responsibilities from operational activities, consistent with NCP reform processes.

  The ongoing evolution of these arrangements gives rise to various potential pressures for any entity providing water and sewerage services in the ACT – procedurally in terms of how best and most appropriately to provide input into policy development processes, and substantively in terms of how to give effect to such policies as the ACT Government determines to implement.

- *pricing regulation*

  ACTEW is subject to price regulation by the ICRC. As a regulated monopoly service provider that invests significant capital in lumpy, long-life infrastructure assets, risks can arise where there is variability and uncertainty in the manner

in which price determinations are made. While it is beyond the scope of this Review to assess any particular price determination made by the ICRC, it is recognised that the pricing regulation processes will directly impact on the revenue to be earned for the provision of water and sewerage services, the profitability of those activities and the return that will be achieved on behalf of the entity's owners.

- *borrowings and ACT dividend policy*

  A further factor is the potential future impact of the ACT's current dividend policy, its relationship with ACTEW's borrowing levels and the potential effects gearing levels may have on future activities.

  Under the existing policy, ACTEW is required to pay a dividend equivalent to 100 per cent of its NPAT. By virtue of it internally funding its share of the capital investments of the ActewAGL joint venture, it is required to borrow to meet the dividends payable to the ACT Government. There are limits on ACTEW's capacity to meet such obligations, as well as fund future infrastructure investment obligations and other growth opportunities.

- *the scope for integration with other water-related services being provided within the ACT*

  In the ACT, there is a range of entities involved in the provision of operational water-related services. These include, for example, TAMS' responsibility for stormwater, and the National Capital Authority's (NCA) responsibility for Lake Burley Griffin and Scrivener Dam. Provision of water services can involve significant costs, which may be reduced where entities are able to exploit economies of scale and/or scope. As such, current arrangements may point to potential opportunities for greater integration in the provision of water services – either through the transfer of operational responsibilities, or through other arrangements.

- *scope for integration with other water-related services in the surrounding regions*

  There are a number of population centres in the regions surrounding the ACT which operate water and sewerage networks of relatively small scale; a number of which require augmentations that will involve significant investment (such as for the renewal of Queanbeyan's sewage treatment facility). These present opportunities for ACTEW, as the largest water and sewerage services provider in the area, to build upon its existing relationships to supply services to neighbouring regions. The capacity of ACTEW to exploit these opportunities will in part depend on the views of the NSW government, which has initiated a review of local government in NSW to develop options to improve its strength and effectiveness.

2.4 Implications for ACTEW's institutional arrangements

In relation to the challenges and opportunities that ACTEW faces, a range of observations may be made which inform the development of recommendations for potential reform to ACTEW's institutional arrangements including:

- just as the operating environment has changed markedly for ACTEW since its inception, so too it can be anticipated that its operating environment will change significantly over the coming years;
- the nature of the challenges facing ACTEW mean that what may have been appropriate structures and arrangements in times past may not be the most suitable going forward;
- in considering potential reforms to ACTEW's institutional arrangements, it is essential that regard be given to the particular characteristics of the ACT as these can influence how utilities may best be structured, and also how best the regulatory framework may be arranged. For example, regard needs to be given to how best to ensure that ACTEW or any successor entity has the capacity and flexibility to:
  - manage the ACT's diverse sources of water supplies in an environment of uncertain demand and supply;
  - respond to and empower consumers;
  - exploit opportunities for growth in the ACT and surrounding regions; and
  - meet the sometimes competing demands associated with public ownership;
- at present it appears that there are opportunities to better integrate the delivery of water services in the ACT, and to the surrounding regions. However, in considering the potential scope of activities, it is important to ensure that prioritization is given to ensure the safe, efficient and effective delivery of water and sewerage services to the ACT community; and
- to enable the ACT's publicly owned water and sewerage utility to have the appropriate level of flexibility to meet the objectives set for it, it is likely to be beneficial if institutional arrangements are structured so as to:
  - facilitate the separation of policy making and operational responsibility;
  - remove or reduce conflicts, for example in the scope and manner in which Ministers undertake their various responsibilities; and
  - ensure that the public service is able to provide the required level of advice and support to Ministers in developing policies and fulfilling their responsibilities.

3 ACTEW – its institutional and governance arrangements

3.1 Introduction

The Review's Terms of Reference seeks recommendations on potential approaches which could:

- improve the existing arrangements and structures (both legal and regulatory) under which ACTEW operates; and
- enhance the process of setting specific goals and objectives for ACTEW, including the potential prioritisation of commercial, social and environmental objectives.

The Terms of Reference also require that should the Review contemplate any changes to the structure of ACTEW it should provide recommendations on the most appropriate entity to hold ACTEW's 50 per cent interests in the partnerships that form the ActewAGL joint venture. This Review does not, however, extend to reviewing the structure of the ActewAGL joint venture itself.

To this end, this Chapter:

- examines ACTEW's current institutional arrangements, with particular regard to the benefits and costs associated with:
  - ACTEW's corporatisation and related reforms; and
  - the economies and diseconomies arising from ACTEW providing both water and sewerage services and holding its interests in the ActewAGL joint venture;
- explores other potential institutional arrangements for ACTEW, with particular regard given to:
  - institutional arrangements currently operating in the ACT; and
  - institutional arrangements for major urban water utilities across Australia;
- assesses options for reform to ACTEW's institutional arrangements;
- considers issues associated with the setting of objectives under the current regulatory framework; and
- touches on a number of ancillary potential changes to ACTEW's governance arrangements.

In undertaking these tasks, the Review has not considered ACTEW's internal governance arrangements. These matters were considered in detail in the PwC review of ACTEW's governance arrangements (see PwC, 2013).

3.2 ACTEW's current institutional arrangements

ACTEW is a Corporations Act company that is also regulated pursuant to the TOC Act. It is directly involved in the provision of water and sewerage services, and has an indirect involvement in the provision of energy services through its interests in the ActewAGL joint venture. Its interests in the ActewAGL joint venture are held through two wholly owned subsidiaries that are also Corporations Act companies – ACTEW Retail Ltd and ACTEW Distribution Ltd. The nature of these arrangements is set out in detail in Chapter 1.

To determine possible recommendations with respect to ACTEW's institutional arrangements, it is necessary for this Review to have regard to the benefits and costs associated with ACTEW's current structure and legal form. In doing so, however, the scope of the Review does not extend to reviewing the structure of the ActewAGL joint venture. As such, assessments of benefits and costs are undertaken solely with respect to ACTEW. Nevertheless, this Review recognises that as ACTEW holds an interest in the ActewAGL joint venture, reform could potentially expose it, or its shareholders, to disbenefits if changes to ACTEW's institutional arrangements adversely impacted upon the operations and value of the joint venture.

In considering potential reforms to current institutional arrangements, attention has already been given to ACTEW's operational performance (see Chapter 1) and forces likely to affect ACTEW's future operating environment, including with respect to the joint venture (see Chapter 2). The following analysis now focuses on the benefits and costs associated with:

- ACTEW's corporatisation and related reforms (section 3.2.1); and
- economies and diseconomies associated with integration of ACTEW's water and sewerage activities and its interests in the ActewAGL joint venture (section 3.2.2).

3.2.1 Corporatisation and related reforms

ACTEW's establishment as a Corporations Act entity subject to the TOC Act took place in the context of the NCP reform agenda and related water reform initiatives which progressed through COAG processes during the early 1990s (see further Chapter 1).[1]

[1] Significant milestones in this reform process as it relates to the water industry include the:
- COAG (1994) strategic framework for the efficient and sustainable reform of the Australian water industry, developed by the Working Group on Water Resource Policy;
- COAG (1995a, b) NCP and related reforms, which included payments to jurisdictions that effectively implemented the strategic framework for water reform in the 1994 agreement;
- COAG (2004) National Water Initiative (NWI) and the establishment of a National Water Commission (NWC) to assist with, and to assess progress on the effective implementation of, water related reforms in the 1995 agreement and to progress additional agreed reforms; and
- COAG (2008) enhanced national urban water reform framework to improve the security of supply for urban water.

Nationwide jurisdictional support for the NCP reform agenda was outlined in the Competition Principles Agreement (**CPA**) (COAG, 1995a)[2] which sets out the principles upon which action would be taken to give effect to the intention of all Australian governments to achieve and maintain consistent and complementary competition laws and policies.

Under the CPA, every jurisdiction agreed, where appropriate,[3] to adopt a corporatisation model for significant Government business enterprises (see cl.3 (Competitive Neutrality Policy and Principles)).[4]

Corporatisation generally involves establishing significant Government business enterprises with separate legal status and governing boards, auspiced to operate independently of government and with a clear, commercial focus. In doing so, corporatisation seeks to enhance the efficiency of these entities by increasing the commercial disciplines under which they operate (see PC, 2005).

However, as these corporatised entities continue to be government owned,[5] regulatory arrangements governing their operations generally incorporate a variety of governance and accountability mechanisms specifically relevant to public ownership. These measures vary in form and substance across jurisdictions and between entities, but may broadly be categorized as encompassing either measures applicable to public sector entities generically (for example, ombudsman schemes, freedom of information, public records requirements) or mechanisms more specifically relating to the governance of corporatised entities, such as limitations of the scope of entities' activities without approval, powers of direction, reporting requirements and corporate planning processes (see further below).

Underlying the push for corporatisation as part of the NCP reform was the expectation that this process would improve efficiency and productivity because it

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[2] The CPA was one of the three intergovernmental agreements made to give effect to the NCP reforms – the others being the Conduct Code Agreement, which provides a legislative framework for a Competition Code to achieve and maintain consistent, uniform and complementary national competition laws and policies applying to all businesses regardless of whether they are publicly or privately owned, and the Agreement to Implement the National Competition Principles Agreement, which defines the terms on which the States/Territories received competition payments in return for their support in implementing NCP reforms on time and in the manner intended.

[3] This measure was subject to the benefits to be realised from implementation outweighing the costs (see cl.3(4),6) CPA).

[4] For the purposes of this measure, "significant Government business enterprises" only related to those classified as "Public Trading Enterprises" and "Public Financial Enterprises" under the Government Financial Statistics Classification (see cl.3(4) CPA).

[5] For the purposes of this Review, reference is made to the term "ownership". Technically, where corporations are established under statute, they are often not established with share capital, and to describe them as "owned" as compared to being an independent creature of statute is inapposite. However, given the general debate surrounding corporatisation and the understanding attributed to the concept of "public ownership" of entities which have been established in this manner this term is used in this Review for ease of reference.

removes operational decision-making – particularly in relation to service delivery – from direct government control, and requires those decisions to be made with a greater focus on commerciality.

Further, corporatisation is also anticipated to improve operational performance because it enables government business enterprises to operate more flexibly and with simplified industrial and employment frameworks, with management subject to less hierarchy and with greater devolution of authority (see ANAO, 1999:4).

Thus Broughton (Submission, p.6) suggests in the case of ACTEW that corporatisation has meant it has enjoyed more flexible employment arrangements than may have been available under the *Public Sector Management Act 1994* (ACT) (**PSMA**). He argues this provides a better arrangement for the employment of a workforce with substantially different sets of skills than found in most areas of the public service.

Similarly, corporatisation allows government business enterprises more flexibility in terms of the scope of activities in which they participate. According to ACTEW (Submission, pp. 36-37), as it has a standard corporate structure, it has been able to more easily enter into commercial arrangements and take commercial risks (balanced against its responsibility to provide utility services) for the purposes of maximizing its return to shareholders and the ACT community.

On the question of specific corporate form, it is not immediately clear that a Corporations Act structure is necessary to enable an entity to undertake commercial activities in the water sector in an Australian context. While it is the most common structure for private sector commercial enterprises, the predominant public sector ownership of the water sector in Australia suggests that this particular legal form is far from mandatory in seeking business opportunities (see further below).

More broadly, the extent to which the ability to seek new business opportunities is an argument in favour of corporatisation depends in part on what it is ACTEW's owners want from that entity, and the nature of their risk appetite in terms of investment and operational activities. For example, if ACTEW's owners' desire is that the entity focuses primarily on its core responsibility of delivering water and wastewater services in the ACT, this may be inconsistent with providing ACTEW with greater freedom to expand the geographical scope of its activities.[6]

Activities undertaken by ACTEW beyond the provision of basic water and sewerage services have included investments in entities such as TransACT and Ecowise Environmental, and participation as a partner or consortium member in activities undertaken through or proposed by the ActewAGL joint venture (see Chapter 1). While it is beyond the scope of this Review to examine the success or otherwise of

[6] In the context of a corporatised entity, government may wish to play a role in setting boundaries as to scope of activity, having regard to its risk appetite. Depending on corporate form, this may be done through regulatory instruments, the entity's constitution or instruments required to be prepared under the regulatory framework. This issue is considered further below in the context of setting objectives (see below).

these initiatives, it has been noted previously that ACTEW has devolved itself of its interests in most of these subsidiaries. While corporatisation provides greater flexibility in terms of operation, such flexibility is not without risks.

Another benefit associated with corporatisation is that by separating themselves from operational responsibilities, governments are able to enjoy an element of business risk and liability protection. Thus, in most jurisdictions, water entities are established as separate legal entities and have been prescribed in legislation as not representing the State.[7]

This issue was highlighted by ACTEW (see Submission, pp.35-36), which argued that corporatising ACTEWA to create ACTEW has meant ACTEW is responsible for liabilities arising out of the business, managing those liabilities, managing business risk and ensuring the efficient and safe management of the business. As such, it argued the main financial risk for the ACT Government associated with ACTEW is in relation to its capacity to pay dividends.

While risk transfer is a consequence of corporatisation, in the case of government business enterprises the extent to which this will occur in practical terms is to some extent uncertain. In particular, where government owned business enterprises are monopoly providers of services required to meet critical human needs – as is the case with ACTEW in the provision of water and sewerage services – it is less than clear that a government would be able to divorce itself entirely from the liabilities and obligations of such an entity should there be issues as to its ability to deliver those services on an ongoing basis. Further, in the case of ACTEW this is even less likely to be the case given the extent to which the ACT Government exercises control over the entity,[8] and provides debt financing to ACTEW, and as such bears ongoing liability and risk in relation to those funds. The issue of ACTEW borrowings is considered in further detail in Chapter 5.

While corporatisation has been associated with a range of benefits, submissions to this Review and related materials also highlight various perceived conflicts and complexities. Matters raised in this context include:

- any form of public ownership means that government is potentially conflicted in that it has duties to both customers and owners, which overlap substantially. Thus the ICRC (Submission, p.11) argued:

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[7] Jurisdictions in which major urban water utilities are subject to provisions specifying they do not represent the Crown include:
- ACT (ACTEW: see s.8 TOC Act);
- NSW (Sydney Water, Hunter Water: see s.20F *State Owned Corporations Act 1989* (NSW), cf Sydney Catchment Authority: see s.6 *Sydney Water Catchment Management Act 1998* (NSW));
- NT (Power and Water Corporation: see s.5 *Government Owned Corporations Act* (NT));
- QLD (Seqwater: see s.6 *South East Queensland Water (Restructuring) Act 2007* (Qld))*;* Queensland Urban Utilities, Unity Water: see s.9 *South East Queensland (Distribution and Retail Restructuring) Act 2009* (Qld));
- TAS (Taswater: see s.7 *Water and Sewerage Corporation Act 2012* (Tas));
- WA (Water Corporation (WA): *see* s.5 *Water Corporation Act 1995* (WA)).

[8] See *Queanbeyan City Council v ACTEW Corporation Ltd* [2011] HCA 40.

> "*To maintain the confidence of the ACT community, the government must be able to demonstrate that its stewardship of ACTEW has struck an appropriate balance between the interests of ACTEW's customers and generating revenue from the company to help balance the budget*";

- publicly owned companies such as ACTEW are not subject to the usual scrutiny of performance as are companies listed on the stock market. Such market assessment is undertaken by way of share price movement and provides both pressure on and incentives for senior management (ICRC, 2013b:12);
- governments may struggle with mechanisms that satisfactorily hold a publicly owned entity accountable. Sanctions against board members, such as dismissal of a board or member previously appointed by the government, are problematic and politically damaging. Pecuniary penalties against the entity merely have the effect of reducing the dividend otherwise payable to government (Broughton Submission, pp.4-5).

  According to Broughton, this provides one argument for exposing entities to the Corporations Act – as directors and officers of a corporation can be personally liable to both civil and criminal penalties for failing to fulfil their relevant duties. These sanctions tend to be potentially more severe than any that might exist between the entity and its public owner;
- corporatisation can create a conflict of interest for the board when the objectives of the government owner are not perceived as in the 'best interests' of the company. In the case of ACTEW, Broughton (Submission, p.5) argues that in these situations boards tend to give paramount importance to their legal obligations under the Corporations Act, as the sanctions are more tangible and more severe. Depending on how 'best interests' is interpreted, he argues this apparent conflict can result in perverse outcomes and inefficiencies and inhibit actions that might provide a broader public benefit – more so given that the company is 100 per cent government owned;
- the shareholders of publicly owned companies themselves hold ownership on trust for the community as a whole – which creates an additional 'principal-agent' problem, and heightens information asymmetries; and
- corporatisation usually involves the payment of dividends back to government, which give rise to arguments as to the appropriateness of that practice generally (as well as the level at which those dividends are paid) (see further Chapter 5). Hence Thomas (Submission, p.3) argues that any government entity providing water and sewerage services should not pay dividends, but rather use those funds to invest in growth infrastructure and to keep prices down. One outcome of the ICRC's most recent water and sewerage pricing decision is the implication that a lower return on investment may be appropriate given the asset is publicly owned (see ICRC, 2013b: Ch 4).

While noting these expressed limitations, the experience across Australia has been that corporatisation has contributed to enhancing the commerciality of operations of significant government business enterprises, including in the water sector.

The Productivity Commission (**PC**), for example, details gains achieved in the financial performance of public trading enterprises generally between 1967-68 and 1995-96 (see PC, 2005: Fig, 4.3), and more specifically shows the improvement in trends in average returns on government business enterprise assets for the water sector between 1994-95 and 2002-03 (see PC, 2005: Fig. 4.4).[9] Over this period, returns on assets improved from just over 2 per cent to slightly below 5 per cent per annum.

The PC also highlights, however, that in achieving this performance, price impacts have varied, with the general effect being that for several key infrastructure services real prices have fallen significantly in aggregate, but by and large businesses have benefited more than households and in some instances real prices for household users in a number of service areas have risen. In part, this would reflect an unwinding of cross-subsidies which had previously operated (see PC, 2005: Ch.4).

In making this assessment, the PC was reviewing the impact of NCP reforms generally.[10] Under the CPA and related NCP reforms, the corporatisation of government business enterprises was accompanied by a range of complementary changes. These include:

- *the separation of the regulatory and operational roles and responsibilities.*

  Separation of regulatory and operational roles and responsibilities is designed to provide greater clarity and to remove conflicts in decision-making. Such separation incorporates both operational and pricing regulation. In the case of ACTEW, this encompasses pricing and industry regulation by the ICRC, technical regulation through the ESDD and environmental regulation through the EPA, with ACTEW having externally imposed service standards including detailed obligations under its Customer Contracts to deliver services to certain standards, under the Service and Installation Rules and the various Codes made under the Utilities Act.

[9] It is noted that this assessment relates to the period before operations of corporatised water entities were impacted by the Millenium Drought, and significant investments in new water infrastructure. Such factors would be expected to have exerted significant negative pressure on financial performance.

[10] As such, care needs to be taken in considering the extent to which improvements in performance assessed by the PC can be ascribed directly to corporatisation processes and related measures. In addition to corporatisation, these reforms encompassed a range of additional measures including industry structural reforms, for example in the energy sector, the introduction of third party access regimes for essential infrastructure services with natural monopoly characteristics and a legislation review program designed to assess whether regulatory restrictions on competition were in the public interest, and if not, what changes were required.

In so doing the corporatisation process and related reforms provide incentives to improve efficiency within ACTEW by setting appropriate performance and accountability targets.

While such separation of roles removes potential conflicts and enhances transparency in decision making, some submissions to the Review (e.g. Thomas, p.2; ICRC, p.11; Broughton, p.5) variously note concerns that:

- separation of responsibilities may limit the capacity for integration of all aspects of water service provision;
- current arrangements still do not provide sufficient clarity as to ACTEW's operational responsibilities, which impacts on other reform aspects such as pricing regulation; and
- current arrangements still do not provide sufficient incentives for ACTEW to improve efficiency and performance.

Another key area where this issue arises is in relation to decision making with respect to major capital works.

In relation to matters of project delivery, corporate entities provide an effective (though not exclusive) institutional form through which major capital projects can be delivered. It allows specialist technical and managerial skills to be accessed in relation to projects which are often complex in nature. It also enables institutional attention to be focused, and facilitates entering, managing and participating in fit-for-purpose contractual arrangements, which may range from design and construction through to alliance contracting depending on the nature of the project.

Less clear, however, is the appropriate nature and extent of the role to be played by corporate entities in determining the nature and timing of such major water security capital projects. In the ACT, responsibility for these decisions appears to lie with ACTEW, with the ACT Government having considerable input into decision-making processes. This issue has been the subject of considerable policy debate (see, for example, PC (2011a), NWC (2011)). Consideration of this issue and whether opportunities exist for continued enhancement in terms of the regulatory structures, and ACTEW and the ACT Government's respective roles in processes relating to major capital works, are addressed further in Chapters 4 and 5.

- *the establishment of independent pricing regulation (see cl.2 CPA), under which there is a regular examination of ACTEW's pricing, asset base and future capital expenditure to ensure appropriate pricing of water, sewerage and other services.*

In and of itself, pricing regulation under the ICRC Act does not require that a public entity providing water and wastewater services take a particular legal

form.[11] Rather, such independent pricing regulation focuses on the oversight of bodies having monopoly power, whether publicly or privately owned. ACTEW is the only entity holding licences to supply potable water and provide sewerage services in the ACT, and its activities currently encompass substantial monopoly elements. As such, it is subject to pricing regulation.

Independent pricing regulation is consistent with greater commerciality in the provision of water and wastewater services, with greater transparency given to pricing processes, and a reduction in ministerial control and direction. The operation of such regulatory arrangements is also consistent with the public entity providing water and sewerage services having a legal form which is separate from government, whether that be a corporation created under individual or sector specific legislation in a jurisdiction, or a company registered under the Corporations Act.

In its last price setting process, the ICRC further noted its view that sole ownership of water and sewerage services by public corporations makes pricing decision challenging as most customers are in effect also owners; and also questioned the effect of public ownership *cf* private ownership (in terms of required returns, for example). While it is beyond the scope of this Review to assess the ICRC's pricing methodology, which is also currently the subject of an appeal by ACTEW, certain aspects of the regulatory framework as it pertains to pricing are considered in further detail in Chapter 4.

- *the identification and funding by government of community service obligations (CSOs).*

  ACTEW, through ActewAGL, facilitates the provision of a range of CSOs, including concessions to health benefit card holders, schools and religious institutions.

  By establishing arrangements in which these CSOs are identified and specifically funded by government, reforms have reduced the presence of hidden cross-subsidies which may not have been adequately targeted to those whom government wished to assist, and may also have contributed to operational inefficiencies within the businesses previously responsible for their provision.

  This process of transparently identifying and funding CSOs can be undertaken independently of any corporatisation process. Nevertheless, corporatisation encourages such an outcome, as the objectives associated with the provision of CSOs may differ from those associated with operational aspects of the delivery of water and wastewater services.

[11] Section 33 of the Utilities Act also makes provision for licences granted to a member of a group to be taken as having been granted to the group. For these purposes, group means a partnership or a joint venture or a consortium, syndicate or other unincorporated body of 2 or more people.

- *the introduction of competitive neutrality between public and private entities, including national tax equivalency regimes.*

  Under the CPA, the corporatisation process was directed at eliminating resource allocation distortion arising out of the public ownership of entities engaged in significant business activities, in part through the imposition of:

  - full Commonwealth, State and Territory taxes or tax equivalent systems;
  - debt guarantee fees directed towards offsetting the competitive advantages provided by government guarantees;[12] and
  - those regulations to which private sector businesses are normally subject, such as those relating to the protection of the environment, and planning and approval processes, on an equivalent basis to private sector competitors (see cl.3(d)(2) CPA).

  In the ACT, the policy approach aimed at giving effect to competitive neutrality principles is set out in the ACT Government's '*Competitive Neutrality in the ACT'* (**Competitive Neutrality Policy)** (ACT Treasury, 2010). For corporatised entities, this policy requires the application of principles with respect to independent performance monitoring, explicit funding for CSOs, tax equivalents, loan guarantee fees and business regulation. In addition, it also set out principles to be applied relating to the setting of commercial target rates of return, capital structures and dividend payments. Various legislative instruments have also been introduced to give effect to these arrangements (see, for example, the *Taxation (Government Business Enterprises) Act 2003* (ACT) which gives effect to the NTER in the ACT).

While each of these interrelated elements provides a basis for support for ACTEW's corporatisation, this support was far from universal in submissions to this Review – both with respect to corporatisation generally, and specifically with respect to ACTEW's current legal form.

Generally, there were doubts expressed regarding the overarching benefits of corporatisation. Broughton (Submission, pp.5-6), for example, questioned generally whether the nature of corporation was well suited to the provision of water and sewerage services, given that water is an important public good and that there were major health benefits associated with the provision of safe water and removal of sewage and wastewater. He further argued that the quality and reliability of supply also impacts on community well-being – economically and socially. As such, decisions with respect to restrictions are ones more appropriately made by government, not a corporation. He concluded that the Corporations Act model for ACTEW appeared to serve no useful purpose other than to prepare the organisation for privatization.

Specifically in relation to ACTEW's current institutional arrangements, submissions to the Review also highlighted various concerns as to interaction of its current legal

[12] See further Chapter 5.

form and the overarching regulatory structure. ACTEW (Submission, p.40) argues for example that the opportunities for growth and commercial flexibility are currently restricted by the regulatory system that ACTEW operates in, which it suggests:

- hinders its ability to independently obtain debt facilities – meaning all major activities are effectively subject to government oversight; and
- limits its ability to move quickly in relation to business opportunities or acquisitions given the consent and approval requirements under the existing regulatory framework.

Separately, both ACTEW and the ICRC, in submissions and elsewhere,[13] point to potential confusion and conflict between the Corporations Act and ACT laws, in particular the TOC Act, including in relation to ACTEW's objects, powers of directions and auditing (see ICRC Submission, p.9).

ACTEW (Submission, pp.37-38) argues that having regard to the Corporations Act and TOC ACT, the current arrangements with respect to its constitution and SCIs could be better used to provide objectives or goals for ACTEW to meet in the provision of services. In particular, ACTEW considers that:

- the Corporations Act provides effective instruments for the setting of such targets and goals, including through the operation of its constitution;
- a greater focus on the corporate nature of its operations – with particular focus on the constitution and shareholders' rights – would be an appropriate way to implement targets or objectives for ACTEW to achieve; and
- a corollary of any changes to its constitution would be amendments to legislation (i.e. the TOC Act) to remove overlapping or inconsistent provisions.

In essence, ACTEW argues that the TOC ACT should be seen as "supplemental" to the Corporations Act and that currently some provisions of the TOC Act are potentially inconsistent with those in the Corporations Act.

Further, the ICRC has highlighted that the sometimes conflicting roles that Ministers may have as legislators and owners have implications for the level of support required to enable them to undertake those tasks. If a corporation model is to work, the ICRC argues that more and appropriately experienced, qualified bureaucratic resources need to be assigned to the task of assisting Ministers to carry out their various roles. More specifically, it argues:

> "*If the institutions of the Territory are not capable of managing the arrangements established, they cannot deliver the benefits of which they might be capable. Managing the assets that ACTEW holds on behalf of the ACT community in a way that delivers maximum benefits to the community will prove challenging whatever arrangements are put in place*." (ICRC Submission, p.12).

[13] See, for example, ICRC (2013a; 2013b).

Finally, concern has been raised in relation to the relationship between corporate form and issues of executive remuneration. ACTEW has faced controversy in recent times with respect to both the level and reporting of executive remuneration (see, for example: ACT Legislative Assembly, 2013:1047-8 (19 March); 1115-1121 (20 March); 1240-1243 (21 March)). According to Broughton (Submission, p.6), ACTEW's current structure has resulted in executive pay levels which appear exorbitant when compared to, say the Head of the ACT Public Service or, perhaps, even more comparable, with the Chief Executive of Action, the ACT Government business unit operating the ACT's bus system. According to Thomas (Submission, p.1), concern regarding such outcomes are heightened because they are inconsistent with the community standards that exist in ACT, which reflect the nature of the workforce which is predominantly employed in PAYE jobs and large public service entities rather than the corporate sector.

3.2.2 Economies and diseconomies

In considering ACTEW's institutional arrangements, attention also needs to be given to synergies that operate between its various businesses and activities, and any economies and diseconomies of scale or scope which may exist.

Economies of scale arise where firms are able to lower the cost per unit of output with increasing scale – either because fixed costs are spread over more units of output or operational efficiencies are achieved, resulting in lower variable costs. Economies of scope occur where the joint production of a single firm is greater than the output that could be achieved by two different firms each producing a single product (with equivalent production inputs allocated between them).

For ACTEW, economies of scale and scope may theoretically arise in combining responsibility for both water and sewerage services, and further through the combination of these services with its interest in the ActewAGL joint venture.

There is a substantial body of literature which has examined the issue of economies of scale and scope in the context of the water sector specifically, and a more limited stream of research with respect to multi-utility firms.

In the case of the water and sewerage service provision, the research findings are inconclusive. According to the PC (2011a:338), although a number of studies have found evidence in favour of joint provision of water and sewerage services, this tends to be strongest for smaller water utilities. Likewise, the literature on scope economies between two or more water supply functions (for example, bulk water and water transmission) indicates that these efficiencies will vary depending on the specific functions under consideration, and other factors such as the location, size, customer density and volume of water supplied by the utility (see further PC, 2011b, Appendix G; VCEC, 2008. pp.58-60; ACIL Tasman, 2007; IPART 2007; Abbott and Cohen, 2010).

Summarising the ACIL Tasman and IPART findings, VCEC (2008, p. 58) found '*modest economies of scale for small water utilities, with those supplying more than 200 ML of water per day (around 73 gigalitres (GL) per annum) experiencing constant returns to scale*'. This is in excess of current volume of water supplied by ACTEW. According to the PC (2011b: Appendix G, p.124), ACIL Tasman (2007, p. 11) concluded that '*estimates of the minimum efficient scale for water supply suggest a range from 125 000 to 1 million serviced inhabitants. For wastewater, the minimum efficient scale is less clear*'. These results suggest ACTEW's water and sewerage services are around or below the size required to enjoy constant returns to scale in terms of volume, though in terms of serviced inhabitants it is above minimum efficient scale. Further, ACTEW also benefits from the relatively small geographic area which it is required to service, as well as natural characteristics such as the gradient of the ACT which allows for substantial reliance on gravity for the transmission of both water and sewage.

Analysis with respect to economies of scale and scope for multi-utility firms is even less definitive. A brief review of the international literature (Cohen and Abbott, 2013) with respect to multi-utility firms in developed nations[14] indicates the following:

- with respect to combined gas and electricity utilities, Mayo (1984) reported scope economies for small companies only; Sing (1987) found that an average combination of utilities exhibited diseconomies of scope, while other output combinations were associated with both economies and diseconomies of scope, and Chappell and Wilder (1986) found scope economies over most output ranges;
- examining Canadian water and electricity service combinations, Yatchew (2000) suggested that economies of scope of between seven to ten percent were achievable (although this research focused on relatively small municipal electricity utilities that in some instances also provided water services; in relation to electricity distribution it found evidence of increasing returns to scale with minimum efficient scale being achieved by firms with about 20,000 customers);
- in considering Italian multi-utility service providers, Fraquelli et al (2004) (see also Piacenza and Vannoni, 2004)[15] found that global and product specific economies of scope, as well as global return to scale, for multi-utilities smaller than the "median' firm.[16] For larger units, notwithstanding the estimates point to the presence of both aggregate economies of scale and scope, the large

[14] There is also some support for the finding that the integration and bundling of utility services improves welfare in developing nations when used to increase provision of basic services – with the benefit arising either due to economies of scope or because access to more than one utility service enables step change in welfare (see, for example, Chong et al, 2004). However, it is beyond the scope of this Review to consider the role of multi-utility firms and bundling in this context, which tends to relate in the first instance to issues of access to utility services.

[15] Piacneza and Vannoni (2004) concluded that "specialised firms could reduce their costs by evolving into muli-utilities providing network services such as gas, water and electricity".

[16] In this study, 'median' equated to those firms producing about 71 million m3 gas, 11 million m3 water and 221 million kwh of electricity.

standard errors are such that the hypothesis of constant return to scale and null advantage from diversification cannot be rejected. They concluded that:

> *"… keeping into account the fact that local public services have not yet been fully privatized/liberalized in most countries, one has at best to be cautious in expecting large welfare gains from diversification moves involving large players"*; and

- with respect to Swiss multi-utilities (which are generally of smaller scale), Farsi et al (2007) concluded the existence of significant scope and scale economies in a majority of multi-utilities (which can be considered as suggestive evidence of natural monopoly in multi-utilities), and that there was considerable variation of estimated values among individual companies, which suggested that the economies of scope and scale can depend on unobserved network characteristics as well as output patterns and customer density. They argued:

> *"The results … show that even after accounting for unobserved heterogeneity, the scope economies exist in a majority of the multi-utilities, suggesting that additional costs could result from unbundling the multi-utility companies. … Especially for small companies the savings associated with scope economies are considerable."*

While such results need to be taken with some caution, they suggest it is more likely that the development of multi-utility firms will be beneficial for utility service provision in small market places. This is possibly of some relevance for the ACT. However, while the ACT is a relatively small market size in an Australian context, it is larger than a number of those considered in the literature above. Generally, it is not possible to determine from this literature at what market size economies of scope may operate. In the specific case of ACTEW and its involvement in the ActewAGL joint venture, this assessment task is made even more difficult because of the unique nature of the ActewAGL joint venture, in that:

- it involves ACTEW partnering with entities of significant scale who respectively operate in separate segments of an energy industry that has gone through considerable vertical disaggregation; and
- the provision of water and sewerage services has now been separated from the provision of energy services.

ACTEW (Submission, pp.34-38) is strongly of the view that its investment in the ActewAGL joint venture has allowed for synergies and efficiencies to develop between the two organisations. Synergies and economies posited include:

- *the planning, construction, operation and maintenance of gas, water and electricity networks in the ACT.*

  According to ACTEW (ACTEW Submission, p.35), the links between the two organisations have enabled a significant transfer of knowledge and experience between ACTEW and ActewAGL across all levels of both organisation from the

staff/management level through to Board level (with common Board members). This has included:

– a consistent approach to network management, to the production of standard processes and procedures, to the production of documentation and to emergency planning and response;
– ACTEW and ActewAGL acting in a coordinated manner in relation to the construction, development and management of significant infrastructure; and
– network planning has been able to be undertaken in a holistic manner – covering all aspects of the delivery of utility services.

While acknowledging the potential for such knowledge transfers, an uncertainty for this Review is the extent to which ACTEW's decision to take direct operational responsibility for water and wastewater services is likely to have already reduced the potential for these synergies to be exploited.

- *the corporate and support services required by both ACTEW and the ActewAGL joint venture are similar.*

  As ACTEW's Submission (p.36) notes, rather than develop its own corporate services capability, ACTEW has leveraged off the ActewAGL joint venture through corporate service level agreements. ActewAGL provides human resources, business systems support, legal, regulatory, finance, marketing and retail services (including account management, billing and contact centre). This arrangement benefits ACTEW as it has access to the ActewAGL joint venture's economies of scale and does not have to "double up" on internal management costs.

  While it has been beyond the scope of this Review to undertake a detailed financial assessment of the economies of scale associated with the provision of these services to ACTEW by the ActewAGL joint venture, the presence of such economies are consistent with economic literature assessing the optimal size of water and wastewater utilities (see above).

  What is less clear, however, is the extent to which these economies can only be, or alternatively are best, achieved under the current institutional structures. The arrangements currently in place have only been in operation since July 2012, prior to which the ActewAGL joint venture was directly responsible for the management and operation of ACTEW's water and wastewater assets. Moreover, these arrangements are established contractually – in the CSA and the CSCSA. As such, it is uncertain to what extent their operation requires ACTEW to be a direct owner in the ActewAGL joint venture partnership for these agreements to operate. On the one hand, it is arguable that these arrangements may function more effectively as a consequence of all parties recognizing ACTEW's interests in the joint venture; on the other hand, this participation may result in less competitive tension for the provision of these services.

- *the links between ACTEW and ActewAGL enable the transfer of information from ACTEW's joint venture partners, AGL and Jemena, which may assist ACTEW in carrying out its water and wastewater services.*

  This potential benefit arises as ACTEW's joint venture partners are involved in large infrastructure businesses, operating in the same market as ACTEW. As such, they can provide information relevant to a range of areas for which ACTEW is now directly responsible in the water and sewerage industry, including:
  - critical infrastructure asset and field service management;
  - customer relationship management;
  - industrial relations issues;
  - challenges in workplace safety and environment management;
  - regulatory and legislative requirements (as both are regulated by the Utilities Act);
  - emergency response strategies; and
  - economic market conditions.

  It is difficult to quantify the extent to which this information is available and of use. At first blush, it is likely to be more important to be able to access such information now that ACTEW has taken direct responsibility for the provision of water and sewerage services. However, it is also likely that this information will still be available irrespective of institutional structures given the service relationships that exist between ACTEW and the ActewAGL joint venture. Moreover, even if institutional separation was to occur, there does not appear to be any strong reason that would preclude at least some ongoing interaction.

- *the business structures of ACTEW and the ActewAGL joint venture have provided a flexible model that has allowed both organisations to develop organically over time. It has allowed the organisations to adapt and deal with a variety of issues, operate with a commercial mindset and capitalize on these efficiencies to make the most of the operating environment.*

  This flexibility is apparent from the changes that have occurred in the way in which the joint venture model has operated; most significantly in allowing a change of partners (with transfer of AGL's interests in the distribution partnership) and most recently in relation to the change in the way water and sewerage services are now provided.

  However, the joint venture arrangements have also imposed some restrictions on ACTEW's operational flexibility – for example, the nature of the current service arrangements operating between it and the joint venture necessarily had regard to previous arrangements in place under earlier joint venture agreements. To the extent that the joint venture limits or affects the way in which ACTEW operates, however, this will largely be a consequence of decisions actively made by the ACT in entering into the joint venture

arrangements more than a decade ago. As a basic principle, there is a need to respect such agreements as have been put in place – even if they constrain how ACTEW operates, or the capacity or manner in which it may be desirable to shift to alternative institutional arrangement.

- *the current structures have benefited ACTEW by enhancing the value of its interest in the ActewAGL joint venture, in particular by enabling the joint venture to function more effectively than would otherwise be the case.*

  Without undertaking a review of the joint venture structure or assessing the extent of such benefits, factors potentially contributing to such an outcome may include, but are not limited to:

  – the partnerships enabling the joint venture operations to leverage off respective partners' significant operational and economic scale, supplier and market relationships and industry expertise to optimize operational efficiency and maximize economic returns to the owners. Further, the partners contribute not only expertise, but also contacts and other non-money resources in the relatively small and distinct ACT market place;

  – the ActewAGL joint venture enjoying economies of scale and scope because it has been successful in capitalizing synergies through providing corporate and customer services to ACTEW. An important portion of ActewAGL's staff form a common corporate centre for services to both businesses such as payroll, IT systems, legal, safety, treasury, human resources and so on. These service arrangements bring access to a large corporate memory and economies of scale that would be diluted or lost if the scope of services to ACTEW were reduced as part of a restructure;

  – ACTEW's ownership interest facilitating the ActewAGL joint venture being able to access ACTEW's skills, experience, expertise, and contacts, in addition to those of ACTEW's partners, AGL and Jemena. ACTEW's understanding and experience across broad and complex issues, contributed both formally at Board level and informally throughout the two businesses, may enable the ActewAGL joint venture to manage its operations more effectively and contributed to positive outcomes. Issues relate to the fact that both ACTEW and the ActewAGL joint venture operate distribution networks that are similarly capital intensive, and are both customer-focused utilities operating in the ACT and surrounding regions with substantial field services and customers. As such, they share many of the same business challenges across a wide range of areas; and

  – in an Australian market place where energy services are disaggregated and to a large degree separated from government ownership, the joint venture arrangement heightens the scope for its partners to innovate in the provision of energy services.

It should be noted that there is not universal agreement amongst Submissions to the Review as to the potential synergies and economies that may exist between

ACTEW's water and sewerage services operations and its investment in the ActewAGL joint venture.

The ICRC (Submission, p.4) posits that it is difficult to see what is offered by ACTEW in relation to the ActewAGL joint venture, and notes the differences in nature, scale and exposure to the energy sector of the corporate entities with which it is partnered.

Further, ACTEW (Submission, pp.39-40) itself acknowledges that the complexity of the structures of ACTEW and the ActewAGL joint venture has led to some confusion regarding the responsibilities and functions of each business. In particular there has been lack of clarity concerning:

- the operational roles and responsibilities of ACTEW and the ActewAGL joint venture;
- the branding of the organisations, including in relation to the provision of sponsorships and other community support;
- the status of ActewAGL – there may not be an appreciation that it is a commercial joint venture with private sector participants, each based interstate, and each of whom contribute to the Canberra community through their involvement in the joint venture; and
- the business development activities of the two organisations – noting that ActewAGL as a commercial joint venture is able to undertake a greater range of strategic investments and activities.

Hence ACTEW notes that due to the confusion around the differentiation between ACTEW and the ActewAGL joint venture there is a perception in parts of the community that there is a duplication of roles between the organisations. It accepts that such perceptions matter and that there could be benefits associated with a structure where it was transparent that there was no duplication or confusion of the business activities, management and community obligations of ACTEW and the ActewAGL joint venture (see ACTEW Submission, p.40).

Further, ACTEW (Submission, p.40) notes that the present legal and commercial identities of ACTEW and the ActewAGL joint venture creates the risk that if one business was to suffer a significant impact or loss, the other business may also be significantly impacted. For example, if there was a significant impact of any type in the water business this may be felt on the energy side of the business because of ACTEW's joint involvement in both the water and energy businesses, notwithstanding that the relevant impact had no link with the energy business. Arranging the businesses so they are independent of one another, or marketed as such as different brands, may decrease this potential risk (particularly with respect to reputational risk).

3.3 *Alternative institutional arrangements for ACTEW*

3.3.1 Introduction

ACTEW is a Corporations Act company that is also regulated pursuant to the TOC Act. Its interests in the ActewAGL joint venture are held through two wholly owned subsidiaries that are also Corporations Act companies – ACTEW Retail Ltd and ACTEW Distribution Ltd. The nature of these arrangements is set out in detail in Chapter 1.

In addressing future potential institutional arrangements for ACTEW, this Review considers both:

- the range of institutional arrangements operating in the ACT; and
- institutional arrangements operating in the water sector throughout Australia.

The consideration of these institutional arrangements necessarily has regard to the scope of ACTEW's activities (see above and Chapter 1), as well as specific aspects of service delivery and governance issues as they relate to the ACT.

In assessing potential institutional arrangements for ACTEW, it is again noted that the scope of the Review does not extend to reviewing the structure of the ActewAGL joint venture. As such, any analysis of benefits and costs with respect to institutional structure relate only to ACTEW. However, to the extent relevant, the Review has regard to how any potential reform may interact with the current joint venture arrangements, and where necessary highlights additional matters that may warrant consideration but which were not able to be addressed fully given the scope of the Terms of Reference.

3.3.2 Potential institutional arrangements

There is a wide range of institutional arrangements operating in the public sector across Australia.

At the heart of these public sector institutional arrangements lie directorates (departments) which are established in each jurisdiction with responsibility to implement government policy and assist Ministers in the performance of their portfolio duties.[17] Generally, directorates (departments) do not have a separate legal identity and form part of the Crown.

[17] See:
Commonwealth of Australia Constitution Act s.64 (and *Administrative Arrangements Order*);
Public Sector Management Act 1994 (ACT) s.13;
Public Sector Employment And Management Act 2002 (NSW) ss.6, 104, Sch.1;
Public Sector Employment And Management Act (NT) s.7;
Public Service Act 2008 (Qld) Pt 2 Div 2;
Public Sector Act 2009 (SA) s.26;

In addition to directorates (departments), however, there are many other institutional forms for public sector entities, including but not limited to:

- *administrative offices*, which are discrete business units operating within directorates (departments), but with a degree of autonomy from those bodies;[18]
- *non-statutory advisory entities*, established by Ministers or Governors-in-Council to provide advice to government;
- *statutory entities established under and primarily governed by their own legislation*; [19]
- *statutory entities established under, and primarily governed by, sector specific legislation*; [20]
- *statutory entities established under or governed by generic legislation (possibly in addition to their own legislation)*;[21] and
- *Corporations Act* companies, which may take various forms including public and proprietary companies limited by shares and companies limited by guarantee.[22]

Each form of entity has particular characteristics including in terms of the mechanisms by which they are established; their governance structures (including their relationships with Ministers); their financial relationship with government; and the arrangements by which they employ staff. The variation in approach to these issues is demonstrated both by the range of different structures and arrangements that operate in the water sector across Australia (see below), and more generally in the variety of legislative arrangements that have been put in place with respect to publicly owned corporations across Australia (see, for example, Appendix A).

In considering what form of entity should undertake a particular task, a range of factors may be relevant (see ACT Treasury, 2004:3) including:

- the nature of the function, including the level of commerciality;
- the allocation of roles and responsibilities, including the degree of government control and scrutiny required (for example, due to the frequency and importance of policy decisions);

State Service Act 2000 (Tas) s.11;
Public Administration Act 2004 (Vic) s.10;
Public Sector Management Act 1994 (WA) s.35.

18 See, for example:
Public Sector Management Act 1994 (ACT) s.54A;
Public Sector Act 2009 (SA) s.27;
Public Administration Act 2004 (Vic) s.11.

19 In relation to the water sector, for example, see Table 3.3 (Sydney Catchment Authority; Water Corporation of Western Australia).

20 In relation to the water sector, for example, see Table 3.3 (Barwon Water, City West Water, Melbourne Water, South East Water, Yarra Valley Water).

21 As to generic legislation operating with respect to public entities across Australia, see Appendix A.

22 As to range of company types, see s.162 Corporations Act ('Changing company type').

- the size of the operation;
- whether the organisation is financially sustainable or is reliant on the Budget;
- whether the relevant function can be separated from the entity's other activities, and separately costed and accounted, or alternatively, where existing functions might be more closely aligned with other functions;
- transaction costs and operational funding requirements;
- the operating environment in which those functions are to be delivered, including whether or not a competitive market exists for the functions;
- who is best suited to manage the inherent risks; and
- the need for effective accountability to government and parliament, including the reporting and monitoring arrangements.

In utilizing these criteria to determine appropriate institutional arrangements, a useful starting point is to consider the functions that government bodies may undertake. According to the Victorian State Services Authority (SSA, 2013), functions undertaken by public sector entities may be categorised broadly as:

- ***service delivery***: governments deliver a large number of services through various forms of public entity. Traditionally these include services such as health, education, transport and emergency services. In determining what services may be delivered by public entities, governments have regard to a variety of factors including the importance to the community of the services to be delivered and the capacity of non-public entities to provide them. Consideration will also be given to the range of objectives associated with the delivery of such services – hence where objectives are primarily commercial in nature, the capacity of non-public entities to deliver is likely to be higher, particularly if they are able to be provided in a competitive environment; when there are multiple objectives, some of which are non-commercial, service provision by public entities may be more appropriate. In any event, service delivery functions may involve technical outputs that require specialist expertise. Significant degrees of ministerial oversight and control may not be appropriate for the delivery of services requiring such skills. Similarly, services involving greater degrees of commerciality will generally be associated with less direct Ministerial control and oversight, although such input may be required with respect to strategic direction;

- ***stewardship***: these functions involve the protection and management of community assets in the long-term public interest. Stewardship functions may relate to both the natural environment and man-made items. The extent of ministerial involvement and control required is likely to relate to the subject matter to which the stewardship function relates, with less control over matters which are perceived as low risk;

- ***integrity***: these functions broadly encompass those activities designed to scrutinize, identify and expose instances of maladministration, misconduct and

corruption by public officials. Given the nature of such tasks, public entities with these responsibilities generally need to enjoy significant independence, and to be seen to do so;

- ***regulatory***: these involve decision-making which affect the rights of business and individuals within a framework established by government. Examples of these functions include the issuing and oversight of licences, the determination of prices and the imposition of penalties for non-compliance. As activities of this nature need to be, and be seen to be, impartial, public entities involved in such functions generally require a fair degree of autonomy, and in some instances high levels of independence;

- ***quasi-judicial***: these involve the imposition of binding decisions, and may involve hearings and findings of fact. The binding nature of quasi-judicial functions requires they be performed without Ministerial involvement; and

- ***advisory***: to ensure governments have sufficient and diverse sources of advice, public entities may be established to enable government to access specialist knowledge or specific perspectives. Entities of this nature may exercise varying degrees of independence, depending in part on their composition and nature of the issues upon which advice is being sought.

Just as these different functions are associated with varying levels of ministerial involvement in decision making, so too the functions required to be carried out have implications for the legal form of a public entity responsible for undertaking those tasks. This can be seen by reference to the institutional arrangements currently operating in the ACT.

3.3.2.1 Institutional arrangements in the ACT

Generally, the ACT public sector is made up of directorates, statutory authorities (also referred to as 'territory authorities' in the ACT) and territory-owned corporations.[23] Each of these institutional forms has different characteristics (see Table 3.1).

Table 3.1: Key features of various forms of organisational structure

Directorates	Territory Authorities	TOCs
• An administrative unit of Government. Does not have a separate legal personality and is subject to direct ministerial control • Chief executive responsible for effective operation of directorate as a whole • Managers report to the Chief Executive • Multiple goals and functions • Commercial activities may be subject to competitive neutrality • Simplest structure for government to reallocate resources and change functions according to prevailing policy objectives • Subject to the *Financial Management Act 1996* (ACT) (**FM Act**)	• Established by enabling legislation for a specific purpose or function • May be a commercial, regulatory, quasi-judicial or advisory body • Powers and functions defined by statute. Powers must not be used for any other purpose • Legal duty to act in a way to advance the public purpose for which the body was established • Usually constituted as a body corporate or corporation sole • Members generally not personally liable • Subject to varying degrees of independence from ministerial control • Usually has a governing board or advisory board • Usually no provisions to be wound up • Commercial authorities may be subject to competitive neutrality • Subject to the FM Act	• Formed under and subject to the Corporations Act • Subject to the TOC Act • Managed by a board appointed by government shareholders in accordance with its Constitution • Board members subject to duties and liabilities under Corporations Act • Subject to competitive neutrality • Does not undertake regulatory or policy formation roles • High degree of commercial independence subject to limitations in the TOC Act • Reports to Government and the ACT Legislative Assembly through the portfolio minister • Chief executive manages the day-to-day affairs of the TOC • Board appoints the chief executive

Source: ACT Treasury (2004)

The entities that currently exist in the ACT based on these institutional forms are as follows:

<u>*Directorates*</u>

Administrative arrangements for the ACT are established under the *Public Sector Management Act 1994* (ACT) (**PSMA**) and the *Administrative Arrangements 2013 (No. 1)* (ACT), a notifiable instrument made under the PSMA. Under these arrangements, the ACT has nine directorates:

[23] As to additional categorizations, see also Wettenhall (2013:41-42) (e.g. 'territory instrumentality"; "statutory office holder").

- Chief Minister and Treasury (**CMTD**);
- Commerce and Works (**CWD**);
- Community Services (**CSD**);
- Economic Development (**EDD**);
- Education and Training (**ETD**);
- Environment and Sustainable Development (**ESDD**);
- Health (**HD**);
- Justice and Community Safety (**JCSD**); and
- Territory and Municipal Services (**TAMS**).

These directorates are administrative units established under s.13 PSMA. The *Administrative Arrangements 2013 (No. 1)* (ACT), which is made under ss.13, 14 of the PSMA, sets out the Minister responsible for each administrative unit, as well as the functions and enactments for which each administrative unit is responsible.

Territory Authorities

In the ACT, the second broad category of institutional form is that of 'territory authorities'. Territory authorities include any body corporate established by ACT legislation, and an entity to which Pt 8 of the FM Act applies, but not a body declared not to be such an authority (see FM Act 'Dictionary'). Pursuant to s.54 FM Act an entity is a 'territory authority' to which Pt 8 applies where that authority has been prescribed by financial management guidelines. Clause 3 of the *Financial Management (Territory Authorities) Guidelines 2012 (No. 1)* (ACT) sets out the entities which are classed as territory authorities for the purposes of s.54 FM Act. These entities are:

- the ACT Gambling and Racing Commission;
- the ACT Insurance Authority (**ACTIA**);
- the ACT Teacher Quality Institute;
- the ACT Compulsory Third-Party Insurance Regulator (**CTP Regulator)**;
- the ACT Public Cemeteries Authority (**Public Cemeteries Authority**);
- the Building and Construction Industry Training Fund Authority (**Training Fund Authority**);
- the Canberra Institute of Technology (**CIT**);
- the Cultural Facilities Corporation(**CFC**);
- the Exhibition Park Corporation (**EPC**);
- the Independent Competition and Regulatory Commission for the Australian Capital Territory (**ICRC**);
- the Land Development Agency (**LDA**);
- the Legal Aid Commission (A.C.T.) (**Legal Aid ACT**);
- the Long Service Leave Authority;
- the Public Trustee for the Australian Capital Territory (**Public Trustee**); and
- the University of Canberra (**UC**).

Governance of statutory authorities in the ACT is regulated by the respective Acts establishing them, the FM Act (see Pt 9) and the *Legislation Act 2001* (ACT) (**Legislation Act**) (see Pt 19.3).

Hence statutory authorities may be established as bodies corporate or corporations by their own Acts (see, for example, Legal Aid ACT: s.6(2) *Legal Aid Act 1977* (ACT)) or by operation of the FM Act (see ss.54 (1), 72 (definition of "*relevant territory authority*"), 73 and 'Dictionary' (definition of "*territory authority*")).

Generally the constitutions of statutory authorities' governing boards are set out in their respective establishing Acts (see, for example: ACT Long Service Leave Authority: ss.20, 21 *Long Service Leave (Portable Schemes) Act 2009* (ACT)). In some instances, these include specific requirements with respect to appointment (see, for example, UC: see ss.11, 11A *University of Canberra Act 1989* (ACT)*,* see also Pt 19.3 Legislation Act). However, entity specific acts are generally silent with respect to processes of appointment, which are governed by both the FM Act and the Legislation Act.

The FM Act provides, inter alia, for:

- the nature and general powers of relevant territory authorities (see Pt 9 Div 9.1);
- the financial powers and responsibilities of territory authorities, their chief executives officers and their boards (see Pt 8);
- governing board member appointments (see Pt 9 Div 9.2) and the functions of governing board members including duties with respect to honesty, care and diligence (s.85) and the avoidance of conflicts of interest (s.86); and
- ancillary requirements and obligations on territory authorities, including limitations on their power to form corporations and enter into joint ventures and trusts without prior written approval (see Pt 9 Div 9.5).

The Legislation Act provides, inter alia, for the making of board appointments. Specific provisions relate to general powers and procedural requirements by which appointments are to be made (Pt 19.3.1), acting appointments (Pt 19.3.2), standing acting arrangements (Pt 19.3.2A) and consultation with the Legislative Assembly with respect to appointments (Pt 19.3.3).

Scope of activities

Territory authorities in the ACT undertake a wide range of activities, and individual authorities may themselves undertake numerous activities that differ in nature. Using the functional taxonomy set out above, the activities undertaken by ACT's statutory authorities include:

- *service delivery functions*

  The most common type of activity undertaken by ACT territory authorities are service delivery functions. These include, for example, vocational (e.g. CIT) and

higher education (e.g. UC) services, cultural (e.g. CFC) and entertainment (e.g. EPC) services, as well as economic development (e.g. LDA) and legal (e.g. Legal Aid ACT) services.

- *stewardship functions*

  Some territory authorities undertake functions that encompass stewardship. For example, the CFC is responsible for conserving and exhibiting art collections in the ACT, while the Public Cemeteries Authority has the responsibility of managing the ACT's public cemeteries.

- *integrity functions*

  The range of territory authorities undertaking integrity functions is more limited. Activities which may be considered to fall in this category include those undertaken by the ACT Gambling and Racing Commission, which is responsible for protecting the integrity of racing in the ACT through its role in regulating gambling and racing activities in accordance with ACT gaming laws and striving to prevent or eliminate illegal activity within the gambling and racing sector. More broadly, it includes the functions of Legal Aid ACT in ensuring vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests.

- *regulatory functions*

  A more common role undertaken by a number of territory authorities is that of regulation. Authorities undertaking such functions include the CTP Regulator (in relation to compulsory third party insurance), the ACT Gambling and Racing Commission (with respect to the oversight of gambling and racing in the ACT), the ACT Teacher Quality Institute (with regard to teacher accreditation) and the ICRC (in relation to pricing regulation of utilities). It is noted that of all the territory authorities, it appears that the EPC is unique in its regulatory capacity in that it has power to make by-laws (with respect to the Exhibition Park).

- *quasi-judicial functions*

  Territory authorities do not generally carry out quasi-judicial functions. However, the ACT Gambling and Racing Commission has available a range of disciplinary provisions under the *Gaming Machine Act 2004* (ACT) (see Pt.4) and the *Casino Control Act 2006* (ACT) (see Pt 3 Div 3.4) to ensure statutory compliance. Possible actions range from a reprimand, to a substantial monetary penalty ($100,000 for gaming machine licensees and $1m for the casino), to suspension or cancellation of licences.

- *advisory functions*

  Advisory functions have been mandated for numerous territory authorities. For example, one of Legal Aid ACT's functions is to provide recommendations with respect to possible change in legal aid provisions (see s.10(2)(a) *Legal Aid*

Act 1977 (ACT)), while the board of the Long Service Leave Authority is required to make recommendations with respect to levies and declarations of corresponding laws (see generally s.24 *Long Service Leave (Portable Schemes) Act 2009* (ACT)).

Table 3.2 categorises the range of functions carried out by the ACT's territory authorities, while Appendix B provides further details of these function for each of the ACT's territory authorities.

Table 3.2: Types of functions undertaken by ACT territory authorities

Territory Authorities*	Service delivery	Stewardship	Integrity	Regulatory	Quasi-judicial	Advisory
ACT Gambling and Racing Commission	X		X	X	X	X
ACTIA	X				X	X
ACT Teacher Quality Institute	X		X	X		
CFC	X	X				
CIT	X					
CTP Regulator	X			X		
EPC	X	X				
ICRC	X			X		X
LDA	X	X				
Legal Aid ACT	X		X			X
Long Service Leave Authority	X			X		
Public Cemeteries Authority	X	X				
Public Trustee	X	X	X	X		X
Training Fund Authority	X			X		
UC	X					

** Entities classified as territory authorities for the Financial Management Act 1996, section 54 under the Financial Management (Territory Authorities) Guidelines 2012 (No. 1)* (ACT)

Funding and governance arrangements

While the functions of all territory authorities involve some element of service delivery, in the main they are reliant at least in part on budget funding and operate at disparate levels of commerciality. For example, in 2012-13 the Public Cemetery Authority, the ACT Gambling and Racing Commission, the CFC, CIT and Legal Aid ACT respectively generated 100, 92, 42, 31 and 15 per cent of their overall income.

Governance arrangements also vary markedly between the various territory authorities, with some entities having governing boards (e.g LDA; EPC) and other advisory boards (e.g. CIT, Public Trustee). In the case of the LDA, while it is established as an independent territory authority, its chief executive is also the Director-General of a directorate.

Territory-owned Corporations

The third category of public sector entity in the ACT is that of Territory-owned corporations (**TOCs**). A TOC is a body corporate limited by shares that is a company

for the Corporations Act that is specified in Schedule 1 of the TOC Act (see s.6, 'Dictionary' TOC Act).

There are currently two TOCs – ACTEW Corporation Ltd and ACTTAB Limted (**ACTTAB**). Both companies are registered under the Corporations Act. The nature and scope of ACTEW's functions have been set out in detail in Chapter 1. ACTTAB provides betting services including pari-mutuel and fixed odds betting services under the *Betting (ACTTAB Limited) Act 1964* (ACT). ACTTAB's shareholders are the Chief Minister and the Treasurer, and the portfolio minister is the Treasurer. The ACT Government announced its intentions to sell ACTTAB in November 2013.

Both ACTEW and ACTTAB are income generating entities, and pay dividends to the ACT Government. Each has a governing board which is responsible for the oversight of the respective organisations. Both organisations operate independently of government, subject to the range of governance and reporting obligations that operate under the TOC Act. In particular, the TOC Act provides for both Voting Shareholders (see s.13) and a Portfolio Minister, being the Minister who has administrative responsibility in relation to the corporation (see TOC Act 'Dictionary'). By operation of the *Administrative Arrangement 2013 (No. 1)* (ACT), the Treasurer has administrative responsibility for the TOC Act, and for government business enterprises ownership policy. In relation to both aspects, the Treasurer is supported by the Commerce and Works Directorate.

Discussion

There are three broad categories of government entity operating in the ACT – directorates, territory authorities and TOCs. In assessing which of these legal forms is most suitable for an entity such as ACTEW, a threshold issue to consider is what functions are required to be undertaken by a publicly owned water and sewerage utility, and relatedly by an entity holding the ACT's interests in a joint venture providing energy services.

In relation to its water and sewerage business, ACTEW's primary function is very much one of service provision. In the ACT water is required to be supplied to, and sewage transferred and treated, for over 155,000 household and business customers. The delivery of these services requires a range of specialist skills; skills which are not readily found within the public sector. The task of service provision also leads to substantial expenses being incurred, and significant revenues earned. In so doing, ACTEW is intended to pay dividends to the government rather than be reliant on budget funding. Further, by virtue of NCP reforms, few regulatory functions are now undertaken by the utility, particularly compared to that which occurred in times past.

The functions associated with the ACT's interests in the ActewAGL joint venture are somewhat different. Like ACTEW's role in water and sewerage, the ActewAGL joint venture's function is very much one of service delivery. Moreover, by virtue of the market in which it operates, this is required to be done in a very commercial manner. As ACTEW is a partner in the joint venture arrangements, this suggests its primary

function in relation to its energy investments is one of service delivery. However, day to day management of energy service provision is conducted by the joint venture separately from ACTEW itself. As such ACTEW's current functions with respect to the ActewAGL joint venture may more aptly be described as encompassing at least some elements of a stewardship role.

Given the commercial nature of both of ACTEW's core functions, the scale of its business activities, the markets in which it operates, and its revenues and profitability, there is at best only limited argument to support the view that ACTEW should operate within the framework of a directorate – for example, as a business unit such as ACTION. While noting the concerns raised by Broughton as to the appropriateness of a corporate form in the provision of water and sewerage services, these concerns do not in the Review's opinion provide a sufficient basis for abandoning the use of a corporate model for ACTEW's current functions. Such a model ensures independence from government, greater commerciality and transparency.

The concerns that Broughton (and others) raise with respect to the provision of water and sewerage services do, however, highlight some of the complexities associated with determining the appropriate legal form, the respective roles and responsibilities of ministers, directorates, shareholders, directors and the entity itself, and the regulatory framework in which those participants operate.

In particular, it gives rise to the specific question of whether the provision of water and sewerage services should be provided through a corporation established by ACT statute, or as a Corporations Act company that is also subject to ACT legislation.

This issue is considered in detail below. However, one difficulty in addressing this question in the current ACT legislative context is that while there is a legislated governance framework for TOCs, and similarly an overarching governance framework for territory authorities under the FM Act and the Legislation Act, the specific arrangements applying to territory authorities depend also on the respective legislation establishing each individual entity. As a result, institutional arrangements differ markedly between the various territory authorities (see Appendix B).

Further complicating any assessment of potential legal forms is that the nature of the entities established under ACT legislation and prescribed as 'territory authorities' do not generally share the attributes associated with corporatisation of significant government business enterprises, such as an independent governing board, substantial revenue earning capacity and the ability to pay dividends.

In addition, while the governance framework established under the FM Act and Legislation Act incorporates most if not all of the matters addressed by similar legislation in other jurisdictions (see Appendix A), there appears to be scope for enhancing these arrangements – for example, with respect to the specification of directors' duties (see s.85 FM Act). As a consequence, it appears arrangements with respect to territory authorities are more appropriate for entities that rely, at least in

part, on budget funding rather than ones with significant commercial activities, and which anticipate government involvement in their activities.

There are various reasons as to why this is the case. As Mantziaris (1998:2) notes, corporations created by statute are highly malleable in nature, which does not allow them to be conceived as a fixed legal category. Thus the frameworks developed for the ACT have necessarily been established having regard to the size of the jurisdiction, the range of activities undertaken by its government owned entities, and the existence of an alternative framework established under the TOC Act. Circumstances do not appear to have warranted arrangements being put in place for corporations to be created by ACT statute with significant business activities.

In considering potential reforms to ACTEW's institutional arrangements, however, a factor considered relevant for this Review is that these current legislative frameworks with respect to territory authorities do not appear to be entirely consistent with those applying to statutory water corporations of the kinds established in other jurisdictions (see further below).

This has specific implications for the issues the Review has been established to address. It raises the question as to whether there would be benefit in codifying and enhancing the consistency of institutional and governance arrangements operating with respect to all ACT public bodies (see for example Wettenhall, 2013). Such an exercise would necessarily involve reviewing both the TOC Act and the legislation applicable to territory authorities. Suffice to say such an exercise is beyond the scope of this Review. Until this occurs, however, options as to institutional form relevant for public entities providing water and sewerage services, and/or holding energy interests in the ACT appear more limited than would otherwise be the case. This issue is considered further in the following sections having regard to institutional arrangements applicable for other major Australian urban water utilities.

Recommendation 3.1

The ACT Government should review the TOC Act to establish a common corporate framework covering both public owned Corporations Act companies and corporations created by ACT statute that are significant business enterprises. To ensure consistency across the ACT Government, this review should encompass the regulatory framework that operates with respect to the governance of all current ACT territory authorities.

In undertaking this review, particular emphasis should be given to ensuring there is no conflict between Commonwealth and ACT legislation as it applies to any publicly owned Corporations Act entity.

Table 3.3: Institutional form of major publicly owned urban water utilities in Australia

		Company registered under Corporations Act	Statutory corporation[24]	Statutory corporation subject to generic state based corporation legislation	Other
ACT	**ACTEW**	Public company limited by shares under the *Corporations Act* (subject to the TOC Act)			
NSW	**Hunter Water Corporation** **Sydney Water Corporation**			Statutory state owned corporation (s.4 *Hunter Water Act 1991* (NSW); s.4 *Sydney Water Act 1994* (NSW); s.20A, Sch 5 *State Owned Corporation Act 1989* (NSW); Corporations Act excluded unless declared by regulation as per s.20G *State Owned Corporation Act 1989* (NSW)	
	Sydney Catchment Authority		A corporation representing the Crown (s.6 *Sydney Water Catchment Management Act 1998* (NSW))		
NT	**Power and Water Corporation**			Government owned corporation not within Crown shield (ss.4, 5 *Power and Water Corporation Act* (NT), s.5 *Government Owned Corporations Act (*NT); Corporations Act excluded unless declared by regulation as per s.6 *Government Owned Corporations Act* (NT)	
QLD	**Queensland Bulk Water Supply Authority (trading as "Seqwater")**				Authority that is not a body corporate, with power of an individual, and does not represent the State (ss.6,7 *South East Queensland Water (Restructuring) Act 2007* (Qld))
	Central SEQ Distributor-Retailer Authority (trading as "Queensland Urban Utilities") **Northern SEQ Distributor-Retailer Authority trading as "Unitywater"** **Southern SEQ Distributor-Retailer Authority (trading as "Allconnex Water")**				Authority that is not a body corporate, with power of an individual, and does not represent the State (ss.8,9, 12 *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld))[25]

[24] In this Review, "statutory corporation" refers to a corporation established by legislation of a State or Territory, as compared being created under the Corporations Act.

[25] By operation of Ch 2, Pt 2 of the *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld), the distributor-retailers take on many forms: they are a statutory bodies under the *Statutory Bodies Financial Arrangements Act 1982* (Qld) and the *Financial Accountability Act 2009* (Qld), units of public administration under the *Crime and Misconduct Act 2001* (Qld); agencies under the *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld); a person authorised by law to provide a public utility service for the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld); and a corporation for the *Penalties and Sentences Act 1992* (Qld). For the *Local Government Act 2009*, section 10 and *City of Brisbane Act 2010*, section 12, a reference to a local government is taken to include a reference to a distributor-retailer.

Table 3.3: Institutional form of major publicly owned urban water utilities in Australia (cont.)

		Company registered under Corporations Act	Statutory corporation	Statutory corporation subject to generic state based corporation legislation	Other
SA	**South Australian Water Corporation**			Statutory corporation to which provisions of the *Public Corporations Act 1993* (SA) apply (ss.5, 6 *South Australian Water Corporation Act 1994* (SA))	
TAS	**Tasmanian Water and Sewerage Corporation Pty Ltd ("Taswater")**	Proprietary company limited by shares under the *Corporations Act* (see s.5 *Water and Sewerage Corporation Act 2012* (Tas) (subject to Corporations Act exclusions as per s.8 *Water and Sewerage Corporation Act 2012* (Tas))			
VIC	**Barwon Water Corporation** **City West Water Corporation** **Melbourne Water Corporation** **South East Water Corporation** **Yarra Valley Water Corporation**		Water corporation (s.85 *Water Act 1989* (Vic)		
WA	**Water Corporation (WA)**		Corporation not agent of the Crown (ss.4, 5 *Water Corporation Act 1995* (WA))		

3.3.2.2 Institutional arrangements for major urban water utilities across Australia

In Australia, public entities are responsible for the delivery of water and sewerage services in all major urban areas. However, the institutional form of these entities varies substantially across the jurisdictions (see Table 3.3).

In the ACT (ACTEW) and Tasmania (Tasmanian Water and Sewerage Corporation Pty Ltd), for example, the entities providing water and sewerage services are respectively public and proprietary companies limited by shares registered under the Corporations Act. In NSW the major urban water distributor-retailers, Sydney Water Corporation and Hunter Water Corporation, are both established under entity specific State-based legislation, but are also prescribed as statutory State owned corporations subject to generic NSW state owned corporations legislation. By contrast, the bulk water supply, the Sydney Catchment Authority, is simply a corporation established under entity specific State-based legislation.

In the NT (Power and Water Corporation)[26] and SA (South Australian Water Corporation) the utilities are also both corporations established under entity specific legislation, but subject to generic local legislation governing public owned corporations. However, in Victoria all water corporations are established under sector specific State legislation, while in Western Australia the Water Corporation is established under its own State legislation. Finally, in Queensland arrangements are different again – with both the bulk water authority ("SEQ Water") and the distributor-retailers ("Queensland Urban Utilities"; "Unitywater" and "Allconnex Water") established as authorities which are not body corporates.

While institutional forms of water entities vary across jurisdictions, each of these entities is subject to a range of governance arrangements that are broadly similar in terms of subject matter. However, within this broadly consistent approach, key aspects of these arrangements differ markedly (see Table 3.4). Specific aspects of these governance arrangements include:

- *board constitution and directors' duties*

  The constitution of boards for major urban water utilities across Australia vary markedly – ranging from a minimum of two directors in Queensland to a requirement for ten in New South Wales. In most but not all jurisdictions, the chief executive officer/managing director is also required to be appointed as a member of the board (e.g. ACT, NSW, NT, SA, VIC and WA).

[26] The NT Power and Water Corporation is the only other major urban water utility substantively involved in the provision of energy services. On 27 September 2013, the NT Treasurer, Mr David Tollner MLA, announced that it would be restructured to separate its monopoly and competitive businesses into stand-alone government owned corporations with separate boards (Tollner, 2013).

Further, while directors of major urban water utilities in all jurisdictions are subject to prescribed directors' duties under legislation,[27] the manner in which these duties are applied – and by extension the nature of these duties and the consequences for breach – differ across the country.

In both the ACT and Tasmania, the utilities are Corporations Act entities, and hence directors are subject both to the statutory duties under Pt 2D.1 of that Act, as well as general law duties (see s.185 Corporations Act). Similar provisions apply in the Northern Territory by operation of section 20 of the *Government Owned Corporation Act* (NT), which prescribes that this Part of the Corporations Act is an applied Corporations legislation matter for the purposes of Pt 4 of the *Corporation Reform (Northern Territory) Act 2001* (NT).[28]

For major urban water entities in all other jurisdictions, statutorily imposed directors' duties derive from different legislative bases and vary in nature and scope:

- in New South Wales, as Sydney Water and Hunter Water are statutory State owned corporations, duties and liabilities are prescribed pursuant to section 33A and Schedule 10 of the *State Owned Corporations Act 1989* (NSW);[29] For the Sydney Water Catchment Authority, limited duties with respect to pecuniary interests are prescribed in Schedule 1 of the *Sydney Water Catchment Management Act 1988* (NSW);
- in Queensland, duties and liabilities for directors are prescribed pursuant to Pt 4 Div 2 of the *Water Act 2000* (Qld);
- in South Australia, duties and liabilities for the board and directors are prescribed pursuant to Pt 4 of the *Public Corporations Act 1993* (SA);
- in Victoria, directors are subject to the 'Directors' Code of Conduct and guidance notes' issued by the Public Sector Standards Commissioner pursuant to section 63 of the *Public Administration Act 2004* (Vic); and
- in Western Australia, directors' duties are prescribed pursuant to section 20 and Schedule 2 of the *Water Corporation Act 1995* (WA).[30]

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[27] Pt 3 Div 4 of the *Commonwealth Authorities and Companies Act 1997* (Cth) prescribes similar duties for directors of Commonwealth authorities; see also Pt 2.2 Div 3 Subdivision A (General duties of officials) of the *Public Governance, Performance and Accountability Act 2013* (Cth).

[28] Pt 2D.1 of the Corporations Act would also apply to company State owned corporations in NSW, provided that Part had not been declared an excluded matter for the purposes of section 5F of the Corporations Act under the *State Owned Corporations Act 1989* (NSW) or regulations made pursuant to it: see s.7B *State Owned Corporations Act 1989* (NSW).

[29] To a limited extent, section 33A and Schedule 10 also apply to company State owned corporations.

[30] In Western Australia, the *Statutory Corporations (Liability of Directors) Act 1996* (WA) also makes provision for liability of directors with respect to statutory corporations. However, this Act does not apply to the Water Corporation of WA.

- *powers of direction*

  Most major urban water entities are subject to powers of direction, although in the case of the Queensland, this power lies in part with local government.[31] In some jurisdictions, the power of direction is prescribed in legislation specific to the water entities themselves (e.g. QLD, VIC, WA). In a number of jurisdictions, powers of direction may derive separately from generic legislation that apply to publicly owned corporations (e.g. NT, SA)[32] (see Appendix C, Table C1). In some instances, powers to direct may operate under both types of legislation in the one jurisdiction (e.g. NSW).

  While powers of direction exist in most jurisdictions, the nature and scope of these powers vary significantly – in terms of who can initiate a direction, who can authorize it, the matters that may be the subject of a direction, the right to compensation and the need for directions to be publicly disclosed. Further in a number of jurisdictions, in addition to general powers of direction there are direction powers specifically relating to the provision of community service obligations (CSOs) (see Appendix C, Tables C1-C2).

- *financial reporting and auditing arrangements*

  For every jurisdiction, financial reporting and auditing requirements for major urban water entities are prescribed in legislation.

  In some instances, reporting obligations specifically reference Corporations Act requirements (e.g. NT, WA). Reflecting their status as statutory corporations, in a number of other jurisdictions there is State-based legislation which sets out the entities' reporting requirements (e.g. NSW; QLD, VIC).

  In every State and Territory, the Auditor-General of the respective jurisdiction is responsible for the auditing of the water entity's accounts.[33]

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31 The exception is Tasmania, which reflects that the water entity is owned by local councils, and not by the State.

32 Generic legislation also exists in other jurisdictions which provides for ministerial powers of direction. However, at present, these powers do not apply to major water entities in those jurisdictions (e.g. TAS, VIC).

33 In the case of the ACT, the ICRC (Submission, p.9) raised the question of whether the requirement under s.18(3) of the TOC Act which requires that the ACT Auditor-General be appointed as auditor of ACTEW could give rise to potential conflict with the requirement under s.324BA of the Corporations Act that an auditor must be a registered company auditor. The ICRC made reference to qualifications and experience required for registration as an auditor under the Corporations Act, and notes that as the *Auditor General Act 1996* (ACT) does not make equivalent specification in terms of qualifications and experience, it could be possible for a person not qualified under the Corporations Act to be appointed as ACTEW's auditor. The ICRC's Submission did not, however, make reference to s.1281 of the Corporations Act, which specifically provides that an Auditor-General of a State or Territory is taken to be registered as an auditor under the Corporations Act. By virtue of the operation of s.1281, it does not appear that there is any substantive inconsistency between the requirements of the TOC Act and the Corporations Act on the issue raised.

- *appointment of chief executive officers*

  Arrangements for the appointment of the chief executive officer (or managing director) to major urban water utilities vary in the extent to which the board and the relevant minister are involved in, and responsible for, the decision.

  In some jurisdictions, responsibility for appointment lies solely with the board (e.g. ACT, TAS, VIC). In others, the board is responsible for the appointment, but may do so only with the approval of the relevant minister (e.g. QLD (Seqwater), SA, WA). By contrast, in NSW (e.g. Sydney Water, Hunter Water) the power to appoint the chief executive is vested in the Governor on the recommendation of the minister, provided the appointee has been recommended by the board. In the case of the Sydney Catchment Authority, the chief executive is appointed by the Governor.

Moreover, pursuant to s.13 of the *Auditor-General Act 1996* (ACT), the ACT Auditor-General is obliged to accept appointment under the Corporations Act.

Table 3.4: Key governance arrangements for major urban water utilities in Australia

		"Ownership"	Board constitution	Directors' duties	General power to direct[1]	Financial reporting & auditing	Appointment of CEO
ACT	**ACTEW**	Voting shareholders appointed by Chief Minister, currently Chief Minister and Treasurer: see s.13 TOC Act	No less than four (4) nor more than eight (8): cl.47(1) ACTEW Constitution; see also s.201A Corporations Act (at least 3 directors)	See Pt 2D.1 Corporations Act	See s.17 TOC Act	Audit required to be undertaken ACT Auditor-General: s.18 TOC Act; see also s.1281 Corporations Act (Auditor-General a registered company auditor)	CEO appointed by the Board: ACTEW Constitution cl.54
NSW	**Hunter Water Corporation** **Sydney Water Corporation**	Shareholders are NSW Treasurer and another Minister for the time being nominated by the Premier: s.20H *State Owned Corporation Act 1989* (NSW); see also s.4C *Hunter Water Act 1991 (NSW);* s.6 *Sydney Water Act 1994* (NSW) (certain Ministers not to be appointed as voting shareholders)	Hunter Water Corporation - Nine members (Chair, 7 directors, CEO): s.4B *Hunter Water Act 1991* (NSW) Sydney Water Corporation – Ten members (Chair, 9 directors): s.5A *Sydney Water Act 1994* (NSW)	See s.33A, Sch 10 *State Owned Corporations Act 1989* (NSW)	See ss.20N, 20P *State Owned Corporation Act 1989* (NSW) See also: s.64A *Hunter Water Act 1991* (NSW); s.93A *Sydney Water Act 1994* (NSW)	Audit required to be undertaken by NSW Auditor-General and annual reporting pursuant to *Public Finance and Audit Act 1981* (NSW) and *Annual Reports (Statutory Bodies) Act 1984* (NSW): s.24A *State Owned Corporations Act 1989* (NSW); see also s 101, Sch.5 *Sydney Water Act 1994* (NSW) re: additional requirements with respect to annual reports for Sydney Water	CEO appointed by Governor on recommendation of portfolio minister, provided also must be recommended by the board of the corporation: s.20K *State Owned Corporations Act 1989* (NSW)
	Sydney Catchment Authority	No shareholders – constituted as a corporation under its establishing Act: see s 6 *Sydney Water Catchment Management Act 1998* (NSW)	Chief executive plus 4 to 8 other members: s.7, Sch 1. *Sydney Water Catchment Management Act 1998* (NSW)	See Sch 1, cl 7 *Sydney Water Catchment Management Act 1998* (NSW) (re: pecuniary interests)	See s.11 *Sydney Water Catchment Management Act 1998* (NSW)	Audit required to be undertaken by NSW Auditor-General and annual reporting pursuant to *Public Finance and Audit Act 1981 (NSW)* and *Annual Reports (Statutory Bodies) Act 1984* (NSW)	CEO appointed by the Governor: s.9 *Sydney Water Catchment Management Act 1998* (NSW)
NT	**Power and Water Corporation**	Single shareholding minister, currently the Treasurer: s.7 *Government Owned Corporations Act* (NT)	Chief executive plus at least 2 other members: s.13 *Government Owned Corporations Act* (NT)	Duties and liabilities as specified Pt 2D.1 Corporations Act: s.20 *Government Owned Corporations Act* (NT)	See s.30 *Government Owned Corporations Act* (NT)	Audit required to be undertaken by NT Auditor-General and annual reporting compliant with Corporations Act requirements: see Pt 4, Div 2 *Government Owned Corporations Act* (NT)	CEO appointed by Administrator on recommendation of shareholding minister, provided also must be recommended by the board of the corporation: s.16 *Government Owned Corporations Act* (NT)
QLD	**Queensland Bulk Water Supply Authority (trading as "Seqwater")**	No shareholders – constituted as an independent Authority for 99 years, not a body corporate: see ss.6, 64 *South East Queensland Water (Restructuring) Act 2007* (Qld)	At least 2 member: s.16 *South East Queensland Water (Restructuring) Act 2007* (Qld)	See Ch 4 Pt 4 Div 2 *Water Act 2000* (Qld)	See ss.58, 61 *South East Queensland Water (Restructuring) Act 2007* (Qld)	Audit required to be undertaken by Qld Auditor-General and annual reporting pursuant to the *Financial Accountability Act 2009* (Qld): s.34 *South East Queensland Water (Restructuring) Act 2007* (QLD); (see also Ch 2 Pt 4 Div 3 re additional reporting requirements)	CEO appointed by Board with the prior written approval of the responsible Ministers: s.27 *South East Queensland Water (Restructuring) Act 2007* (Qld)

	Central SEQ Distributor-Retailer Authority (trading as "Queensland Urban Utilities") **Northern SEQ Distributor-Retailer Authority trading as "Unitywater"** **Southern SEQ Distributor-Retailer Authority (trading as "Allconnex Water"**	No shareholders – constituted as an independent Authority for 99 years (not a body corporate): see ss.9, 10 *South East Queensland (Distribution and Retail Restructuring) Act 2009* (Qld)	At least five members: s.33 *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)	Duties with respect to disclosure of interest: s.42 *South East Queensland (Distribution and Retail Restructuring) Act 2009* (Qld)	See ss.49-51 *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld) *(Reserve powers of participating local governments)*	Audit required to be undertaken by QLD Auditor-General and annual reporting pursuant to the *Financial Accountability Act 2009* (Qld): s.15 *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld) (see also s.19 re: deletion of commercially sensitive material from annual report)	CEO appointed by Board: s.44 *South East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)
SA	**South Australian Water Corporation**	Shareholders are the Minister for Water Security and Treasurer: see cl.3, The South Australian Water Corporation Charter June 2010 made under s.12 *Public Corporation Act 1993* (SA)	Chief executive plus 6 other members: s.12 *South Australian Water Corporation Act 1994* (SA)	See Pt 4 *Public Corporation Act 1993* (SA)	See s.6 *Public Corporation Act 1993* (SA)	Audit required to be undertaken by SA Auditor-General and annual reporting requirement specified: ss.32, 33 *Public Corporation Act 1993* (SA)	CEO appointed by the board with the approval of the Minister: s.17 *South Australian Water Corporation Act 1994* (SA)
TAS	**Tasmanian Water and Sewerage Corporation Pty Ltd ("Taswater)**	Tasmania's 29 councils: see ss.9, 10 *Water and Sewerage Corporation Act 2012* (Tas)	Proprietary companies must have at least 1 director: s.201A Corporations Act (Taswater has 7 directors)	See Pt 2D.1 Corporations Act	None, though see s.12 *Water and Sewerage Corporation Act 2012* (Tas) ("Shareholder's letter of expectation")	Audit required to be undertaken by Tas Auditor-General and annual reporting in accordance with Corporations Act for large proprietary companies: s.24 *Water and Sewerage Corporation Act 2012* (Tas)	Chief executive officer to be appointed by, and may be removed by, the Board: s.15 *Water and Sewerage Corporation Act 2012* (Tas)
VIC	**Barwon Water Corporation** **City West Water Corporation** **Melbourne Water Corporation** **South East Water Corporation** **Yarra Valley Water Corporation**	No shareholders – constituted as an statutory corporation owned by the State s.85 *Water Act 1989* (Vic)	Managing director plus 2 to 9 other members: s.95 *Water Act 1989* (Vic)	See 'Directors' Code of Conduct and guidance notes' issued by Public Sector Standards Commissioner: s.63 *Public Administration Act 2004* (Vic); see also ss.96, 108, 109 *Water Act 1989* (Vic)	See ss.307, 307A *Water Act 1989* (Vic)	Audit required to be undertaken by Vic Auditor-General and annual reporting in accordance with *Financial Management Act 1994* (Vic); see also s.122ZJ *Water Act 1989* (Vic) re: additional reporting	Managing director of the water corporation appointed by the board: s.99 *Water Act 1989* (Vic)
WA	**Water Corporation (WA)**	All shares held by Minister responsible for the Water Corporation: s.72 *Water Corporation Act 1995* (WA)	Chief executive plus 5 to 6 other members: s.7 *Water Corporation Act 1995* (WA)	See s.20, Sch 2 *Water Corporation Act 1995* (WA)	See ss.63-66 *Water Corporation Act 1995* (WA)	Audit required to be undertaken by WA Auditor-General and annual reporting intended to be consistent with Corporations Act requirements: see s.86, Sch 3 *Water Corporation Act 1995* (WA)	Chief executive appointed by the board with the concurrence of the Minister: s.13 *Water Corporation Act 1995* (WA)

1. *See also Appendix C*

Discussion

For entities providing water and sewerage services in major urban areas across Australia, legal form varies markedly. Only in the case of the ACT is the utility a public company limited by shares registered under the Corporations Act (see Table 3.3).[34] This raises the question as to what is the most appropriate legal form for an entity such as ACTEW that provides water and sewerage services in the ACT.

In all instances major urban water utilities in Australia are publicly owned. There are various reasons why this is the case.[35] In part it is historic – the provision of water and sewerage services to urban areas having been the domain of public entities in Australia for the majority of our history (see, for example, ACT (Donovan, 1999); Sydney (Sydney Water, 2012); Melbourne (Abbott, Wang and Cohen, 2011)).[36] More relevantly, it is a product of an industry structure that is capital intensive, has a range of monopoly characteristics and involves the provision of services to meet critical human needs and which are associated with significant public health externalities. Public ownership has also been encouraged by the complex relationship that exists between water and sewerage service provision and other areas of public policy – most directly, water resource management policies in a nation with a dry and variable climate.

A threshold matter that arises from the public ownership of such water utilities is what is the appropriate nature of the roles and responsibilities of the Parliament and the Ministers who by their election and appointment are required to oversight the activities and performance of publicly owned entities on behalf of the community.

Guidance on this issue can be found in the principles of 'responsible government' which arise out of Australia's constitutional arrangements at both Commonwealth and State and Territory levels.[37] Central to these principles is that ministers undertake their roles on behalf of the Crown, and in undertaking those responsibilities are accountable to Parliament (see generally Hanks, Gordon & Hill, 2012: 4.109-4.241). As a consequence, ministers are required to exercise oversight and control over any entity for which they are allocated responsibility, and exercise authority in relation to it subject to any constraints imposed by parliament itself.

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[34] It has not always been the case that the entities supplying water and wastewater services in Australia were primarily statutory corporations (see further section 3.4.1.2).

[35] Experience in other countries with respect to public and private ownership differs markedly. In Europe, for example, private companies such as Veolia and RWE have historically played that role, and in the UK, the water sector was originally publicly owned, but was privatized in the 1980s. In Australia, private sector involvement in the water and sewerage industry has tended to focus on service provision, construction and ownership of major infrastructure components.

[36] In Melbourne, for example, private companies originally provided water from pumps, rainwater tanks and horse drawn tanks. In 1853 the Victorian Government founded the Commission of Sewers and Water Supply (see Abbott, Wang and Cohen, 2011).

[37] As to judicial references to the "responsible government", see for example: *Lange v Australian Broadcasting Authority* (1997) 145 ALR 96 at 104-106; *Re Patterson Ex parte Taylor* (2001) 207 CLR 391, [67]-[69] (Gaudron J); [216]-[224] (Gummow and Hayne JJ); *New South Wales v Bardolph* (1934) 52 CLR 455; *Egan v Willis* [1998] 195 CLR 424; *New South Wales v The Commonwealth* (1975) 1435 CLR 337; *Sue v Hill* (1999) 199 CLR 462, [88]-[89].

Further, as the entity is publicly owned, parliament retains the right to inquire into the affairs of the corporation.[38]

In establishing the scope and limits of a minister's role, however, governments and parliaments also face the challenge of putting in place institutional arrangements so as to ensure services are delivered in the most efficient manner on behalf of the community. Thus the thrust of the NCP reforms has been to establish institutional arrangements that encourage and facilitate cost-effective service delivery, in particular by separating out operational and regulatory responsibilities and by allowing publicly owned entities to operate commercially and independently of government.

As the ANAO (1999:4) states, the task in establishing institutional arrangements in this context generally requires satisfying:

> *"… a more complex range of political, economic and social objectives, and operat[ing] according to a quite different set of external constraints and influences than do private sector businesses. In addition, … [public sector entities are] subject to expectations and forms of accountability to their various stakeholders, who are more diverse and likely to be more contradictory in their demands than those of, say, a private sector corporation."*

In part, such accountabilities may be established through extant legislation which imposes public accountability obligations on a wide range of public entities. This includes, for example, legislation relating to public records, ombudsman schemes and freedom of information.

More generally, however, such accountabilities are determined through the specific legal form chosen for the relevant entity, the roles and responsibilities allocated to the ministers, boards, management and the Parliament, and the specific mechanisms adopted by which these roles and accountabilities are established.

In the case of an entity involved in the provision of water and sewerage services and/or holding interests in a joint venture providing energy services, this process will generally involve determining:

- the objectives the entity is required to fulfil (see further below);
- the extent to which the entity is required to ensure its intended activities are known to their shareholders – for example, through corporate planning processes and/or statements of corporate intent;
- the extent to which the entity's activities may be constrained – for example, where ministerial and/or parliamentary approval is required for certain activities to be undertaken;

[38] *See Lange v Australian Broadcasting Authority* (1997) 145 ALR 96 at 107.

- the extent to which the entity is financially independent – for example, its capacity to borrow independently of government;
- the reporting requirements which apply to such an entity – to both Ministers and Parliament; and
- the extent to which Minister's may exercise authority over its activities – for example, through powers of direction.

Decisions with respect to such matters do not simply involve focusing on whether particular accountability mechanisms should apply, or the manner in which they should operate, but more generally also require consideration of the legislative instrument(s) and/or provisions by which they are to be established, and their consistency with one legal form as compared to another.

In the case of ACTEW, for example, the TOC Act establishes various accountability mechanisms which apply to it as a company registered under the Corporations Act. According to the ICRC (ICRC, 2013a) this gives rise to issues of potential conflict between the ACT and Commonwealth legislative instruments. An alternative approach would be for a corporate entity and accountability measures to be established just by ACT legislative instruments. To the extent desired, this legislation could incorporate such provisions of the Corporations Act as may be considered desirable (see s.5G Corporations Act).[39]

Some of the potential complexities involved in the relationship between legal form and particular accountability measures may be illustrated by reference to powers of direction.

As their title suggest, powers of direction are powers vested in the minister under legislation to direct the activities of an entity over which that minister has been allocated responsibility. Powers of direction attempt to reconcile two conflicting needs – the executive's need to delegate decision-making to an agent and the executive's need to preserve its capacity to intervene in the agent's decision-making (Mantziaris, 1998:1).

All major urban water utilities are subject to powers of direction except in Tasmania (see Table 3.4). However, the water utilities subject to powers of direction are generally established as statutory corporations – that is, corporations created by State or Territory legislation; only in the ACT is the utility established as a Corporations Act entity.

In other jurisdictions which provide for the creation of publicly owned Corporations Act entities through generic legislation, the approach taken to powers of direction are sometimes constrained. Thus, while in the ACT, and QLD, powers of direction applicable to such entities are defined broadly, legislation in NSW and Victoria either

[39] This is the approach adopted in the NT, for example, where section 20 of the *Government Owned Corporations Act* (NT) incorporates the Corporations Act provisions with respect to directors' duties,

prescribes only limited powers of direction (NSW) or none at all (VIC) (see Appendix A).[40] In the case of NSW, this compares directly to the broader powers of direction applicable in relation to statutory State owned corporations (see Table 3.4).

The contrasting approach adopted in NSW reflects the fact that statutory corporations and Corporations Act companies differ in nature. Companies registered under the Corporations Act may have their purposes for which they are established set out in objects clauses in their Constitutions (see s.125 Corporations Act). However, the legal capacity and powers of the company are still those of an individual both in and outside the jurisdiction of the Corporations Act (see s.124 Corporations Act). Hence an act of a company is not invalid merely because it is contrary to or beyond any objects in the company's constitution (s.125(2) Corporations Act).[41] By contrast, the powers of a statutory corporation are determined by reference to the legislation under which it is created. It is possible that it may be given the powers of an individual, but this will often not be the case. A statutory corporation can only do those things that its constituting Act contemplates being done by it (see further below).

As the legal capacity of a Corporations Act company and a statutory corporation may vary, so too the appropriateness of prescribing a power of direction with respect to the respective entities also varies. For a statutory corporation, allocating a power of direction to government is consistent with that government also limiting the scope of powers of that corporation by the Act establishing it. By contrast, by establishing an entity as a Corporations Act entity, the government has evinced its intention that such an entity be able to act in a more unconstrained fashion, subject to the range of statutory and general law duties and obligations applicable to the directors and officers of such entities. The notion that Corporations Act entities are generally intended to operate independently of their shareholders appears to underpin the ICRC's (2013a:15) argument in relation to the power of direction prescribed under the TOC Act for a Corporations Act entity that:

> "*Section 17 provides a power for the shareholders to direct the board of a TOC in managing the affairs of the TOC to act in a way that, in the absence of the direction they would not wish to do. This runs directly counter to the role and responsibility of directors as they are envisaged in corporations law. While the power to manage the affairs of the corporation lies with members or shareholders, there are processes specified in corporations law through which that power should be exercised. Directing a supposedly independent board is not one of them. If shareholders judge that a board is not conducting the affairs of the corporation in a satisfactory way, procedures are available under corporations law to dismiss that board or individual members of it. It is, however, fundamental to the model of the management of a company*

[40] In NSW, there is a narrow power of direction with respect to transfers involving company State Owned Corporations: see s.7A *State Owned Corporations Act 1989* (NSW).

[41] Similarly, the exercise of power by the company is not invalid merely because it is contrary to an express restriction or prohibition in the company's constitution: s.125(1) Corporations Act.

embodied in corporations law that as long as a board is in office it should exercise control over the company within the bounds set by the constitution of the company and the provisions of the Corporations Act. To do otherwise is tantamount to abandoning the corporation law model."

It is important to note in the context of the ACT's current legislative arrangements for TOCs that in questioning the merits of having an operative power of direction in relation to a Corporations Act entity, the ICRC did not appear to query the enforceability of such a power. Consideration of that issue would need to have regard to section 5G(5) of the Corporations Act which provides, inter alia, that if a provision of a law of a State or Territory specifically authorizes a person to give instructions to the director of a company or body, or requires directors of a company to comply with instructions given by a person, a provision of the Corporations legislation does not prevent the person from giving an instruction to directors or exercising control or direction over the company or body, prohibit a director from complying with the instruction or direction, or impose a liability (whether civil or criminal) on a director for complying with the instruction or direction. Further the person is not taken to be a director of a company merely because the directors of the company are accustomed to act in accordance with the person's instructions.

That the Corporations Act provides for such circumstances also indicates that provision for such powers of direction has been contemplated in the creation of that Act, and so it is not the case that having a Corporations Act entity subject to constraints imposed by ACT legislation is precluded by or fundamentally inconsistent with such legislation.[42]

At heart, however, the issue is not one of enforceability but rather the appropriateness of putting in place a provision such as section 17 of the TOC Act in the overall governance arrangements for an entity established as a Corporations Act entity. Such an entity is more likely to be seen as being intended to operate independently of government in a fashion similar to that of a private sector entity; as compared to a statutory corporation whose objects, functions and powers are defined under specific legislation of the jurisdiction. It is notable in this context that since its establishment, ACTEW has never been subject to a direction from its Voting Shareholders.

In summary, the appropriateness of a particular legal form depends on the extent to which ministers and parliaments should retain oversight and control having regard to public ownership, and the capacity to put in place arrangements that clearly establish that desired outcome through a consistent set of accountability mechanisms.

[42] Further, the provision of a power of direction does not of itself evince an intention that a minister is precluded from communicating with an entity for which he or she is responsible other than in relation to that power, although it may impact on the propriety of particular communications (see, for example, *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; (1997) 76 FCR 151, 231; *Townsville Housing Resource Unit Inc v Flegg*) [2013] QSC 96, [40]).

This in turn will depend on the functions for which the entity is established – for example, whether it is just the provision of water and sewerage services, or both these and energy related services. It will also depend on the degree of independence and oversight the government regards as appropriate given the nature of services being provided, the risks associated with that service provision, and the regulatory framework within which it operates.

The accountability required by government may range from minimal and observatory, for example reporting requirements, through to the setting of objectives for the organization, consultative or deteminative roles in corporate planning processes, and the application of general government policy or directions powers.

Desired outcomes with respect to all of these matters will affect the choice of legal form, as well as ancillary governance arrangements. The specific question of appropriate corporate form as it relates to an ACT publicly owned entity providing water and sewerage services and/or holding energy interest is considered in further detail below.

3.4 Options for reform to ACTEW's institutional arrangements

A number of options for reform of ACTEW were highlighted in Submissions, including:

- retaining the status quo (ACTEW Submission Option 1, p.42);
- changing the legal form of ACTEW:
  - through the adoption of a "Reserve Bank" type entity, governed by a small board which provided priorities and guidance to an enhanced "Water manager" charged with all operational aspects of water in the ACT. This would include the management of catchments, potable water supply and sewerage, storm water and groundwater (Thomas Submission);
  - through the establishment of a statutory authority, with an advisory board rather than a governing board (Broughton Submission);
- retaining the current institutional structure, while:
  - undertaking a full branding and name change to establish a better demarcation of the services by ACTEW and the ActewAGL joint venture; and
  - enhancing the reporting and governance arrangements between ACTEW and its subsidiary company partners in the ActewAGL joint venture. This would include:
    - at each ACTEW Board meeting ACTEW management (through the Managing Director) would be required to provide a formal report on the performance of ActewAGL from an ACTEW perspective –

covering any significant events or future issues in relation to the ActewAGL joint venture;
    - a Director of the subsidiary companies (most likely the Managing Director) must report on the actions of the subsidiaries in relation to their participation on the ActewAGL Joint Venture Board;
    - relevant personnel within ACTEW who currently manage the energy investments would be seconded to the subsidiaries to undertake that role; and
    - a formalization of the support provided to the subsidiaries by ACTEW – to recognise and emphasise the different business of the subsidiaries and the parent company (ACTEW Submission Option 2, pp. 43-47);
- creating new institutional arrangements, in which ACTEW would establish new subsidiary arrangements with the aim of more clearly separating its energy investment activities from its water business (ACTEW Submission Option 4, pp. 59-61); and
- creating new institutional arrangements, in which separate entities would be responsible for the provision of water and wastewater services, and for the investments in the ActewAGL joint venture currently held by ACTEW.

  Various potential permutations of these arrangements were put forward or discussed, including:
  - the establishment of a second TOC ("NewTOC"), which would hold ACTEW's investments in the ActewAGL joint venture. It was further suggested, inter alia, that:
    - ACTEW and the NewTOC should have the same Board, Managing Director, Company Secretary and Chief Financial Officer; and
    - NewTOC would enter into an agreement with ACTEW under which it would provide NewTOC with access to relevant ACTEW resources and personnel (ACTEW Submission Option 3, pp. 48-58); and
  - the water businesses and the energy investment being held by separate entities, respectively a Corporation Act company and a statutory authority. Further, having regard to the entity that would hold the energy investment, given the partnerships that exist with privately owned entities, that entity should be given an explicit mandate to pursue profit maximization (ICRC Submission).

3.4.1 Assessment of reform options

While the options set out in Submissions do not represent every possible reform option – for example, an internal reorganisation could encompass the establishment of separate subsidiaries; one holding the energy investments, the other the water and sewerage business – collectively they highlight the key, and interrelated, issues to be addressed being:

- whether the status quo should be retained or structural reform undertaken;
- if reform is desirable, what is the appropriate corporate form(s) for the entity/entities to be established; and
- if reform is desirable, whether reform should take the form of an internal reorganisation or the creation of separate entities for the water and sewerage business, and to hold the interests in the ActewAGL joint venture.

In assessing each of these issues, a range of factors are relevant including, but not limited to:

- historic and current operational performance;
- the nature of ACTEW's activities;
- future pressures affecting ACTEW's operating environment;
- the presence of economies and diseconomies of scale and scope;
- economic structural issues (e.g. monopoly, competition, etc);
- clarity of roles and responsibilities;
- the capacity of the existing entity, including skills and expertise of its board, management and staff;
- budget impacts;
- transitional costs that would be involved in any change; and
- any additional costs and/or savings that would result in the future from changes to institutional arrangements.

It is also recognised that based on the current regulatory frameworks that exist in the ACT, the range of potential structures is limited to directorates, territory authorities and TOCs registered under the Corporations Act entity. As noted above, the current regulatory framework would likely benefit from ongoing enhancement to most appropriately provide for entities of the form established elsewhere in Australia with respect to major urban water utilities, within a clearly defined governance framework for corporations created by an Act of the jurisdiction that are significant government business enterprises (as is the case, for example, in the NT, NSW and SA) (see Rec 3.1).

3.4.1.1 Status quo or reform

ACTEW's current institutional arrangements are in part the product of the distinct natural and demographic characteristics of the ACT, and the nature of its historical development. They also derive heavily from the policy environment that operated during the 1990s – ACTEW's current structure formed in the context of a complex and passionate debate as to the benefits of competition, the potential for privatization and the support which existed for ongoing public ownership of the ACT's water, sewerage and energy assets.

The structures put in place have served the ACT for nearly a decade and a half. In that time there have been issues of concern and controversy. Some of these are ongoing. Yet in terms of its core responsibilities, ACTEW has generally fulfilled its role of providing a safe and secure supply of water, and ensuring effective sewage transfer and treatment. Further the ActewAGL joint venture in which its hold a 50 per cent interest has operated profitably, and continues to be the major provider of energy services to the ACT community. As such, the circumstances in which this Review is being undertaken are not of apparent imminent crisis requiring drastic and dramatic reform.

In recent times ACTEW has gone through a period of considerable activity and change – having only recently completed major investments in water security infrastructure and taken back control for the direct provision of water and sewerage services. Together, these activities have necessitated a major organisational redesign. There is some benefit in allowing these changes to be bedded down, and to give ACTEW the opportunity to demonstrate their effectiveness.

At the same time, however, there is also a range of factors which provide impetus for reform of ACTEW’s current institutional arrangements.

First, regard needs to be given to the nature of the industries in which ACTEW operates or holds an interest. While some structural elements of the water and sewerage sector and the energy industry are similar, as too are aspects of their regulatory frameworks, it is also the case that energy services are provided in a competitive environment, and one in which the participants are predominantly from the private sector.

By contrast, the nature of the water industry, and its predominant public ownership in Australia, suggests a role for a government owned entity different from that applicable to a participant in the energy industry. Water has a particular focus for the Australian community having regard to our historically variable climate, and particularly so for the ACT as an inland territory situated within the Murray Darling Basin. This in turn suggests institutional arrangements should also differ – for example, to enable more regard to be given not only to issues of commerciality but also to other broader environmental and social objectives.

Secondly, much has changed to the environment in which ACTEW delivers it services since it was first established. The ACT population has grown – for example, from just over 315,000 in 2000 to just under 375,000 in 2012 (ICRC, 2013c:65). While ACTEW operates in a relatively small market place by Australian standards, and one more likely than larger urban areas to benefit from such economies of scale and scope as may arise from combining energy with water and sewerage activities, this growth means that on their own water and sewerage services are now more able to be provided at or above minimum economies of scale than was the case in the earlier years of the ACT’s development.

Separately, concern for environmental issues has increased over the past decade, in part driven by the experiences of the Millennium Drought. Amongst other things, this drought has also led to significant new investments in water supply infrastructure. Together these events have focused greater community attention on water service provision. In turn, they have highlighted the importance of having institutional structures in place which are focused on effective decision making with respect to investments and operations in the water sector.

The energy sector too has seen significant change. Since ACTEW was first corporatized, the industry has moved from a state and territory based industry structure to a far more nationally oriented one. Participants in the industry have reorganized – with widespread privatization, and disaggregation of distribution from retail and generation activities. Such changes can be seen clearly in the ACT, where ACTEW now holds its interests in the ActewAGL joint venture together with two private sector participants – AGL and Jemena.

While all of these changes are relevant in their own right, in terms of factors contributing to the impetus for reform perhaps the most important change is ACTEW's recent decision to take back responsibility for the operation of its water and sewerage assets from the ActewAGL joint venture.

In and of itself, such a step is consistent with efficiency benefits being best able to be achieved by ACTEW through the direct management of those water and sewerage assets, rather than in combination with energy assets. Further, while there may be some synergies between water, sewerage and energy service provision, this action also indicates there is capacity to extract at least some, if not most, of these benefits through means other than institutional integration – for example through the contracting of services, as now occurs. Similarly, where benefits may continue to arise from sharing commercial expertise and jurisdictional knowledge, particularly at the board level, this does not of itself require institutional integration – there is nothing to preclude, for example, individuals serving on multiple boards, and allowing each organisation to benefit from their relevant skills and expertise.

Whether or not influential to ACTEW's decision to take back responsibility for water and sewerage operations from the joint venture, another key factor supporting change is the relatively poor returns generated by ACTEW's water business in recent years. While myriad factors can be said to have influenced this outcome – many of which may have been beyond ACTEW's control – its water business only just broke even in the 2012-13 financial year, and in the previous two years suffered losses. Given the higher gearing levels ACTEW now faces, this outcome suggests there would be benefit in establishing an entity responsible solely for the provision of water and sewerage services, so as to allow it to focus on enhancing this financial performance, and also to better enable the community to see clearly how this business is performing.

Looking forward, there are also a number of environmental factors which are likely to be relevant. Ongoing population growth, for example, can be anticipated to

enhance economies of scale with respect to water and sewerage service provision. There is also potentially greater uncertainty in both water and energy sectors, due to climate variability and technological change, which in both instances means entities responsible for providing the respective services would likely benefit from greater clarity of focus for management.

While such factors suggest there is reason for reform, any consideration of new institutional arrangements also needs to have regard to a variety of financial factors, including transitional costs, ongoing costs and the effects of reform on dividends. In considering such factors, however, it is noted that it is beyond the scope of this Review to undertake a detailed business case with respect to any potential reform option, and as such the following assessment is necessarily general in nature.

Transitional costs are difficult to estimate, as they will depend on how reform is to occur. The potential for such costs to be significant should not be underestimated, and in considering specific reform options regard needs to be given to simplicity so as to minimise these costs as far as possible. Factors likely to contribute to transitional costs will include, but are not limited to:

- the manner in which assets and business operations will be transferred to a new entity if separate entities are to be created for water and sewerage, and for energy related activities. A transfer of energy assets would appear to be intrinsically simpler in that these interests are predominantly held through two subsidiary companies;
- while transferring energy assets may be simpler, any such change would need to have regard to existing rights under the ActewAGL joint venture arrangements. This Review is not auspiced to review the structure of the ActewAGL joint venture, and hence no detailed assessment of these rights has been made. As a general principle, however, it is necessary that all rights are respected;[43]
- the extent to which legislation will be required to be amended and/or approvals granted by the Legislative Assembly, for example under the TOC Act and the *ACTEW/AGL Partnership Facilitation Act 2000* (ACT);[44]
- any ancillary internal changes for ACTEW associated with it separating its activities, including the need to ensure any of ACTEW's ongoing commercial arrangements with the ActewAGL joint venture are appropriately structured. Separation would likely also require a change of name, which in turn would necessitate a marketing campaign to inform the Canberra community of the new name. Other costs associated with such a name change would include the

[43] Consideration will also need to be given to any approval required to be provided by ACTEW itself as a Corporations Act entity. Should a direction be required pursuant to section 17 of the TOC Act, consideration will also need to be given to what, if any, compensation may be required to be paid to ACTEW.

[44] Approval may also be required from the ICRC with respect to transfer of ownership of entities who jointly hold licences issued under the Utilities Act.

registration of new business names, new logos, trademarks and domain names;[45] and

- the extent to which costs may be incurred by the other ActewAGL joint venture partners where reform requires agreements to be reviewed, consents to be obtained and/or any new agreements to be made.

In relation to ongoing costs, if separate entities are created there are likely to be a range of corporate costs that will need to be borne. Where there are two separate entities, these costs would ordinarily be anticipated to increase. It is important to recognise, however, that there are already costs being incurred by ACTEW with respect to managing its interest in the ActewAGL joint venture. In 2012-13 this was estimated to be $15.3 million, although it appears by far the largest proportion of this related to allocated debt financing costs. Any additional corporate overhead costs in a new entity could be expected to be offset, at least in part, from reduced overhead costs in the water and sewerage business. Also relevant is the need to recognise that the ACT's investment in the ActewAGL joint venture is a significant one. Under the joint venture arrangements, ACTEW's role is not simply that of a holding company but also that of a partner (e.g. through its wholly owned subsidiaries). These interests need to be managed as such, and this requires resources to be allocated so as to ensure decisions are made on an ongoing basis with appropriate knowledge, experience and expertise. To do otherwise risks being a false economy. Making the costs of managing the ACT's interests in the ActewAGL joint venture more explicit will also assist in future decision making with respect to these assets.

Finally, in relation to the effect of reform on dividends, this too is uncertain. It will depend upon a range of factors including the levels of debt allocated to any new or reformed entities, the outcome of ACTEW's appeal of the ICRC's most recent pricing determination with respect to water and sewerage services, and the extent to which greater focus will facilitate improved financial performance. In part, such outcomes will in turn depend on the manner in which any reform occurs. Hence the level of borrowing allocated to an entity holding the ACT's interests in the ActewAGL joint venture may depend on the valuations placed on these interests, which may be subject to revision if transferred to a new entity. This is because the book value of some of these assets appears to be below net realizable value due to the application of the relevant Australian accounting standards. However, it is beyond the scope of this Review to determine whether a transfer of these assets to a new entity may enable a different value to be ascribed to these assets.

On balance, having regard to all of the factors outlined above and in particular ACTEW's decision to take back control of its water and sewerage operations, the Review believes the circumstances are appropriate for the ACT to reform ACTEW's current institutional arrangements.

[45] As a Corporations Act entity, a change of name for ACTEW would require a special resolution adopting a new name in accordance with its Constitution, and the lodgment of an application for a name change with ASIC within 14 days after the special resolution is passed.

In forming this view it must be noted, however, that the Review's Terms of Reference precluded reviewing the structure of the ActewAGL joint venture. As such, there are some limitations on the extent to which the Review has been able to assess in detail the costs and benefits of ACTEW's current structure to the joint venture itself, and more specifically, the extent to which they are dependent on the current structure or could be achieved through other means. For the same reason, the Review did not regard it as appropriate to undertake a detailed assessment of the joint venture agreements, and hence the consents and approvals which may be required to be obtained to give effect to the reforms being proposed.

Recognising these constraints, the following points are noted with respect to ACTEW's interests in ActewAGL:

- there is a range of joint venture agreements in place, and any potential change needs to recognise and respect any rights that exist under those agreements, including with respect to any services provided by ActewAGL joint venture partners to the joint venture itself, and any consents and approvals required to be given;
- even if required consents and approvals were to be given, conditions may be attached that may need some time and resources to satisfy;
- commercial service agreements are in place between ACTEW and the ActewAGL joint venture, in particular the CSA and the CSCSA. Any potential reform will need to recognise and respect any rights that exist under those agreements, and also that in relation to the CSA and CSCSA there is likely to be a cost to the ActewAGL joint venture if the volume of services to ACTEW or successor entities were reduced or the arrangements were unwound or terminated prior to expiry; and
- in any event, there would be costs incurred in the resulting restructuring and redrafting exercise with respect to the ActewAGL joint venture agreements which would need to be met.

3.4.1.2 Legal form

The second issue to be addressed by this Review is the legal form of any new or reformed entities that might be created if there is to be change to ACTEW's current institutional arrangements. Consistent with the discussion above, the threshold question is whether any entity should be a statutory corporation established by ACT legislation, or established as a Corporations Act company subject to additional requirements under ACT legislation. To address this issue, it is necessary to briefly outline some of the differences between the two legal forms in the context of an entity both providing water and sewerage services to the community, and being publicly owned.

Historically, companies registered under corporations' legislation in Australia were treated like corporations created under statute so far as their legal capacity and

powers were concerned. Thus each company was required to set out the purposes for which it was established in its objects. Its capacity and powers were confined to acts necessary for, connected with, or incidental to those objects. Acts taken by a company beyond its powers were void and incapable of ratification by even a unanimous vote of its members (see Austin and Ramsay, 2007:741).

Since 1984, however, companies registered under the Corporations Act (or any earlier corresponding law), have had the legal capacity and powers of an individual both in and outside the jurisdiction of the Corporations Act (see s.124 Corporations Act). Further, an act of a company will not be invalid merely because it is contrary to or beyond any objects in the company's constitution (see s.125 Corporations Act), nor would such an act be a contravention of the Corporations Act.[46] This is the case with respect to TOCs in the ACT, notwithstanding that they are publicly owned.

By contrast, the powers of statutory corporations established for public purposes are determined by reference to the legislation by which they are created. As such, the statutory corporation can only do those things that its constituting Act contemplates being done by it. It is possible for the legislation establishing or governing such a statutory corporation to provide that its acts will not be invalid even where its power has been exceeded (see, for example, ss.20Z-20ZE *State Owned Corporations Act 1999* (NSW); s.44 *State Owned Enterprises Act 1992* (Vic)). More often, however, the statute will contain express provisions with respect to the purposes, objectives, functions, powers and duties of the corporation. Those provisions, together with the necessary implications to which they give rise, are the source of the corporation's authority and capacity and define the limits of its powers.[47] Where a statutory corporation, unlike a company registered under the Corporations Act, is not provided with the capacity of an individual but rather more limited powers specified by its objectives, then if such a corporation seeks to do an act or enter into a contract unconnected with its objects such action will not bind the corporation and the transaction will be void under the doctrine of '*ultra vires*'.[48]

The different bases by which Corporations Act entities and statutory corporations are established not only affect the capacity of the respective bodies, they also potentially affect the nature of legal remedies that may be available in relation to

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[46] However, section 125 is only concerned to prevent an act of a company being invalidated to the prejudice of the company or a third person. It does not require that directors are to be treated as if they had acted within their authority. As such, non-compliance with stated objects could, for example, constitute a breach of directors' duties which results in those directors being liable for loss or subject to other sanctions.

[47] *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council and Ors* (2006) 203 FLR 394 [72] per Barrett J See also: *Rail Signalling Services Pty Ltd v Victorian Rail Track* [2012] VSC 452 [45] per Vickery J; *Kathleen Investments (Australia) Ltd v Australian Atomic Energy Authority* (1977) 139 CLR 117; at 130; *Humphries v Proprietors Surfers Palms North Group Titles Plan* (1994) 179 CLR 597 at 604; *Commonwealth v The Australian Commonwealth Shipping Board* [1926] HCA 39; (1926) 39 CLR 1; *Corporation of the City of Unley v South Australia* [1996] SASC 5700; (1996) 67 SASR 8 (successfully appealed on another ground which made the ultra vires question no longer relevant).

[48] "*Ultra vires*" broadly translates as "beyond power". In determining the scope of these powers, reliance will be placed on applicable rules of statutory interpretation; see, for example, *Legislation Act 2001* (ACT).

the exercise of their powers. For example, while publicly owned Corporations Act entities are subject to private law remedies based upon contracts and torts, whether or not they are subject to remedies from public law such as judicial review will depend upon the nature of the regulatory frameworks in which they operate.[49] Such public law remedies will generally apply to statutory corporations.

In the ACT, the different legal forms may also have implications in terms of whether entities are taken to represent the ACT and relatedly the extent to which the entities enjoy immunity from the application of specific Acts as being part of the ACT.[50] For example, whether a statutory corporation forms part of the ACT may be determined by reference to the relevant statute establishing it (e.g. a reference in a statute to a body 'representing' the ACT will be sufficient).[51] If there is no such express indication, the functions and duties of the relevant body or person may give rise to an inference that it does so.[52] This 'functions test' provides an indication as to whether a statutory corporation represents the ACT, but it does not apply to the exclusion of other tests.[53] Hence, courts will also consider:

- the extent or degree of ministerial control over the relevant entity;[54]
- the independence and autonomy enjoyed by directors or management;[55] and
- whether the entity holds property on behalf of the ACT.[56]

These features will also be relevant in determining whether a Corporations Act entity represents the ACT. Generally its form suggests this is less likely to be the case than for a statutory corporation – for example, because Corporations Act entities are associated with greater autonomy in decision making.[57] Nevertheless, in the case of ACTEW it has been held that, even though the TOC Act (s.8) specifically provides that TOCs do not represent the ACT nor are they entitled to any immunity or privilege of the ACT only because of their status as TOCs, ACTEW was part of the polity of the

[49] While this may not be universally the case, as to the potential limitation of judicial review for Corporations Act entities, see for example *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35; 216 CLR 277; 198 ALR 179; 77 ALJR 1263.

[50] The common law presumption of Crown immunity from legislation is that an Act does not bind the executive government unless it does so expressly or by necessary implication.

[51] *Wynyard Investments Pty Ltd v Commissioner for Railways (NSW)* (1955) 93 CLR 376; *Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654, 661; *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646; 658-9, 661-2.

[52] *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70, 75, 80.

[53] *Repatriation Commission v Kirkland* (1923) 32 CLR 1; *Registrar of Accident Compensation Tribunal v Commissioner of Taxation* (Cth) (1993) 178 CLR 145 at 170.

[54] *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 342 per Stephen J, at 371 per Aickin J; *Townsville Hospitals Board v Council of the City of Townsville* (1982) 149 CLR 282; *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 308; per Mason, Murphy and Deane JJ.

[55] *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282, 308 per Mason, Murphy and Deane JJ.

[56] *Superannuation Fund Investment Trust v Commissioner of Stamps (SA)* (1979) 145 CLR 330 at 335 614 per Barwick CJ.

[57] See, for example, *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48; 219 CLR 90, [161]-[165]; see also *SGH Limited v Commissioner of Taxation* [2002] HCA 18.

ACT by reason of the subordinating provisions[58] of the TOC Act (see Q*ueanbeyan City Council v ACTEW Corporation Ltd).*[59]

As the autonomy of statutory corporations is often more limited than for Corporations Act entities, so too the legislation establishing and limiting the scope of their powers will often also provide for mechanisms by which government may play a more active role in the conduct of its activities – for example, through powers of direction and in the determination of statements of corporate intent. In the case of major water utilities operating around Australia, for example, those established as statutory corporations sometimes provide a role for ministers to approve such strategic documents, and generally vest with ministers a directions power in relation to their contents, which may be exercised without having to compensate the entity for so doing. By contrast, under the TOC Act, SCIs are approved by each TOC's board (subject to consultation processes) and there is no specific directions power in relation to the making of these SCIs (see further Chapter 6).

Finally, the Corporations Act is primarily established to apply to private sector entities, which are generally established for commercial purposes. By contrast, legislation establishing statutory corporations for public purposes will often also provide for a range of objectives to be achieved which is broader than that ordinarily applicable to Corporations Act entities, but which are of greater relevance for a public sector entity seeking to balance a range of desired outcomes and with a disparate set of stakeholders (see further below).

It is recognised that, as is the case in the ACT, such matters may also be the subject of legislation applicable to publicly owned Corporations Act entities. However, such provisions are often more limited in scope (see Appendix A). Moreover, their practical application may also differ. For example, the likelihood of powers of direction being exercised may be more constrained in relation to Corporations Act entities than for a statutory corporation due to perceived concerns of the person(s) exercising such a power as to the possibility of being deemed to be a 'shadow director'.[60]

Having regard to these differing characteristics, a factor weighing in favour of ACTEW's current corporate form is that presently through its wholly owned

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[58] That is, provisions of the TOC Act by which the ACT exercises control over ACTEW.

[59] [2011] HCA 40. This case related to the question of whether a "water abstraction charge" (WAC) and a "utilities (network facilities) tax" (UNFT) were duties of excise. The High Court ruled that ACTEW was so intimately connected to ACT that it was not distinct from the polity itself and the charges were not duties of excise because they were internal financial arrangements of the ACT. This decision creates a potential uncertainty in that it provides support for ACTEW being "an exempt public authority" by virtue of it being either "an instrumentality or agency of the Crown … in right of a Territory" (see s.9 Corporations Act) and/or a 'public authority' (see, for example *Re NSW Grains Board* [2002] NSWSC 913), in which case an issue may arise as to its status as a 'corporation' for the purposes of the Corporations Act (see s.57A).

[60] That is, a person who is not appointed as a director, but is deemed a director as a result of being a person who directors are accustomed to act in accordance with their instructions or wishes (see meaning of 'director': s.9 Corporations Act).

subsidiaries it holds a 50 per cent interest in the ActewAGL joint venture that supplies energy services to the ACT and surrounding regions. After two decades of reform, the energy sector in Australia is primarily supplied by private sector entities, the retail sector operates in a competitive market framework, and both it and the distribution sector are subject to national regulatory arrangements. Institutional arrangements need to accommodate the fact that ACTEW's interests are held not simply in the form of passive investment management through a holding company but that under the joint venture agreements the owner of these interests has active responsibilities as a partner (e.g. through its wholly owned subsidiaries). As such, the entity holding those interests need to be able to participate in the joint venture with flexibility having regard to the energy industry's competitive pressures – in terms of staffing, expertise, investment, etc – and in so doing have a commercial focus. These characteristics tend towards ACTEW's interests in the ActewAGL joint venture being held by a Corporations Act entity.

In the case of ACTEW's water and sewerage operations, however, the nature of the industry is substantially different, with major urban water utilities across Australia operating within an industry structure with limited competition and significant monopoly characteristics. Further, it is an industry involved in the provision of essential services required to meet critical human needs, and with widespread public health externalities. It is also an industry in which decision making involves interaction with a range of other policy areas that involve substantive roles for government – in particular, water resource and natural resources management.

These characteristics contribute to the Review's view that, all other things being equal, such an entity would best be established as a corporation by ACT statute. Primarily, this is because this legal form better provides the ACT Government with the required capacity to set the parameters of, and in some instances have a role in, the decision making and activities of such an entity. It is also more consistent with an entity that is required to achieve multiple objectives that are both commercial and non-commercial in nature (see further below).

This approach differs from that posited by the PC (2011), which argued in favour of Corporations Act type entities being the most appropriate form for water entities on the basis that they were most likely to ensure operational independence. This approach was coupled with support for such entities to have a single objective centred on economic criteria (see further below), and other reforms.

It is, however, consistent with the approach taken around Australia with respect to public bodies providing water and sewerage services. While there is a range of different types of entities in the water sector, they are predominantly statutory corporations.

This has not always been the case. For example, in Victoria the metropolitan retailers – City West Water, South East Water and Yarra Valley Water – were originally established as Corporations Act entities. However their corporate form was changed in July 2012. In part this was to make governance arrangements more

consistent across all other water utilities in Victoria. Another additional benefit of establishing these entities as statutory corporations was the capacity to align the firms' objectives through the relevant minister exercising responsibilities through the corporate planning process.[61]

Similarly in NSW, where originally Sydney Water was established as a company, in 1999 following the McClellan inquiry (see McClellan, 1998) the Government removed the responsibility for the management of the inner catchments from Sydney Water Corporation and reincorporated Sydney Water Corporation as a new statutory State owned corporation to bring the management and control of the water supply and wastewater systems closer to Government.

As such, this Review considers in the first instance that the most appropriate legal form for an entity with responsibility for the provision for water and sewerage services in the ACT is as a corporation created by ACT statute.

However, while this may be the preferred outcome, in determining a pathway for reform consideration also needs to be given a range of additional factors, such as:

- the extent of change required to give effect to such an outcome;
- whether the benefits that would arise from such a reform are sufficient to warrant change;
- whether or not the issues such change is designed to addressed can be managed in other ways, at least in the short term; and
- whether a change in corporate form would create additional, different issues that may need to be addressed.

Having regard to such matters, the Review considers that while it may not be optimal for a publicly owned water and sewerage utility to be a Corporation Act entity, in the shorter term various issues of concern associated with such a corporate form – such as potential conflict between objectives and objects – could be addressed through the clarification of the entity's roles and responsibilities, improved specification of objectives and objects in legislation and constitutions, and by more robust processes and communications operating between ACTEW and the ACT Government (see further below and later Chapters).

By contrast, establishing a new entity to provide water and sewerage services as a statutory corporation is not likely to be straightforward. As outlined above, this would likely involve either establishing a new regulatory framework for public entities in the ACT, or specific legislation applicable to just a water and sewerage utility. The scale of this task should not be underestimated. As can be seen from the legislative frameworks operating across Australia, there is considerable variation in

[61] The change also facilitated a range of other outcomes that were not possible when the entities were structured as Corporations Act entities, including with respect to powers for compulsory land acquisition, the making of by-laws and the powers of officers against obstruction, abuse or intimidation.

the form of governance arrangements that may be adopted for such corporations (see Table 3.4, Appendix A). This gives rise to a complex range of choices that would need to be made in any reform process.

Further, in addition to any legislative reform, new institutional arrangements may also impose novel and greater burdens on the ACT Government in terms of oversight. These may be difficult and complex to manage, and certainly so if there are only a small number of entities to be overseen.

Finally, ACTEW has already gone through substantial change in recently restructuring its water and sewerage business. Hence there is benefit in limiting the scope and scale of change which may be required as a consequence of this Review. It is recognized that if ACTEW's interests in the ActewAGL joint venture are to be separated from its water and sewerage business (see below), this in itself would be a significant task to be managed.

Based on all these factors, this Review does not believe it is appropriate to recommend a change in corporate form from a Corporations Act entity at this time. However, this conclusion would have been different if there was an overarching ACT legislative framework in place that more readily encompassed a wider range of entities, including territory authorities with limited commercial activities and corporations created by ACT statute that are significant government business enterprises, as well as TOCs. If and when such a legislative framework is established (see Rec. 3.1), it would be appropriate for this issue to be reassessed and for the ACT's publicly owned water and sewerage utility to be established as a corporation by ACT statute.

For such time as ACTEW or its successor entities do continue to operate as Corporations Act entities, change will be required to ensure that the ACT legislation is complementary – rather than supplemental – to the governance arrangements established under the Corporations Act. Matters relating to such changes are discussed below and in subsequent chapters.

3.4.1.3 Internal reorganisation or structural separation

For the reasons outlined above, the Review considers on balance there would be benefit in reforming existing institutional arrangements to encourage greater focus on the provision of water and sewerage services, while ensuring that the value of the ACT interests in the ActewAGL joint venture is also protected and enhanced. To give effect to such an outcome, the potential reform alternatives are either internal reorganisation or structural separation.

In considering this issue, it is necessary also to have regard to the Terms of Reference, which require that if changes to institutional arrangements are recommended, that recommendations also be given with respect to how ACTEW interests in ActewAGL should be held going forward.

Generally, the Review does not believe that internal reorganisation of the type suggested by ACTEW would address the underlying need for greater clarity of focus on the water and sewerage business. While it would enable day to day management responsibility to be more clearly delineated, at a corporate level overall performance would still be affected by both water and sewerage operations and the interests in the ActewAGL joint venture. Experience to date indicates that even where information is made available to facilitate assessment by the community of the performance of the separate business elements, this is not easily apparent or understood. Moreover, there is also confusion in the community as to which activities are undertaken by ACTEW and what is done by the ActewAGL joint venture.

As such, the Review considers it would be beneficial if ACTEW's water and sewerage business was established in an entity separate from that which holds the interests in the ActewAGL joint venture. Such a change would reduce any confusion that exists in the community as to the roles and responsibilities of ACTEW relative to that of the ActewAGL joint venture. More importantly, it would enable management given responsibility for water and sewerage to focus firmly upon these activities. For this reason, this Review also does not regard it as beneficial for management responsibilities across the two new entities to be undertaken by the same people. Such an approach is inconsistent with ensuring a clear focus for each organisation, and risks institutionalizing potential conflicts. However, having regard to the various synergies which have been discussed above, and skills and corporate knowledge that exist within the ACTEW board, the Review does consider there would be benefit if there was some ongoing common board representation – particularly through any transitional period.

In making this assessment it is important to again note that the Review's Terms of Reference specifically precludes reviewing the structure of the ActewAGL joint venture itself. As such consideration of this issue has been undertaken primarily based on an assessment of ACTEW's interests – both generally and specifically as they relate to its interests in the ActewAGL joint venture. However, if the ACT Government is to embrace this proposed reform, there is a need to do so in a manner that respects the interests of the ActewAGL joint venture partners – generally as they are businesses operating within the ACT in a critical industry; specifically having regard to the relationships and agreements that exist between the joint venture partners (see above).

In forming this view, the Review has assumed ACT's current ownership of both water, sewerage and energy interest continues. Having regard to the Review's Terms of Reference, no weight has been given to ownership issues in determining any recommendation.

Finally, it must be noted that even if separate entities are established for both the ACT's water and sewerage business and its interests in the ActewAGL joint venture, there is no guarantee as to future performance.

Such an outcome depends on myriad factors, including the potential impacts of competition given the ActewAGL's joint venture's current market share, technological change; the possibility of poor execution; changing weather patterns affecting water and energy usage patterns and even the possibility of unpredictable events and natural disasters.

Nevertheless, greater clarity of corporate focus should mean that while there may be both transitional and ongoing costs associated with reform, the community will be better off; particularly if change results in a more focused water and sewerage business driven by a clear need to improve its return on investment. This outcome is currently clouded because of diversity of ACTEW's current operations.

Recommendation 3.2

Having regard to ACTEW's decision to take direct responsibility for the provision of water and sewerage services, the ACT Government should:

(a) establish separate entities to be responsible for (i) the provision of water and sewerage services in the ACT, and (ii) holding and managing the ACT's interest in the ActewAGL joint venture. However, prior to the ACT Government determining to do so, it needs to ensure that any legitimate concerns of the ActewAGL joint venture partners are able to be appropriately addressed;

(b) in the first instance, each entity should be established as a Corporations Act company, subject to the TOC Act. However, once a common statutory framework is established in the ACT for territory authorities, corporations created by ACT statute that are significant government business enterprises and TOCs (see Rec. 3.1), it would be appropriate to restructure the entity responsible for the provision of water and sewerage services as a corporation created by ACT statute under such a framework;

(c) each of these two entities should have separate boards and management to enable them to have independent focus. It is possible, and maybe preferable, given the skill base and corporate knowledge of current ACTEW board members that there be some common board membership. As is currently the case, any conflicts would need to be managed on a case by case basis. However, it is important that management of the two entities are separated to provide each with the opportunity to have clarity of focus on their particular entity's business activities. In making this recommendation it is recognised that this may involve some additional ongoing costs; and

(d) separation would necessarily result in a name change – at least for the entity responsible for the provision of water and sewerage services.

3.5 Objectives

A corollary to continuing to use a Corporations Act company as the legal form for publicly owned entities providing water and sewerage services, and holding the ACT's interests in the ActewAGL joint venture, is that attention is required to be given to the objectives (and objects) of these entities, and the instruments by which such objectives (and objects) are to be specified.

Currently, the TOC Act (s.7) provides that the main objectives for all TOCs, and their subsidiaries, are:

(a) to operate at least as efficiently as any comparable business; and

(b) to maximise the sustainable return to the Territory on its investment in the corporation or subsidiary in accordance with the performance targets in the latest statement of corporate intent of the corporation; and

(c) to show a sense of social responsibility by having regard to the interests of the community in which it operates, and by trying to accommodate or encourage those interests; and

(d) if its activities affect the environment—to operate in accordance with the object of ecologically sustainable development.

Further, these objectives of the company are of equal importance.

At the same time, under ACTEW's Constitution (cl.2) the objects for which ACTEW has been established are specified as:

(a) to supply energy, including electricity, and water;

(b) to promote and manage the use of energy and water;

(c) to provide sewerage services;

(ca) the provision of communications services; and

(d) to undertake other related business activities which may be undertaken by a natural person.

Further, the ACTEW Constitution provides that no object is to be construed to limit the extent of any other object.

Various concerns have been raised in relation to these arrangements (see, for example, ICRC, 2013a: Ch 2):

- first, there is a general question as to the effect of specifying objectives in ACT legislation for a Corporations Act entity which also specifies its objects in its constitution, having regard to the legal capacity of such an entity and the nature of directors' duties;

- secondly, the confusion that may arise from having objects, or objectives, specified in two separate instruments – one under Commonwealth legislation, the other an ACT statute – where they are expressed differently; and
- thirdly, conflict that may exist as between the objectives set out in section 7 of the TOC Act.

Each of these matters is considered separately below.

3.5.1.1 Effect of objectives as prescribed under TOC Act for Corporations Act entities with objects clause

In the ACT, as occurs in some other jurisdictions, a hybrid approach has been adopted in which ACTEW has been established as a company under the Corporations Act, but subject to the provisions of ACT legislation, that is the TOC Act.

The interaction between the Commonwealth and ACT legislation gives rise to a variety of issues, including with respect to the powers of such an entity – such as whether the provisions of the TOC Act attract the doctrine of ultra vires notwithstanding the Corporations Act; what constraints does such legislation place on such a corporation's activities; and what are the implications, if any, for directors' duties.

In relation to the first issue, according to Austin and Ramsay (2007:742) whether such provisions as contained in the TOC Act attract the doctrine of '*ultra vires*' is a matter of statutory construction.

There is little in the way of direct authority upon which to rely in considering how the TOC Act – and in particular section 7 – should be interpreted in this context. In an interlocutory proceeding in New Zealand, a statutory objectives clause similar to that which operates under the TOC Act was held to provide a basis for at least arguing that the provider of a monopoly telecom service should be prevented from disconnecting services to a business customer with whom it was in dispute and who had ceased payment (see *Clutha Leathers Limited v Telecom Corp of New Zealand* (**Clutha Leathers**).[62] It is not clear, however, whether this decision relied on the relevant Act limiting the legal capacity of the relevant entity, or rather requiring that its powers be exercised reasonably in accordance with the purposes of the relevant Act.

On balance, it would appear unlikely that the TOC Act operates to limit the legal capacity of any company prescribed under it, particularly insofar as the question relates to the objectives of such an entity as prescribed in section 7 of that Act. More likely the TOC Act should be regarded as stipulating the manner in which companies subject to its provisions are able to exercise their powers (see further below).

[62] (1988) 4 NZCLC 64,249.

In this context, provisions in the TOC Act which impose conditions on certain transactions – for example, that a TOC must not without the prior written consent of the Voting Shareholders dispose of any of its main undertakings (see s.16) – operate by making such contracts illegal and hence void.[63]

More complex is the question of the effect of action taken which is inconsistent with a provision setting out the objectives of the TOC (see s.7 TOC Act), and how this relates to contravention of objects clauses contained in a company's constitution.

Generally, while a breach of an objects clause may not itself be a contravention of the Corporations Act, it may give rise to an action against a director or another officer for breach of duty under Pt 2D.1 or under general law.[64] Further, a third person who dishonestly assists a director to commit a breach of duty or knowingly receives company assets transferred in breach of directors' duties can be liable to pay compensation to the company.[65] Moreover, even if it was simply a breach of the entity's object clause, it is still the case that transactions with third persons are generally voidable[66] where the third person knows or suspects that directors are acting contrary to the company's interest or abusing their powers.[67]

By contrast, a contravention of a provision of the TOC Act setting out objectives could operate to enable such action to be challenged. Thus, in Clutha Leathers an order was granted temporarily prohibiting the company from terminating its services where the court held it was possible a provision setting out the company's objectives may have been breached.

A related issue which arises is where there is uncertainty as to the application of such objectives having regard to directors' duties. These duties include a duty to act in good faith in the interests of the company and to act for proper purposes (see, for example, ss.181, 184 Corporations Act).[68]

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63 A contract which is illegal and hence void is of no effect, and is not enforceable. As to illegal contracts, see Carter, Peden & Tolhurst (2007: Ch 25).

64 For example, for a breach of a duty of care. In determining whether or not directors have complied with their duties, courts have tended to be reluctant to review business judgments of directors. This is more so the case in connection with the first duty (in interests of company): see *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co Ltd NL* (1968) 121 CLR 483 as cf. the second duty (improper purpose): see *Wayde v New South Wales Rugby League Ltd* (1985) 180 CLR 459; 61 ALR 225 at 232. See generally Permanent Building Society (in liqq) v Wheeler (1994) 14 ACSR 109 at 137; 12 ACLC 674 (per Ipp J.). If the exercise of power is improper directors will also be jointly and severally liable personally to compensate the company: see *FAI Insurances Ltd v Urquhart (No 2)* (1986) 11 ACLR 38 at 41.

65 See *Barnes v Addey* (1874) LR 9 Ch App 244.

66 Broadly, "voidable" is a term used with respect to a contract such that it will be valid and binding unless avoided or declared void by a party to that contract who is legitimately able to avoid the obligations created by that contract.

67 See, for example: *Richard Franks Ltd v Price* (1937) 58 CLR 112 at 142 per Dixon J. As to the basis of knowledge and reliance, see also Ford, Austin & Ramsay (2013: [13.300]-[13.300.42]).

68 In addition to statutory duties, directors are also subject to a range of general law duties.

For directors of Corporations Act entities, the duty to act in good faith in the interests of the company requires that a director acts for the benefit of the company as a whole. In doing so, directors may have regard to the existing members of the company[69] as well as creditors.[70] However, the interests of the company as a whole does not equate to the interests of the company as a commercial entity,[71] nor is there any case law requiring consideration of the interests of employees, customers, contractors and the community.[72]

A potential issue arises if the objectives as specified in the TOC Act were to be regarded as inconsistent with the interests of the company as a whole. However, it is difficult to see how this would be the case given these objectives have been put in place by the Legislative Assembly, which is established as the representative body for the ACT, for whom the shares in TOCs are held on trust. More fundamentally, directors are obliged to act in accordance with applicable legislation, such as the TOC Act for which it is a prescribed corporation.

3.5.1.2 Specification of corporate objectives in multiple regulatory instruments

A separate issue arises where corporate objects, and objectives, are specified in multiple instruments and there is potential inconsistency between these specifications. In such circumstances, directors may lack clarity as they seek to fulfil their governance responsibilities.

In the case of ACTEW, the TOC Act has been enacted to provide for the establishment of government enterprises as TOCs. Its provisions apply, subject to any agreed modifications, to all TOCs.

ACTEW's Constitution, on the other hand, is specific to ACTEW. Constitutions may be adopted by Corporations Act companies to establish internal governance rules, either in combination with or as a replacement to replaceable rules contained in the Corporations Act (see s.135 Corporations Act).[73] By operation of the Corporations Act (s.140), constitutions have effect as a contract between the company and each member, between the company and each director and company secretary, and between a member and each other member under which each person agrees to observe and perform the constitution so far as they apply to that person. If a company has a constitution, it may set out the company's objects; however, an act

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[69] For discussion, see Austin, Ford & Ramsay (2005:275).

[70] See, for example, *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1; [2008] WASC 239 at [4384]-[4450].

[71] *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 438; see also *Greenhalgh v Ardene Cinemas Ltd* [1951] Ch 286 at 291.

[72] There is a body of law which indicates management may implement a policy of enlightened self interest on the part of the company, but may not be generous with the companies resources when there is no prospect of commercial advantage to the company: see *Hutton v Cork Railway Co* (1883) 2 Ch D 654; 49 LT 420; *Re George Newman & Co* [1895] 1 Ch 674; [1895-99] All ER Rep Ext 2160.

[73] Cl.8 ACTEW's Constitution provides that the replaceable rules shall not apply to ACTEW.

of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution (s.125(2) Corporations Act). At a minimum, constitutions may only be amended by special resolution, which require, inter alia, support of at least 75 per cent of the votes cast by members of a company entitled to vote on that resolution (see ss.9 (meaning of 'special resolution'), 136 Corporations Act).

On its face, having both objectives set out in the TOC Act and objects specified in a company constitution has the potential to give rise to confusion. However, the nature and implications of any such confusion will depend in large part on the extent, if any, of the inconsistency that exists between the two documents.

At present, ACTEW's objects set out in its Constitution specify the type of business or activities for which the company was established. By contrast, the objectives set out in the TOC Act provide for the manner in which that business or activity is to be undertaken. As such, ACTEW's objectives and objects are not ostensibly inconsistent as they currently stand.

Further, both the TOC Act (s.11(4)) and the ACTEW Constitution (cll.4, 5) make provision for dealing with any such inconsistency. Generally, where such inconsistency exists, provisions contained in the TOC Act will prevail over provisions contained in the Constitution that have not been approved by the Legislative Assembly of the ACT. As such, there are mechanisms in place which operate to negate potential inconsistency.

A related issue is whether by reasons of it being a Corporations Act company, a TOC such as ACTEW or its directors are subject to statutory or general law obligations to make decisions in such a manner that while there is not an ostensible inconsistency, in practice the entity and its director face confusion and conflict in the performance of their roles. A decision which resulted in activities being undertaken in a manner inconsistent with a company's objects could be sufficient to establish that directors' duties had been breached (see above). However for ACTEW and its directors, in fulfilling their duties to the company in accordance with its Constitution, there is an overarching requirement that they comply with such legislation as relevantly applies to the company. This will include the provisions of the TOC Act as it relates to the objectives of TOCs.

This does not mean, however, that the potential for confusion does not exist, or that the existence of both the TOC Act objectives and objects in ACTEW's Constitution do not currently give rise to issues to be considered in creating any new, or modifying any existing, governance arrangements for a TOC. The question is how such issues can best be addressed having regard to the totality of matters to be considered in determining appropriate institutional arrangements.

Confusion could be addressed, for example, by establishing entities by ACT statute rather than as Corporations Act companies. This approach was adopted in Victoria following the Inquiry into Reform of the Metropolitan Retail Water Sector (VCEC,

2008) recommendation that water retailers which were Corporations Act companies be made statutory corporations in part due to non-commercial objectives that had been placed upon them (see further below).

An alternative approach would be to combine the TOC objectives and the constitution's objects (suitably amended to reflect the desired scope of activities of any relevant entity) in a single instrument. This could be in either the body or schedule to the TOC Act itself, or in the entity's constitution. A constraint on removing objectives from the TOC Act is it might be seen as reducing the level of Legislative Assembly involvement in the governance and oversight of the ACT's publicly owned entities.

On balance, it does not appear to this Review that the extent of inconsistency or confusion arising from objectives and objects being specified in two different instruments is sufficient in itself to warrant adopting a new corporate form. Further, the potential for confusion is also insufficient to warrant reducing the role of the Legislative Assembly, which is an integral part of the accountability arrangements applicable to publicly owned entities. In forming this view, regard is given to the particular nature of publicly owned corporations and the relationship that exists between ministers, the legislature, the corporation, and its directors.

It is the case, however, that if the recommendations for the creation of separate entities to hold ACTEW's water and sewerage interests and its interests in the ActewAGL joint venture set out above are adopted, careful attention will need to be given to the drafting of the objects of the new or reformed entities. For example, it would be desirable, though not essential, for the objectives currently set out in section 7 of the TOC ACT to be specified in Schedules to that Act and relate specifically to each entity being specified as a TOC. The reasons for this are set out below in the context of considering single versus multiple objectives.

3.5.1.3 Single versus multiple objectives

The third issue raised in relation to the objects and objectives of TOCs is the potential for conflict that exists between the objectives set out in section 7 of the TOC Act and the potential prioritization of commercial, social and environmental objectives. In its Regulated Water and Sewerage Services Draft Report (ICRC, 2013a:11) the ICRC noted that these objectives:

> "*… contain a number of internal conflicts. How would a corporation like ACTEW ensure that the first two 'commercial' objectives are given as much importance as the latter two 'non commercial' objectives? Indeed, how would ACTEW measure its performance against the two non-commercial objectives.*"

For the purposes of this Review, it has been assumed that the current provisions reflect the view of the ACT Legislative Assembly regarding the objectives it wishes all publicly owned corporations to strive to achieve.

Specifying such a range of objectives for a publicly owned corporation is not unique to the ACT; however nor is this approach universally adopted across all States and Territories. Thus, for major publicly owned water utilities, objectives vary from primarily commercial ones (e.g. NT), to those similar to the ACT, but broader still (e.g. NSW) (see Appendix D).

Where an entity has multiple objectives, as is the case for ACTEW, directors face potential complexity in determining what action to take to fulfilling their duties, for example, their duties to act in good faith in the interests of the company, and for proper purposes, if those objectives are vague and/or conflict.

The practical impact of this complexity is, however, uncertain.

In many instances, decisions will be able to be made which appropriately have regard to the multiple objectives prescribed by legislation. It is also necessary to recognise that in exercising judgment in decision-making, directors will be doing so in the context of legislation establishing the objectives of that entity. Where objectives set in legislation have the potential to conflict, it may be implied that in recognizing the objectives are specified to be of equal importance directors will need to exercise judgment having regard to the potential for such conflict, and to weigh up the competing objectives over an extended period across a range of issues.

More broadly, it is also necessary to recognise that multiple objectives arise in the context of publicly owned corporations because such entities are established for public purposes. Those purposes will often encompass a number of objectives, which may conflict, because if the entity was required simply to meet commercial objectives it may be questionable as to whether the entity was required to be publicly owned.

This may be seen in relation to entities providing water and sewerage services. The PC (2011a: Ch 3), for example highlighted the range of goals such entities seek to achieve, including water security and reliability; controlling costs; universal and affordable access; public health; environmental protection sustainability and amenity; flood mitigation; water use efficiency and water conservation and commercial viability and dividends to government.

Similarly, the NWC (2011: Ch 2) set out a range of outcomes of the water sector, including that water supply is secure; customers are provided with value-for-money services and have the opportunity to express their values and preferences; public health and the environment are protected and that the sector contributes effectively to broader sustainability and liveability outcomes.[74] It also outlined a range of

[74] The NWC (2011:40) further noted there is also an ongoing lack of consensus about what the sector should be trying to achieve. Examples of divergences in opinion across the sector include:

- whether water conservation is a public policy objective in its own right or a contributor to economically efficient water use and investment;
- whether customer choice is worthwhile and whether it has adverse equity impacts;

characteristics necessary for the sector to achieve these outcomes, including resilience, flexibility, efficiency, transparency, accountability and customer-focus.

This view appears to be shared by ACTEW who noted in its Submission (pp. 88-89) that it did not believe a prioritization of its commercial, social and environmental objectives was required on the basis that if it failed in one of those areas, it would view itself as having failed as an organisation.

However, while noting that water utilities may need to achieve a range of objectives, the PC (2011a:69, see Rec 3.1) also argued that economic efficiency provides a framework for making trade offs between objectives. As such, it recommended in favour of an approach in which objectives are established such that the:

> *"… primary objective of the urban water sector is to provide water, wastewater and stormwater services in an economically efficient manner so as to maximize net benefits to the community. This objective should be met by pursuing the following more specific objectives:*
> – *achieving water security and reliability at lowest expected cost;*
> – *contributing to universal and affordable access to water and wastewater services; and*
> – *contributing to public health, flood mitigation and environmental protection."*

While the Review agrees there are benefits of such an approach to facilitate decision-making in relation to trade-offs to be made between competing objectives, this is not straightforward in relation to matters that are not easily monetized – for example, with respect to the provision of universal and affordable access to services. Moreover, specifying such a single objective is also unlikely to be consistent with the underlying bases as to why those services continue to be provided by a publicly owned entity. For these reasons, this Review regards it as appropriate for multiple objectives to be specified in relation to such an entity, notwithstanding the potential complexities that this may create for decision-making.

Slightly different issues arise in relation to the objectives for any entity holding ACTEW's current interests in the ActewAGL joint venture. Establishing objectives for such an entity needs to recognise that these interests relate to energy operations being undertaken through a joint venture, that this joint venture involves private sector participants, and that the joint venture provides services in a competitive market place in which numerous private sector entities participate. This tends

- how sustainability is defined and achieved;
- how customer service and broader community and environmental outcomes are balanced against the costs of achieving them;
- how potential trade-offs between equity and efficiency should be addressed (particularly in relation to pricing);
- whether the sector should adopt centralised planning (by government) or decentralised (service provider and market-oriented) solutions; and
- how far the urban water industry should be responsible for broader objectives in urban areas (encapsulated in the term 'liveable cities').

towards objectives which are more commercially focused, recognizing however that the objectives set out in the TOC Act have applied to ACTEW for some time. This in turn suggests that there is scope for any new entity to operate effectively and without inappropriate constraint under the joint venture arrangements, even if the objectives set out in the TOC Act were not changed.

Retaining multiple and potentially conflicting objectives that are required to be considered contemporaneously has implications as to what institutional arrangements are most appropriate; and in particular which enable directors to resolve any internal conflicts. That is, what legal form would best enable competing interests to be assessed in relation to the entities activities – so as to reduce potential conflicts or enable them to be appropriately managed.

One approach is to establish entity as statutory corporations. Under such arrangements, there may be objectives that conflict but also additional processes put in place which could be used to manage such conflicts. These include, for example, corporate planning processes involving a specific approval role for ministers. Such processes enable ministers to take responsibility where directors are unable to find a resolution to matters where objectives conflicts. This is the approach taken for most water utilities established as statutory corporations, whereby ministers are able to direct the nature of Statements of Corporate Intent, and to do so without being subject to compensation arrangements (see Table 6.1).

Alternatively, as noted above, it is possible for the ACT to retain the entities as Corporations Act companies. However, if this is to be done, there is likely to be benefit from making changes to provide greater clarity in terms of objects and objectives – for example, by making them consistent across relevant instruments, by removing or limiting internal inconsistencies where certain objectives are less appropriate, and by coordinating them with other regulatory instruments to assist directors where conflicts are difficult to resolve.

This latter step could potentially involve changes in terms of corporate planning processes / statement of corporate intent given the roles of both the government and the entities as Corporations Act companies. At this stage, it has not been determined that such an ancillary change is necessary. This is because, first, the proposed separation of entities would provide greater focus with respect to the activities of each entity, and this would be reflected through planning processes. Secondly, such changes would be better undertaken following review of overarching governance framework for all ACT entities (see Rec 3.1), and in the context of establishing the entity providing water and sewerage services as a corporation by ACT statute.

Recommendation 3.3

In establishing new institutional arrangements, the ACT Government should ensure:

(a) where objectives are set out in the TOC Act that this be done in the Schedule to that Act and be drafted specifically in relation to each entity. This is because the objectives relevant to an entity holding interests in the ActewAGL joint venture partnership may differ from those relevant to the provider of water and sewerage services;

(b) the objects set out in the relevant entity's constitution are consistent with the objectives as set out the TOC Act; and

(c) the objects in the relevant entity's constitution clearly specify the scope of activities that the Government wishes the entity to undertake.

3.6 Ancillary changes to ACTEW's institutional and governance arrangements

In considering institutional and governance arrangements, there are a number of ancillary matters relating to the role of Voting Shareholders under the TOC Act to be addressed – in particular with respect to board appointment processes, their power to direct and the application of government policies. Other issues relating to the role of Voting Shareholders are considered elsewhere in this Review, including with respect to dividends (see Chapter 5) and communications and reporting arrangements (see Chapter 6).

3.6.1 Board appointment processes

Appointments to the Board of ACTEW are governed by provisions of the TOC Act, together with clauses 47 to 53 of the ACTEW Constitution.[75] Together these instruments provide, inter alia, that Voting Shareholders:

- are responsible for appointing directors (s.12(1) TOC Act);
- determine the number of directors to be appointed and the terms of their appointments (see cll. 47, 49 ACTEW Constitution);
- are responsible for appointing the Chair and Deputy Chair (see cl.50 TOC);
- must be satisfied that a candidate has the expertise or skills necessary to assist the TOC to achieve its principal objective (s.12(1) TOC Act); and

[75] Provisions with respect to the appointment of directors to territory authorities are contained in Pt 9 Div 9.2 FM Act. These provisions only apply to territory authorities to which Pt 8 of the FM Act applies (see s.72 FM Act (definition of 'relevant territory authority')), being authorities prescribed by the financial management guidelines for that part (s.54 FM Act). ACTEW is not prescribed in those guidelines (see *Financial Management (Territory Authorities) Guidelines 2012 (No. 1)* (ACT)).

- before any person is appointed as a director, Voting Shareholders must consult with the Public Accounts Committee of the Legislative Assembly, which has 30 days to comment (s.12(2) TOC Act).[76]

Having regard to the requirements of the TOC Act and the ACTEW Constitution, the processes taken by the ACT Government with respect to the appointment of directors to ACTEW include:

- the Voting Shareholders satisfying themselves that a candidate is suitable;
- the Voting Shareholders considering any names that may have been provided to them by the ACTEW Board's Nomination Committee;
- a requirement for consultation with the Office of Women, and that the outcomes of that consultation be reported to Cabinet on the appointment paper;
- the Voting Shareholders ensuring appointments are undertaken consistent with the ACT Government's commitment to:
  - achieving 50 per cent representation of women on its boards and committees;
  - encouraging greater participation of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with a disability; and
  - promoting representation from a broad cross section of the community, including community organisations (see further ACT Government, 2009); and
- the Voting Shareholders taking any proposed appointment to Cabinet for appointment. In the case of an appointment to ACTEW, this would generally occur prior to consultation with the Public Accounts Committee;

There are no current requirements that appointments for Board positions be advertised. Further, there are no current policies setting limits on the term which a person may serve as a director of a board in the ACT.

Adopting the principles enunciated by the Nolan Committee in the United Kingdom, the PC (2011a:262) argues that in the selection of board members for government utilities:

- ultimate responsibility for appointments should remain with ministers;
- appointments should be guided by the overriding principle of appointment on merit;
- merit selection procedures should take account of the balance of skills and backgrounds required, and these should be clearly specified;

[76] The TOC Act and ACTEW's Constitution also makes provisions with respect to the appointment of directors to ACTEW's subsidiary including requirements with respect to consultation with the Public Accounts Committee prior to consenting to the appointment of such a director by ACTEW (see s.12 TOC Act; cl.47 ACTEW Constitution).

- the basis on which members are appointed and how they are expected to fulfil their role should be made explicit;
- candidates for appointment should be required to declare any significant political activity which they have undertaken in the past five years; and
- codes of conduct should be developed, incorporating requirements to declare, and deal with, potential conflicts of interest.

More specifically, the PC (2011a, Rec 10.1) recommended that directors of government utilities should be appointed on merit following a transparent selection process.

In numerous jurisdictions across Australia, including the ACT (ACT Government, 2009), the processes involved in the appointment of directors to government entities has been set out publicly in varying degrees of detail (see, for example, NSW,[77] Queensland,[78] Victoria[79]).

Some jurisdictions also provide guidance in relation to terms of appointment. In Victoria, for example, guidelines specify that in the ordinary course, appointments should be limited to two terms (which are generally of no more than three years duration each) (see DPC, 2012: section 3.7). Similar limitations on board tenure operate in other jurisdictions as well (see, for example, Commonwealth (see Department of Finance and Deregulation (Cth), 2011:13), Tasmania (see Department of Treasury and Finance (Tas), 2012:5). According to the Victorian guidelines, this is because decisions with respect to reappointment need to recognise:

> "*… the need to ensure a regular turnover of members and injection of fresh ideas and enthusiasm should be balanced against the need to retain a proportion of members with the necessary skills and experience, and the need for succession planning or management of an organisation through a period of transition or considerable change.*"

The issue of board tenure was also addressed in the '*Review of the Corporate Governance of Statutory Authorities and Office Holders*' (Uhrig, 2003:100-101), which similarly recommended maximum board service periods (generally six years, with extensions for directors who are appointed as chair) to allow for a structured rotation of directors.

It should be recognised that finding suitably qualified persons to fill the role of directors of government entitities, and in particular entities with significant commercial activities such as ones responsible for the provision of water and sewerage services, or holding the ACT's interests in the ActewAGL joint venture, is not without its challenges.

[77] See http://www.boards.dpc.nsw.gov.au/.

[78] See http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard/selection-recruitment.aspx.

[79] See http://www.dpc.vic.gov.au/index.php/resources/governance/appointment-and-remuneration-guidelines-html.

Further while it is appropriate to have guidelines for matters such as tenure of appointment, special circumstances such as particular corporate knowledge or the need to manage an organisation through a transitional period, are factors that need to be taken account of in decision making processes in relation to the ongoing board appointments.

Having regard to these considerations, this Review supports the need for transparency in board selection processes, and also for general limits to be placed on the tenure of board appointments. Further, in addition to making the processes by which appointments are made publicly available, the transparency and efficacy of these selection processes are likely to be facilitated if appointments are publicly advertised.

Recommendation 3.4

The ACT Government should ensure:

(a) any position for appointment to the boards of the relevant government owned entities should be publicly advertised;

(b) there are limits on the duration of each individual term of appointment for board members, being no more than three years; and

(c) there are limits on the overall duration of board service periods – in the first instance, this should be six years for directors, and an extended period for chairs. However, the application of this policy should be subject to waiver where there are special circumstances requiring continuation of service – for example, where a board member has specialist expertise or corporate knowledge, or where the organisation is undergoing a restructuring process. In circumstances where this waiver is exercised, the reasons for doing so should be publicly disclosed.

3.6.2 Power of direction

Issues with respect to powers of directions have been considered in some detail above (see section 3.3.2.2). A specific issue for this Review is whether the current power to direct pursuant to section 17 of the TOC Act should be amended having regard to the fact that this power is currently vested with Voting Shareholders. This issue arises in that:

- powers of direction generally operate with respect to government owned corporations to enable ministers to retain a power over the operations of those entities;
- while powers of direction are generally provided in relation to statutory corporations, this is less often the case in relation to Corporations Act companies (see Appendix A). Where powers of direction are granted with

respect to such entities, it may be done for limited purposes only (e.g. NSW, see s.7A *State Owned Corporation Act 1989* (NSW)).

- where publicly owned entities are Corporations Act companies, as is the case for TOCs, a potential issue arises that in giving directions to that entity, a person may be deemed to be acting as a shadow director of that entity. However, in the case of publicly owned companies, the risk of this occurring given section 5G(5) of the Corporations Act is limited (see above);
- further, in relation to TOC Act entities, a question arises whether a distinction will be drawn where powers of direction are held by Voting Shareholders who are persons required to be Ministers, as compared to being vested in them in their capacity as Minister;[80] and
- in relation to TOC Act entities, a further uncertainty exists in that Voting Shareholders hold shares "on trust for the Territory", and it is not clear whether this simply replicates general responsibilities under principles of responsible government, or creates a new concept based on separate notions of a "trust" relationship involving specific fiduciary duties. In other jurisdictions with similar arrangements, reference is made to shares being held "for and on behalf of State" (e.g. NSW, QLD).[81]

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[80] Focusing just on generic legislation operating in jurisdictions across Australia (see Appendix A), in the case of statutory corporations:
- in the ACT, the FM Act which provides for the governance of territory authorities is silent as to shareholders;
- in NSW, the shareholders of a statutory State Owned Corporation are required to be the Treasurer and another Minister for the time being nominated by the Premier as a voting shareholder: see s.20H *State Owned Corporations Act 1989* (NSW). Minister hold these shares for and on behalf of the State: see, for example, Sch.6 cl.3 *State Owned Corporations Act 1989* (NSW);
- in the NT, where public entities are established as government owned corporations, the shareholder may be nominated either by name or by reference to a ministerial office, and is referred to thereafter as the shareholding Minister: see s.8 *Government Owned Corporations Act* (NT);
- in SA, the generic legislation applying to publicly owned corporations is silent as to shareholders, and instead makes reference to control by a Minister: see s.6 *Public Corporations Act 1993* (SA);
- in Tasmania, where entities are established as Government Business Enterprises, the Act is silent as to shareholders: see *Government Business Enterprises Act 1995* (Tas); and
- in Victoria, where entities are established as State Business Corporations, the Act is silent as to shareholders: see *State Owned Enterprises Act 1992* (Vic).

[81] In the case of the publicly owned Corporations Act entities, legislation differs across jurisdictions, and provides:
- in the ACT, the TOC Act provides that a person may be authorised to hold shares in a TOC, provided they are a Minister. They do so "on trust for the Territory": see s.13 TOC Act. The TOC Act then generally references "voting shareholders";
- in NSW, voting shareholders are the Treasurer and one of the other eligible Ministers who is for the time being nominated by the Premier as a voting shareholder: see s.3 *State Owned Corporations Act 1989* (NSW). Ministers hold these shares for and on behalf of the State: see, for example, Sch.2 cl.3 *State Owned Corporations Act 1989* (NSW). This Act also varies in terms of prescribing whether an obligation lies with "voting shareholders": see, for example, s.14 (with respect to dividends) and the "Ministers who are the voting shareholders": see, for

While this issue is unlikely to have much practical significance, on balance it is felt by this Review that it could be appropriate to put this question beyond doubt, and clearly specify that any direction power being exercised in relation to a TOC is being exercised in a ministerial capacity, rather than simply in the capacity as a Voting Shareholder. In the context of the TOC Act, this would be most easily done by requiring any power of direction to be exercised by the Portfolio Minister. Section 17 of the TOC already provides that it is the Portfolio Minister who is required to notify the Legislative Assembly of any directions issued.

Vesting power in such a way would, however, give rise to a number of issues.

First, there is scope for more clearly specifying the Portfolio Minister under the ACT's administrative arrangements. Currently those arrangements provide for the Treasurer to have administrative responsibility for the TOC Act and also to have responsibility for '*government business enterprises ownership policy*'. However, it makes no specific reference to any individual corporation. By contrast, the TOC Act provides that the Portfolio Minister '*in relation to a territory-owned corporation, means the Minister who has administrative responsibility in relation to the corporation*.' To avoid any possibility of doubt, it could be beneficial for future administrative orders to include specific reference to the administrative responsibility of any corporations prescribed under the TOC Act, or alternatively for the TOC Act to be amended so that the meaning of 'Portfolio Minister' is the minister who has administrative responsibility in relation to that Act.

Secondly, while the Review is advised that it has always been the case, there is currently no requirement for the Portfolio Minister to be a Voting Shareholder. Given the role of Portfolio Minister encompasses a range of reporting requirements to the Legislative Assembly, the task of fulfilling any accountability requirements to the Assembly is likely to be assisted if he or she is also engaged in the activities and performance of the entity as a Voting Shareholder.

Thirdly, vesting power only in the Portfolio Minister would mean that this power could be exercised by an individual, whereas under current arrangements the making of directions is to be done by the Voting Shareholders collectively. This issue could be addressed if the government was to shift the power of direction from Voting Shareholders to the Portfolio Minister, but also providing that it may only be exercised with the approval of the other Voting Shareholder.

example, ss.12, 13 (with respect to the Constitutions of company State Owned Corporations or their subsidiaries);

- in Queensland, the shareholders of a Government Owned Corporation (GOC) are the GOC Minister and the portfolio Minister of the GOC (the shareholding Ministers): see s.78 *Government Owned Corporations Act 1993* (Qld). They hold these shares "on behalf of the State": s.80 *Government Owned Corporations Act 1993* (Qld);
- in Victoria, shares in a body being converted into a State owned company may be issued to the State, nominees of the State, a statutory corporation or a State owned company: see s.63 *State Owned Enterprises Act 1992* (Vic).

Finally, in making a change of this nature it needs to be recognised that it would shift the role of Portfolio Minister from simply being responsible for overseeing the delivery of information from ACTEW to the Legislative Assembly, to a more substantive and active role. This may have unintended consequences with respect to the remaining roles required to be undertaken by the Voting Shareholders in that capacity.

In contemplating these changes, the Review notes that powers of direction have been rarely exercised in the ACT. The establishment of TOCs as Corporations Act entities is designed so that oversight is exercised through engagement between the shareholders and the board, rather than in the direct day-to-day management of the company. Nothing suggested above should be taken to indicate the Review considers it would be necessary or appropriate for powers of direction to be utilised more frequently than is currently the case, particularly while entities remain as Corporations Act companies. For this reason, while these issues are raised, no specific recommendation is made at this time with respect to powers of direction. However, this issue would need to be considered further in the context of establishing a public utility to provide ACT's water and sewerage as a corporation created by ACT statute.

3.6.3 Application of government policies

The TOC Act also provides for the application of government policies, and requires that the directors ensure that the applicable policies are, as far as practicable, complied with by the corporation or its subsidiary (see s.17A).

Potential difficulties arise with the application of general government policies to publicly owned corporations, particularly where those entities operate on a more commercial basis than other public sector entities. For example, standards related to employment intended to apply across government directorates may be less appropriate or adversely affect how a statutory corporation or Corporations Act entity may operate.

Submissions to the Review highlighted concerns with respect to various aspects of ACTEW's activities – including remuneration and sponsorships. These matters have been considered in some detail in other fora, including:

- the ACT Auditor-General's *Review of Executive Remuneration disclosed in ACTEW's 2010-11 Financial Statements and Annual Report 2011* (ACT Auditor-General, 2013) which found errors in reporting of the remuneration of the Managing Director and recommended:
  - ACTEW should be required to include information provided in remuneration tables in its annual report in its financial statements so that it is audited by the Auditor-General; and
  - communication processes between the Government and ACTEW should be documented; and

- the PwC review of ACTEW's governance arrangements, which in general terms found ACTEW's governance framework was consistent with the key principles of effective governance having regard to the size, structure and complexity of both the organisation and the activities it undertakes (see PwC, 2013:4). It made a series of recommendations, including with respect to sponsorship and remuneration arrangements.

Remuneration and sponsorship are matters potentially the subject of government policy. For example, the ACT has established the ACT Remuneration Tribunal as an independent statutory tribunal with responsibility for setting the remuneration, allowances and entitlements for various public officials in the ACT.[82] However, this role does not extend to remuneration for either ACTEW's directors or officers.

It is not possible for this Review to make general recommendations in relation to the application of specific government policies, as that would necessarily require an assessment of those policies in the context of all government entities. However, a number of observations may be made in relation to matters of this nature raised in submissions:

- while the ACT Government has power under section 17A of the TOC Act with respect to government policies, it is limited by its wording in that directors of TOCs must ensure the applicable policies are complied with by the corporation "as far as practicable". Depending on the policy in question there may be substantive reasons why the government may not wish to apply all policies universally across all public sector bodies. For example, the application of policies with respect to remuneration may restrict the capacity of a publicly owned entity to attract desired candidates. This is more likely to be relevant with respect to the energy industry, which is substantially privately owned, as compared the water and sewerage sector in which public ownership is prevalent. Moreover, any application of universal government policies needs to consider the independence sought to be achieved through the creation of a Corporations Act entity to be responsible for the provision of water and sewerage services and/or hold interests in an energy joint venture. To date reliance placed on this provision has been limited;
- in and of itself, sponsorship may be appropriate for water entities, even ones which are monopoly service providers. Examples of sponsorships and grants in other jurisdictions in 2011-12 include the Trees for Life – Tree Scheme and the Credit Union Christmas Pageant by the South Australian Water Corporation; Hunter Water's grants for a community garden for the Southlakes Carers and NT Power and Water Corporation's sponsorship of the Million Paws Walk and the Science and Engineering Category of the Young Achiever Awards. A more fundamental issue will be the nature of such sponsorships, their relevance to the community and the specific public entity providing them, and the relationship sought to be established between the community and the entity

[82] As to positions subject to the ACT Remuneration Tribunal, see Sch 1 *Remuneration Tribunal Act 1995* (ACT).

through such sponsorship arrangements. Hence, the desirability for public sector sponsorship arrangements could be anticipated to be greater in communities where the size and scale of private sector entities were relatively small;

- some of the issues that have arisen in times past with respect to sponsorships appear to have occurred a consequence of confusion between the roles and responsibilities of ACTEW and the ActewAGL joint venture. This is in turn partly due to the nature of the current institutional arrangements. The reforms which have been recommended in this Review, including the separation of water and sewerage activities from the holding of energy interests, and any subsequent name changes, would be likely to reduce such confusion. These reforms may also impact on remuneration issues having regard to different scope of future roles in the new organisations, and the relevant comparative positions against which those roles may be assessed;
- in undertaking any reforms, care needs to be taken to ensure that government policies given effect through legislation are not inadvertently undermined due to a change in the institutional arrangements of a particular entity. For example, while it is not anticipated to be the case, any changes to institutional arrangements should be done in a manner which ensures that the provision of water and sewerage services continues to be the subject of the *Human Rights Act 2004* (ACT); and
- finally, the extent to which government policies may appropriately apply to publicly owned entities involved in the provision of water and sewerage services may differ where corporations are established by ACT statute. This would be a similar situation to that which currently applies in NSW and the Northern Territory (see Appendix A), although it should be noted at the Commonwealth level government policies may already apply to both authorities (see ss.28, 48A CAC Act) and Corporations Act companies (see ss. 43, 48A CAC Act). If there is sufficient concern that action is being taken inconsistent with government policy, this would best be addressed in the context of reviewing the public entity following the review of overarching governance arrangements for territory authorities, statutory corporations that are significant government business enterprises and TOCs (see Rec. 3.1).

> ***Recommendation 3.5***
>
> *The ACT Government should:*
>
> *(a) assess the need for the application of government policies at such time as it considers whether a stand-alone public entity responsible for the provision of water and sewerage services in the ACT should be a corporation created by ACT statute following review of general governance arrangements for publicly owned entities; and*
>
> *(b) ensure that in making any changes to institutional arrangements, this should be done in a manner which ensures that the provision of water and sewerage services continues to be subject to the Human Rights Act 2004* (ACT).

4 ACTEW – the regulatory framework in which it operates

4.1 Introduction

The Review's Terms of Reference seeks recommendations on potential approaches which could improve the existing arrangements and structures (both legal and regulatory) under which ACTEW operates.

This chapter focuses primarily on the regulatory framework within which ACTEW[1] operates, with particular regard to its roles, responsibilities and obligations for the provision of water and sewerage services. Specifically, this chapter:

- briefly outlines the structure of the existing regulatory framework;
- examines broad opportunities for reform to:
  - clarify responsibilities and obligations in the provision of water and sewerage services;
  - clarify the relationship between a utility's regulatory and policy obligations and the ICRC's price regulation processes; and
- considers a number of more specific potential enhancements which could improve the existing regulatory framework.

4.2 ACTEW's regulatory environment

ACTEW provides services and undertakes its operations subject to a broad regulatory framework which imposes a range of responsibilities and obligations as to how it must operate.

This regulatory framework encompasses responsibilities and obligations primarily relevant to its role as a water and sewerage service provider – such as drinking water quality and the management of the environmental impacts of diverting water for human consumption.

Separately, it also encompasses a large number of more general responsibilities and obligations relevant to a wide range of entities, such as those relating to matters of governance, public accountability, business practices and workplace relations.

In many instances individual pieces of legislation deal with a variety of subject matters. For example, the Utilities Act regulates the electricity and gas industries as well as the water and sewerage sector. Moreover, it provides for technical

[1] For the purposes of this chapter, a reference to ACTEW is also a reference to any new publicly owned entity established to provide water and sewerage services in the ACT and/or where relevant any new publicly owned entity established to hold ACTEW's interests in the ActewAGL joint venture.

regulation and the provision of community service obligations in addition to establishing industry wide licensing arrangements.

Further, the legislative framework that applies to ACTEW is supported by a range of other instruments including regulations,[2] codes,[3] guidelines,[4] plans,[5] licences[6] and determinations.[7] The ACT Government has also set out a range of strategic plans and policy statements which inform the application of this regulatory framework. These range from the '*Canberra Plan: Towards Our Second Century'* (**Canberra Plan**) (ACT Government, 2008) which is designed to guide the growth and development of Canberra, and which seeks to respond to challenges including climate change and water security, to the ACT Government's '*Competitive Neutrality Policy*' (ACT Treasury, 2010), which has been prepared in keeping with the ACT's commitment to the NCP reforms, in particular the CPA which obliges the ACT to publish a policy statement on competitive neutrality (see cl.3(8) CPA).

To illustrate the breadth of the regulatory framework, Table 4.1 below sets out the key legislation that governs ACTEW's activities, including in relation to its interests in the ActewAGL joint venture (for brief details as to the purpose of each Act, see Appendix E).

As Table 4.1 illustrates, in addition to ACT legislation ACTEW's regulatory framework encompasses both Commonwealth and NSW laws. In the former case, this incorporates legislation relating to governance matters (e.g. Corporations Act), general business practices (e.g. the *Fair Work Act 2009* (Cth)) and the energy industry specifically. In the latter case, it arises primarily due to ACTEW's operational responsibilities for a dam located in NSW.

While it is not possible for this Review to assess every regulatory instrument affecting ACTEW, a number of issues have been highlighted in submissions to this Review and in other processes (e.g. the ICRC's price determination processes) that are focused upon in this Review. Key amongst these are:

- the potential conflicts that exist between legislative instruments affecting ACTEW's governance arrangements (these matters have been considered in detail in Chapter 3);
- the lack of clarity in certain aspects of the current regulatory framework (see section 4.3.1); and
- the interaction between the price determination process and the current regulatory framework (see section 4.3.2).

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2 See, for example, *Environmental Protection Regulation 2005*.
3 See, for example, the *Water Ways Sensitive Urban Design (WSUD) General Code* and the *Water Use and Catchment General Code*.
4 See, for example, the *Water Resources Environmental Flow Guidelines 2013*.
5 See, for example, the *Territory Plan*, made under the *Planning and Development Act 2007* (ACT).
6 See, for example, ACTEW's drinking water utility licence issued under the *Public Health Act 1997* (ACT).
7 See, for example, *Water Resources (Water available from areas) Determination 2007 (No. 1)*.

Table 4.1: Key legislative instruments affecting ACTEW, responsible ministers and directorates (in brackets)

Legislation / Responsible Minister	Chief Minister	Treasurer	Attorney-General	Minister for Economic Development	Min. for the Environment and Sustainable Development	Min. for Health	Min. for Territory and Municipal Services	Min. for Workplace Safety and Industrial Relations
Environment								
Environment Protection Act 1997 (ACT)					**X (ESDD)**			
Nature Conservation Act 1980 (ACT)					**X (ESDD)**			
Tree Protection Act 2005 (ACT)							**X (TAMS)**	
Environment Protection and Biodiversity Conservation Act 1999 (Cth)								
Governance								
ACTEW/AGL Partnership Facilitation Act 2000 (ACT)		**X (CWD)**						
Territory-owned Corporations Act 1990 (ACT)		**X (CWD)**						
Corporations Act 2001 (Cth)								
Health								
Public Health Act 1997 (ACT)						**X (HD)**		
Dangerous Substances Act 2004 (ACT)			**X (pt) (JCSD)**					**X (pt) (CMTD)**
Industry/ technical / operational								
Electricity (National Scheme) Act 1997 (ACT)*					**X (ESDD)**			
Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011 (ACT)					**X (ESDD)**			
Electricity Feed-in (Renewable Energy Premium) Act 2008 (ACT)					**X (ESDD)**			
Electricity Safety Act 1971 (ACT)					**X (ESDD)**			
Fair Trading (Australian Consumer Law) Act 1992 (ACT)			**X (JCSD)**					
Gas Safety Act 2000 (ACT)					**X (ESDD)**			
Lands Acquisition Act 1994 (ACT)					**X (ESDD)**			
National Energy Retail Law (ACT) Act 2012 (ACT)					**X (ESDD)**			
National Gas (ACT) Act 2008 (ACT)					**X (ESDD)**			
Planning and Development Act 2007(ACT)				**X (pt) (EDD)**	**X (pt) (ESDD)**			
Utilities Act 2000 (ACT)**		**X (pt) (CWD)**	**X (pt) (JCSD)**		**X (pt) (ESDD)**		**X (pt) (TAMS)**	
Water and Sewerage Act 2000 (ACT)					**X (ESDD)**			
Water Resources Act 2007 (ACT)					**X (ESDD)**			
Competition and Consumer Act 2010 (Cth)								
Dams Safety Act 1978 (NSW)								
Water Act 2007 (Cth)								

Table 4.1: Key legislative instruments affecting ACTEW, responsible ministers and directorates (in brackets) (*cont.*)

Legislation / Responsible Minister	Chief Minister	Treasurer	Attorney-General	Minister for Economic Development	Min. for the Environment and Sustainable Development	Min. for Health	Min. for Territory and Municipal Services	Min. for Workplace Safety and Industrial Relations
Public accountability								
Annual Reports (Government Agencies) Act 2004 (ACT)	**X (CMTD)**							
Auditor-General Act 1996 (ACT)	**X (CMTD)**							
Financial Management Act 1996 (ACT)		**X (CMTD)**						
Freedom of Information Act 1989 (ACT)			**X (JCSD)**					
Human Rights Act 2004 (ACT)			**X (JCSD)**					
Ombudsman Act 1989 (ACT)	**X (CMTD)**							
Public Interest Disclosure Act 2012 (ACT)	**X (CMTD)**							
Territory Records Act 2002 (ACT)	**X (pt) (CMTD)**	**X (pt) (CWD)**						
Pricing								
Independent Competition and Regulatory Commission Act 1997 (ACT)		**X (CMTD)**						
Tax								
Taxation (Government Business Enterprises) Act 2003 (ACT)		**X (CMTD)**						
Utilities (Network Facilities Tax) Act 2006 (ACT)		**X (CWD)**						
Workplace relations								
Discrimination Act 1991 (ACT)***			**X (JCSD)**					
Work Health and Safety Act 2011 (ACT)			**X (pt) (JCSD)**					**X (pt) (CMTD)**
Workplace Privacy Act 2010 (ACT)			**X (JCSD)**					
Fair Work Act 2009 (Cth)								
Privacy Act 1988 (Cth)								

Allocation of responsibilities as prescribed in Administrative Arrangements 2013 (No. 1) (ACT)*;*

CMTD = Chief Minister and Treasury Directorate; CWD = Commerce and Works Directorate; EDD = Economic Development Directorate; ESDD = Environment and Sustainable Development Directorate; HD = Health Directorate; JCSD = Justice and Community Service Directorate; TAMS = Territory and Municipal Services

* *Nationally, the energy industry is regulated/ overseen by the AER established under Pt 111AA of the Competition and Consumer Act 2010* (Cth)*, and the AEMC established under the Australian Energy Market Commission Establishment Act 2004* (Cth)*. In addition to the legislation detailed, there is a suite of Commonwealth legislation in relation to carbon pricing (see, for example Clean Energy Act 2011* (Cth)*) and renewable energy (see, for example, Renewable Energy (Electricity) Act 2000* (Cth)*).*

** *Insofar as the Utilities Act establishes the basis by which water restrictions are administered in the ACT, the Magistrates Court Act 1930* (ACT) *is also relevant with regard to issues of enforcement (see further section 4.3.1).*

*** *This Act also relates to discrimination beyond the workplace, include discrimination arising with respect to service provision.*

Further issues have also been raised in relation to the outcomes of the ICRC price regulation process, and in particular the uncertainty and impact of pricing methodologies adopted in this process (see, for example ACTEW Submission, p.23). Such matters are not addressed in this Review; first because they are outside the Review's Terms of Reference and secondly because the ICRC's most recent price determination is currently the subject of an appeal.[8] The Review also notes that the ICRC's regulatory processes are currently subject to a review being undertaken by the ACT Auditor-General. This review, which was commissioned by the Auditor-General independently of the Government, focuses on the consideration of the roles and responsibilities of the various entities involved in the process for reviewing water and sewerage prices in the ACT, and the efficiency and effectiveness of the administration processes and communications protocols for undertaking the regulatory review of water and sewerage prices in the ACT. Given the review being undertaken by the Auditor-General, this Review has limited its focus to two issues operating at the interface of pricing regulation and the overarching regulatory framework within which ACTEW operates (see further below).

Finally, in considering opportunities for reform to the current regulatory framework under which water and sewerage services are provided in the ACT, it is useful that this process be undertaken with a consistent application of relevant reform principles. To this end, in assessing the need for and potential nature of reform to clarify a utility's obligations in the provision of water and sewerage services, and the interaction of this regulatory framework with pricing regulatory processes, regard has been given to the reform design principles set out by the NWC in '*Urban Water in Australia: future directions*' (NWC, 2011) with respect to institutional reform in the urban water sector (see Chapter 3), the principles for good regulatory practice established by the Regulation Taskforce (2006) [9] and the ANAO's principles of good regulatory process set out in '*Administering Regulation*' (ANAO, 2007).

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8 Matters raised in submissions that have not been addressed in this Report include:

- whether there should be a legislative requirement for detailed consultation and dialogue between the ICRC and the relevant industry as part of price determination process;
- whether the ICRC should be required to follow a consistent approach and method;
- should there be an agreed dispute resolution process if the ICRC and relevant industry participants do not agree on process or procedural matters;
- what oversight should the ACT Government have over the ICRC processes;
- should there be a formalised right of appeal with respect to ICRC decisions beyond the current rights of review in the ICRC Act; and
- should review, reports and determination of the ICRC be subject to confirmation by the Voting Shareholders or the relevant Portfolio Minister (see ACTEW Submission, p,72).

9 The principles of good regulatory practice espoused by the Regulation Taskforce (2006) are:

- governments should not act to address 'problems' until a case for action has been clearly established. This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all 'problems' will justify (additional) government action;
- a range of feasible policy and regulatory options need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework;
- only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted;

4.3 *Opportunities for reform*

4.3.1 Clarifying responsibilities and obligations in the provision of water and sewerage services

The nature and clarity of regulatory arrangements play a critical role in determining the scope of ACTEW's activities and the manner in which it operates, having regard both to its responsibilities and those of other parties, such as Ministers, directorates and regulators.

Under the current regulatory framework, responsibility for the development and oversight of water-related policy in the ACT lies with the Minister for the Environment and Sustainable Development (**Minister for ESD**), who in turn is supported by the Environment and Sustainable Development Directorate (**ESDD**).

Since 2004, the ACT's primary water policy document has been '*Think water, act water — a strategy for sustainable water resource management*' (ACT Government, 2004). This policy had six core objectives:

- provide a long-term reliable source of water for the ACT and region;
- increase the efficiency of water usage by reducing per capita use of mains water;
- promote development and implementation of an integrated regional approach to ACT/NSW cross-border water supply and management;
- protect the water quality in ACT rivers, lakes and aquifers to maintain and enhance environmental amenity, recreational and designated use values and to protect the health of people in the ACT and down river;
- facilitate the incorporation of water sensitive urban design (WSUD) principles into urban, commercial and industrial development; and
- promote and provide for community involvement and partnership in managing the ACT water resources strategy (ACT, 2004:19).

A new draft policy '*Water for the future – striking the balance*' (ACT Government, 2013a) was released in July 2013 for community consultation. Recognising the existing objectives, the new policy focuses on three key outcomes:

- well-managed, functioning aquatic ecosystems that protect ecological values and contribute to the sustainability and liveability of the ACT and region;
- an integrated and efficient water supply system that:

- effective guidance should be provided to regulated parties and any relevant regulators to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements;
- mechanisms are needed to ensure that policy and regulation remain relevant and effective over time; and
- there needs to be effective consultation with affected parties at all stages of the policy and regulatory cycle.

- contains the optimal mix of supply options with a primary focus of water security in the medium term being met through purchasing water entitlement rights to allow the transfer of water from the Tantangara dam to Googong Dam;
- is adaptive to change; and
- secures the social, economic and environmental needs of the ACT community; and

- consistently work[ing] with the community to ensure safe, clean water to drink and play in.

Axiomatically, the regulatory framework which has been established in the ACT has been put in place with the aim of giving effect to government policy. Under the current regulatory framework, this is sought to be achieved through a comprehensive suite of legislation (see Table 4.1), supported by a large number of subordinate instruments and related documents.

Key amongst these ancillary documents are the various licences and authorizations that ACTEW is required to obtain, and with which it must comply, including:

- utility services licences to provide water and sewerage services. These licences are granted by the ICRC under the Utilities Act, and includes service standard requirements as well as reporting requirements to the ICRC;[10]
- a drinking water utility licence issued by ACT Health under the *Public Health Act 1997* (ACT) (see Pt 3). Under the conditions of this licence, ACTEW is required to comply with the *Drinking Water Quality Code of Practice 2007*;
- licences issued by the ACT Environment Protection Authority (**EPA**) under the *Water Resources Act 2007* (ACT) with respect to the abstraction of water and the release of environmental flows. Specifically these licences may include a licence to take water; a driller's licence to do bore work; a bore work licence; a waterway work licence and a recharge licence; and
- authorizations by the EPA under *the Environment Protection Act 1997* (ACT) and the *Environment Protection Regulations 2005* (ACT) with respect to wastewater treatment and discharge (though not the transfer of sewage through the sewerage network).

In addition, ACTEW's water flow must be approved by the Minister and be in accordance with the environmental flow guidelines made under Part 3 of the *Water*

[10] These regulatory arrangements also provide for the setting of standards through industry and technical codes (see, for example, Pt 5 Utilities Act). Codes which apply under ACTEW's water licence are the Water and Sewerage Network Boundary Industry Code 2013, and five technical codes (Dam Safety Code 2008; Water and Sewerage Network (Design and Maintenance) Code 2000; Water and Sewerage Service and Installation Code 2000; Water Metering Code 2000; and Water Supply and Sewerage Service Standards Code 2000). An Emergency Planning Code 2011 has also been made which operates for all utilities providing a transmission or distribution service under the Utilities Act.

Resources Act 2007 (ACT), and an application must be made to the Minister for water access entitlements.

An issue of concern highlighted throughout the Review process in relation to these regulatory arrangements is that in some areas there appears to be opportunities for greater clarity in relation to the roles, responsibilities and obligations of the government, ACTEW and directorates, including:

- the roles and responsibilities of parties with respect to augmentation of water supply and sewerage infrastructure;
- the roles and responsibilities of parties with respect to the imposition of temporary water restrictions, water conservation measures and water efficiency initiatives; and
- the application of broader government policies and initiatives to the provider of water and sewerage services (see Chapter 3).

4.3.1.1 Augmentation of water supply and sewerage infrastructure

The question of what are the appropriate roles and responsibilities for ministers, directorates (departments) and water utilities with respect to decisions to augment water supply and sewerage infrastructure has been the subject of considerable debate in Australia over the past decade. This debate has been driven by the scale of investment in water security infrastructure that has occurred during this period, the nature of the infrastructure which has been built, the timing of these investments and the roles different parties have played in these investment decisions (see, for example, PC, 2011a;[11] NWC, 2011).[12]

[11] According to the Productivity Commission (PC, 2011a: xxxi-xxxii):

> *"… there is a need for greater clarity about the roles and responsibilities of institutions in the urban water sector. In particular, there is a need for clearer delineation between decisions most appropriately made by elected representatives (those regarding 'public interest' and policy considerations), commercial decisions by water utilities regarding service delivery, those decisions most appropriately made by regulatory agencies, and those made by consumers.*
>
> *Inadequate institutional arrangements for determining supply augmentation have been a significant factor in overinvestment in desalination capacity in recent years. These deficiencies have facilitated increasing politicisation of supply augmentation processes. It is, of course, important that governments seek to ensure their communities have adequate water security."*

[12] The NWC (2011: 41) argued that the roles of government, regulators and water businesses in supply–demand planning and investment should be clarified. In particular, it supported:

> *" … greater separation of planning from government policymaking, through either centralised approaches (such as independent government planning and procurement bodies) or decentralised or devolved approaches (for example, firmly assigning responsibility for meeting a government-defined supply security standard to water service providers, or developing market-oriented approaches). Governments could also consider the role of planning at different levels (for example, the potential for broader integrated water resource plans combined with more specific water security plans developed by service providers).*

At an holistic level, all Australian jurisdictions have recognised there is scope for improvement in the way in which supply augmentation decisions are made. Thus as part of the national urban water framework developed by COAG in 2008, all jurisdictions have agreed to adopt *National Urban Water Planning Principles* (see Department of the Environment, 2013), which provide for:

- delivery of urban water supplies in accordance with agreed levels of service;
- urban water planning to be based on the best information available at the time and investing in acquiring information on an ongoing basis to continually improve the knowledge base;
- adopting a partnership approach so that stakeholders are able to make an informed contribution to urban water planning, including consideration of the appropriate supply–demand balance;
- managing water in the urban context on a whole-of-water-cycle basis;
- considering the full portfolio of water supply and demand options;
- developing and managing urban water supplies within sustainable limits;
- using pricing and markets, where efficient and feasible, to help achieve planned urban water supply–demand balance; and
- periodically reviewing urban water plans.

Less clear, however, is the extent to which these principles have as yet been fully incorporated into regulatory frameworks and decision-making processes in the ACT. While it is unlikely that any new supply augmentation will be required by the ACT for some considerable time given the investments recently made, it is instructive to consider how the current regulatory framework formally ascribes roles and responsibilities for such decisions, and also the processes by which supply augmentation decisions have been made in the ACT in times past.

Under the '*Think water, act water*' policy, the ACT Government set as a key objective the provision of "*a long-term, reliable source of water for the ACT and region*" (ACT Government, 2004: 19). However, that policy did not set a specific target for the level of water security to be achieved. This target was enunciated by the then Minister for the Environment, Climate Change and Water, Simon Corbell, in a ministerial water security statement in the ACT Legislative Assembly on 26 March 2009 (ACT Legislative Assembly, 2009: 1434). In that statement, Minister Corbell specified that the overarching water security objective for the ACT was to achieve a

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and that:

> *"… governments can give the community greater confidence and certainty that supplies can be secured by defining robust minimum security standards or objectives and regularly monitoring the achievement of those standards by service providers. This would reduce the political and economic risk associated with water supply decisions. Having clearly defined step in roles for government during emergencies would add further certainty—although it should be remembered that droughts and floods are part of business as usual in Australia and institutional arrangements should be resilient to climatic variability."*

level of water security such that temporary water restrictions would only be required to be imposed, on average, only one in every 20 years. This target has since been specified in the ACT's new draft water policy, '*Water for the future: striking the balance*' (see ACT Government, 2013a:13)

In the first instance, responsibility for achieving this target appears to lie with ACTEW. It is not explicitly stated in any legislation or any other regulatory instrument]. However, it may be implied:

- given ACTEW is the owner of the ACT's water and sewerage assets;
- from ACTEW's status as a Corporations Act company, with objects set out in its Constitution that provide, inter alia, for its role to supply water (cl.2(a));
- from ACTEW's SCIs that have been prepared pursuant to the TOC Act;
- given ACTEW's governance arrangements (see Chapter 3). Under these arrangements, ACTEW is required to obtain approval for acquisitions and disposals of subsidiaries and undertakings (see s.16 TOC Act), and its directors are required to tell voting shareholders as soon as practicable of any significant event affecting the company (see s.16A TOC Act). ACTEW is also subject to a power of direction (see s.17 TOC Act). While this power of direction could be exercised to require supply augmentations, it is at best questionable whether the other provisions of the TOC Act require a decision with respect to the construction of new water security infrastructure to formally obtain the approval of shareholders, given it relates to an existing business activity (being the supply of water); and
- by virtue of ACTEW being the only holder of a licence issued by the ICRC under the Utilities Act to supply potable water in the ACT. It is noted, for example, that under this licence ACTEW is obliged to comply with all relevant technical codes (see cl.6.2 ACTEW Water Licence, see also s.25 Utilities Act). Under the Water Supply and Sewerage Service Standards Code, ACTEW is required to ensure that water supply from the water network is available 24 hours a day, every day of the year, subject to any disconnections of services, interruptions of supply or restrictions to supply (see cl.9).

Ostensibly, these arrangements are consistent with the PC's recommendations that governments should establish water security targets and then leave decisions with respect to the nature and timing of investment in such infrastructure, and the imposition of restrictions, to the relevant utility (see PC, 2011a: Recs 7.1, 10.1).

However, as the ICRC (2012: 106-107) has noted, uncertainty is created by the current arrangements because both the regulatory framework and the nature and scope of ACTEW's obligations could benefit from greater clarity.

In the first instance, the ICRC argues that the current ACT Government water security objective of no more than one year in 20 of water restrictions is not sufficiently clearly defined and is therefore open to inconsistent interpretation.

It does not, for example, specify the criteria by which such restrictions will be applied. Further, it does not make any reference to the duration of those restrictions, or graduate the response depending on the extent of those restrictions. This in turn makes it difficult for ACTEW to plan to meet the desired level of security. By way of comparison, the security of supply objective for South East Queensland is considerably more detailed (see Box 4.1). Issues with respect to roles and responsibilities in relation to temporary water restrictions are considered further below (see section 4.3.1.2).

Box 4.1: Water security objectives, South East Queensland

(1) During normal operations sufficient water will be available to meet an average total urban demand of 375 litres per person per day (including residential, non-residential and system losses), of which 230 litres per person per day is attributed to residential demand;

(2) Sufficient investment will occur in the water supply system with the objective of ensuring that;

- *medium level restrictions will not occur more than once every 25 years on average;*
- *medium level restrictions need only achieve a targeted reduction in consumption of 15 per cent below the total consumption volume in normal operations;*
- *the frequency of triggering drought response infrastructure will be not more than once every 100 years on average;*
- *the total volume of water stored by all key water grid storages will not decline to 10 per cent of their combined total water storage capacity more than once every 1000 years on average;*
- *the total volume of water stored by all key water grid storages will not decline to 5 per cent of their combined total water storage capacity more than once every 10,000 years on average; and*
- *none of Wivenhoe Dam, Hinze Dam or Baroon Pocket Dam will reach minimum operating levels more often than once every 10,000 years on average.*

(3) It is expected that medium level restrictions will last longer than six months no more than once every 50 years on average."

Source: South East Queensland System Operating Plan, 2012, p.2;

More broadly, as has been argued for jurisdictions across Australia (see PC, 2011a), the ICRC posits that the roles and responsibilities of relevant parties involved in water security planning are not defined clearly enough.

This is reflected, for example, in both ACTEW and the ACT Government have taken roles in the water security activities over the past decade – ACTEW with respect to the construction of major supply augmentations and the imposition of water

conservation and temporary restrictions; the ACT Government in relation to water-efficiency measures and secondary water initiatives.

More generally, however, issues of clarity arise because while ACTEW may be impliedly responsible for major water supply augmentation decisions, this role is not explicitly stated. Further, the augmentation decisions that have been made have involved considerable government input.

Thus, in 2003 and 2004 the ACT Government issued a number of strategies and policy papers (see ACTEW, 2004:1) that led to ACTEW undertaking a review into options for the next water source for the ACT to mitigate the risk of the ACT being subjected to extreme conditions in the future.

In April 2004, ACTEW issued a report '*Options for the Next ACT Water Source*' (ACTEW, 2004) which indicated a list of eleven short listed options for securing a long term water supply for the ACT. The Government requested ACTEW to initiate a detailed assessment of the options (ACT Legislative Assembly, 2004:2872).

In July 2007 ACTEW presented a series of recommendations for ensuring the long-term security of the ACT's water supply which included the following projects:

- the Enlarged Cotter Dam project, which aimed to expand its capacity to 78 GL;
- the construction of the M2G pipeline; and
- either the establishment of a water transfer program from Tantangara dam or the building of a water purification plant (ACTEW, 2007).

In conjunction with the development of these recommendations, the Government set up a Water Security Taskforce and Water Security Advisory Panel to review the options identified by ACTEW. In September 2007 the Taskforce made a number of recommendations to Government including confirmation of the above (ACT Government Water Security Taskforce, 2007).

With the exception of the water purification plant, which the Government only agreed to design at that stage, the Government supported these projects going ahead and announced them on 23 October 2007 (Stanhope, 2007). The water purification plant project was later deferred.

Between October 2007 and August 2009 ACTEW carried out further planning and design work, including the development of the Total Outturn Costs. On 31 August 2009 the Government considered a presentation by ACTEW on the final Total Outturn Cost estimate for the new dam of $299 million with a total project cost of $363 million. The Government endorsed the project on 31 August 2009 and on 1 September 2009 the ACTEW Board gave approval to enlarge the Cotter Dam at a project cost of $363 million.

Table 4.2: Chronology of water supply augmentation decisions in the ACT

Year	Action
2003	- ACT Government issues strategies/policies for long term ACT planning
2004	- ACT Government issues '*Think water act water*' policy - ACTEW issues a report on options for water security - Government requests ACTEW to undertake more detailed analysis of proposed projects
2007	- July: ACTEW provides recommendations to Government for water security projects and other measures. - Government refers recommendations to its Water Security Taskforce to consider. - September: Taskforce makes recommendations to Government confirming the ACTEW recommendations. - October: Government considers the recommendations and agrees to support them and their detailed planning, design and costs formulation. - 23 October: Chief Minister announces Government support for the projects
2008	- December: ACTEW provides a progress report to Government including recommendations to proceed with the projects. Still subject to costs being established.
2009	- 26 August: ACTEW Board considers new project cost estimates for the Enlarged Cotter Dam Project (ECD) and submits them to the ACT Government. - 31 August: Government considers the progress report and costs and agrees to continue to support the projects. - 1 September: ACTEW Board gives approval to the ECD project. - November: Attorney-General commissioned the ICRC to review costs and other matters associated with the ECD

As this chronology indicates, while the decision to approve the water security projects was ultimately taken by ACTEW, this occurred following lengthy assessment and input by the ACT Government.

There are numerous reasons why the ACT Government would wish to retain a role in decision making processes with respect to water supply.

In the first instance, such decisions involve the provision of a basic and essential service, and as such governments will naturally retain a keen interest in ensuring that this service is being provided in an efficient and secure manner. As the PC (2011a) and the NWC (2011) argue, however, this does not mean governments have to play a determinative role in supply augmentation decisions, and further that there is a range of benefits in allocating such responsibilities to entities independent of government.

More difficult, however, is removing government from a role in supply augmentation decisions where the task of comparing supply options may be impacted upon by decisions in related policy areas not easily able to be assessed or determined by such an independent entity.

Support has been regularly enunciated for adaptive, real options based approaches to supply augmentations, and for such processes to be unconstrained as to the range

of supply options available (for example, by caps or prohibitions on inter-regional trade, or the potable use of recycled water) (see, for example, PC, 2011a, Rec 5.2).

However, such processes do not easily extend to decisions which involve trade offs to be made between the use of water for environmental purposes and human consumption. Environmental flow requirements have been subject to variation in the face of changing conditions. This was the case, for example, in Melbourne, where environmental flows to the Yarra River were reduced during the Millennium Drought. Similarly, in 2006 and 2007 the Murray-Darling Basin jurisdictions established emergency measures which had the effect of reducing environmental flows to ensure water was available for human consumption (see, for example Australian Government, 2007). Such decisions generally involve policy decisions for government that extend beyond areas of responsibility for water utilities, for example with respect to natural resource management issues. Further, their nature may vary depending on the decision-makers' underlying views as to the relative merits of seeking to reduce the human impact on natural resources through conservation as compared to allowing demand to be met in an unconstrained fashion. In any event, such decisions can be anticipated to impact on the need for new investment in water supply infrastructure.

Separately, determining the appropriate role for government in decision-making of this type is made more complex again where it has a direct financial interest in the supply augmentation decisions – both as an owner and recipient of dividends from the utility responsible for those assets, and also where it borrows on behalf of the utility to enable it to fund its infrastructure investments. In the former case, the scale of investment may be so significant as to alter the risk profile of the business, and as such warrant involvement of shareholders. In the latter case, in determining the extent to which government may have an interest in a specific supply augmentation a distinction may be drawn between borrowing that is required for an individual project, and the overall level of borrowing required by the entity. However, where the cost of a supply augmentation is sufficiently large as to materially affect overall borrowing – as may be the case for large, lumpy, water infrastructure investments – this distinction may be of limited practical application (see further Chapter 5).

Finally, it would be unrealistic for government not to retain – either legislatively or impliedly – a reserve power to take action if it determined that regulatory processes were not operating effectively, that the responsible utility has failed to fulfil its obligations with respect to security of supply, or there had been such an unexpected change in circumstances that it was necessary for action to be taken. This is of particular issue for an industry where decision making historically has been based on long-term averages, but where there appears to be increased uncertainty as to the use of such averages for future supply decisions.

Recognising the benefits that arise from decision-making based on clear evidence utilising transparent process, there would appear to be scope in the ACT for ongoing regulatory enhancement to ensure, as far as possible, that decision making

processes are established which minimise the need for reactive intervention by government, and which additionally provide confidence to the community that decisions with respect to water supply augmentation are being made in an appropriate manner. This is particularly important given the scale of investments periodically required, and the potential for circumstances in which decisions are to be made to vary over time.

Further, this Review believes there would be benefit in transparently specifying the process for adaptive decision making to be adopted in the ACT with respect to future water supply augmentation infrastructure, and other related major capital works.

The ICRC considered this issue in 2012 (ICRC, 2012: 107-115), and made reference to the approach adopted in Victoria, where water utilities are subject to '*Guidelines for the development of a water supply demand strategy*' (Victorian Department of Sustainability and Environment, 2011). Under these guidelines water corporations are required to follow a decision-making process under which:

- a water security objective (or level of service) under normal circumstances is determined following consultation with customers;
- the water supply system performance is modelled over the long term (50 years) and short term (five years) using scenario-based supply and demand forecasts;
- if there is an impending supply and demand imbalance, a long list of supply and demand options are developed and then refined to create a short list of viable options;
- this short list is subject to more detailed economic, social and environmental options analysis, including customer consultation;
- a list of priority actions to be implemented over the short term (next five years) and long term (next 50 years) to ensure supply-demand balance is finalised and then implemented;
- each year the short-term system performance is updated to reflect new information, with adjustments made to actions as necessary; and
- every five years the entire water supply and demand strategy is reviewed and updated.

Such a regulatory approach appears to be consistent with the ACT's draft water policy (ACT Government, 2013a:12) which, inter alia, focuses on the outcome of an integrated and efficient water supply system that contains the optimal mix of supply options, is adaptive to change, and secures the social, economic and environmental needs of the ACT community.

Further, to achieve this outcome, the draft policy endorses a strategy which focuses on providing water, wastewater and recycling and re-use services in an economically efficient manner so as to maximise net benefits to the community and the environment while maintaining public health, through the following actions:

- develop decision-support policies and tools that balance water supply with environmental, social, economic and health considerations;

- implement best practice arrangements for governance, policy making, regulatory agencies, and water utilities;
- develop clear objectives for water utilities, including consideration of community expectations;
- establish an integrated water service provider responsible for all water service including potable and non potable water supply, sewerage, environmental flow, and conservation, rural, forestry and urban water services; and
- actively monitor and optimise the performance of water service providers and include the ACT community in water-related decision making.

As this strategy recognises, however, in undertaking such decision-making processes it is not just necessary to determine which entity is responsible for making decision with respect to water supply augmentation that is important. As the NWC (2011:vii) notes, other relevant issues will include the mix of policy instruments affecting the supply-demand balance. Generally this will include approaches adopted with respect to pricing. On the supply side this may include policies that affect the capacity of different supply options such as trade between regions; the use of recycled water, and the purchase of irrigation water for domestic use. On the demand side, a key element is the extent of reliance to be placed on water restrictions. It is this issue which this Review now considers in the context of the ACT regulatory framework.

Recommendation 4.1

Having regard to its water strategy 'Water for the future: striking the balance', the ACT Government should:

(a) further specify the responsibilities of participants with respect to supply augmentation decisions. While primary responsibility for such operational decisions should rest with the publicly owned water utility, any ongoing role for government should also be clearly specified having regard to its broader policy responsibilities and its potential exposure as the utility's owner and provider of debt financing; and

(b) specify the adaptive processes to be applied by the water utility in relation to supply augmentation decisions. These processes should incorporate periodic reviews having regard to issues associated with uncertainty in investment decisions in the water sector.

4.3.1.2 Temporary water restrictions, water conservation measures and water efficiency initiatives

Closely related to the issue of water supply augmentation are the subjects of temporary water restrictions, water conservation measures and water efficiency initiatives.

Water restrictions are a tool used to manage water supply-demand balance issues, particularly in the short to medium term. Water conservation measures are permanent restraints on water usage, such as prohibitions on the hosing down of hard surfaces by households.[13] Water efficiency initiatives involve programs designed to reduce water usage; for example, mandatory water efficiency labeling,[14] or the provision of subsidies for water saving products, such as mulch or trigger nozzles.

Water restrictions can be effective in reducing water usage, and often enjoy considerable community acceptance and support (see, for example, NSW Office of Water, 2010:8). For some, this is because the imposition of restrictions is consistent with their desired outcome of limiting water use so as to reduce the impact of human consumption on the environment; for others restrictions have the benefit of imposing the conservation burden equitably across the community. However, as numerous studies have also found, water restrictions may have significant cost impacts on the community (see PC (2008, 2011a), NWC (2011)), including loss of personal and public amenity (see Cooper et al, 2010), costs to business, administration costs and cost associated with seeking alternative private supplies (see, for example, MJA 2007).

For almost the first decade of this century, the ACT was subject to temporary water restrictions. First introduced in 2002, restrictions varied in severity (see Table 4.3). At one stage, Stage 4 restrictions were contemplated.[15] However, ACTEW was able to take preventative measures so that this did not occur. The drought broke in 2010

[13] As to water conservations measures developed by ACTEW and approved by the Minister, see *Utilities Water Conservation Measures Approval 2010*. Under these measures, the ACT Government retains the discretion to declare a State of Emergency under the *Emergencies Act 2004* (ACT) under which supply and/or use of water may be restricted to Emergency Use Only.

[14] See, for example, the Water Efficiency Labelling and Standards scheme (WELS) established under the *Water Efficiency Labelling and Standards Act 2005* (Cth).

[15] Stage 3 Temporary Water Restrictions were introduced in October 2003 due to rapidly decreasing dam levels, significantly reduced rainfall, increased consumption and drier than average weather. In May 2007, dam levels had further reduced to just above 30 per cent (pre Enlarged Cotter Dam figures) and the ACT was at extreme risk of moving into Stage 4 Temporary Water Restrictions. Stage 4 would have meant the cessation of all outdoor water use. Due to significant rainfall received in June 2007 and community education programs, Stage 4 was avoided, although Stage 3 remained in place until August 2010.

and in the following two years heavy rainfalls in the ACT have seen dams filling significantly.[16]

Table 4.3: Temporary water restrictions and water conservation measures in the ACT

Period	Restriction Level
16 December 2002-28 April 2003	Stage 1
29 April 2003-30 September 2003	Stage 2
1 October 2003-29 April 2004	Stage 3
1 March 2004-31 August 2004	Stage 2
1 September 2004-28 February 2005	Stage 3
1 March 2005-31 October 2005	Stage 2
1 November 2005-30 June 2006	Stage 1
31 March 2006-31 October 2006	PWCM-Trial
1 November 2006-15 December 2006	Stage 2
16 December 2006-31 August 2010	Stage 3
1 September 2010-31 October 2010	Stage 2
1 October 2010-Continuous	PWCM

Source: ACTEW; PWCM = Permanent Water Conservation Measures

During the period in which temporary water restrictions were in place, water usage in the ACT fell from 66 GL in 2002 to as low as 41 GL in 2011 (see Table 1.2). By 2012-13, water usage has risen back to 48 GL.

Given the impact such temporary restrictions and related measures may have on water use, any clarification of policy approach with respect to water supply augmentations needs to have regard to decision making in relation to these policy instruments.

In the ACT, current arrangements provide that a regulation may make provision in relation to a shortage, or possible shortage, in the amount of an essential service needed for the community, including provision regulating the use of an essential service by consumers (see Pt 9A, s. 149B Utilities Act; see also s.261 (regulation-making power)). Specific regulations made with respect to water shortages are contained in the *Utilities (Water Conservation) Regulation 2006*. Under these regulations, the Minister for ESD may make approved water conservation measures developed by a utility (see Pt 2) and approve a scheme developed by a utility for temporary restrictions on the use of water supplied by the utility (see Pt 3).[17] This

[16] From 2011 to early 2013, and prior to adding the additional capacity from the new Enlarged Cotter Dam, ACT's dams were filled to 100 per cent capacity. As at November 2013 and including the additional Enlarged Cotter Dam capacity the ACT's dams were filled to 78 per cent capacity.

[17] As to temporary restriction measures developed by ACTEW and approved by the Minister for ESD, see *Utilities (Water Restriction Scheme) Approval 2010 (No 1)*. Under these measures, the ACT Government retains the discretion to declare a State of Emergency under the *Emergencies Act 2004* (ACT) under which supply and/or use of water may be restricted to Emergency Use Only.

Regulation also provides for the enforcement of both conservation measures and temporary restrictions by the utility.[18]

Under the arrangements approved by the Minister for ESD, responsibility for the imposition of temporary water restrictions is vested with ACTEW (see r.12 *Utilities (Water Conservation) Regulation 2006*). Prior to imposing such restrictions, ACTEW is required to consult with the Minister for ESD and the EPA and to make its decision by reference to the desirability of reducing water usage on an ongoing basis, the source capacity or quality of stored water available to it and/or the level of reduction in current and future water consumption which it considers necessary. The approved temporary restriction measures provide for four stages of restriction, targeting annual reductions of between 10 and 55 per cent. In deciding the target for reduction in water consumption to be achieved and thus which stage of temporary restrictions should be in force, ACTEW may have regard to:

- dam storage levels;
- the time of the year and likely future consumption of water;
- daily consumption levels in the immediately preceding period;
- daily consumption levels in corresponding periods in previous years;
- currently available weather forecasts and other meteorological advice;
- the desirability of reducing water usage on an ongoing basis;
- the desirability of avoiding excessive reliance on only one of the ACT's water catchments;
- the possibility that, if restrictions do not sufficiently reduce current water consumption, water available for later supply may be of a quality that may cause damage to property; and
- any other relevant consideration (see *Utilities (Water Restriction Scheme) Approval 2010 (No. 1)*).

ACTEW has the power to grant exemptions or partial exemptions to specified customers, classes of customers or all customers in relation to temporary water restrictions. It has a similar power with respect to the approved water conservation measures.

Various issues arise in relation to these arrangements.

First, in determining the nature and timing of the restrictions, the ACT's overarching water security objective is not clearly stated (see above). As a result, any decisions made by ACTEW to impose restrictions are subject to uncertainty.

Secondly, at present, while ACTEW is responsible for decisions regarding restrictions, it is not responsible for all decisions affecting the supply-demand balance. For example, the ACT Government continues to play a role with respect to water

[18] As to enforcement, see also *Magistrates Court Act 1930* (ACT); *Magistrates Court (Utilities Water Conservation Infringement Notices) Regulation 2006.*

efficiency measures and secondary water projects, such as the stormwater reuse program at Inner North Canberra being operated by TAMS. The ACT Government also promotes a range of water efficiency measures, such as the use of greywater, household and garden water savings advice, dual flush toilets and until recently providing rebates for home installation of rain water tanks.

Such measures are likely to be undertaken in a more coordinated fashion if a single entity was given responsibility for all such initiatives (see Chapter 1). In doing so, however, regard would need to be given to ACTEW's monopoly characteristics. To the extent delivery responsibilities may be integrated through a single public entity, rigorous application of competitive neutrality policy is required to ensure third party providers are not inappropriately restricted from offering relevant services.

A difficult question arises, however, in relation to responsibility for the allocation of responsibilities with respect to environmental flows. Generally decision-making with respect to supply-demand balances by water utilities, including in relation to the imposition of restrictions, are taken on the basis that such environmental flows are separately determined and fixed. In the case of the ACT, they are also required to be undertaken having regard to the ACT's obligations with respect to the Murray-Darling Basin.[19] However, as noted above, it is possible for these flows to be subject to change in the face of changing climatic conditions. Such uncertainty can impact on decisions with respect to temporary restrictions.

Thirdly, in the ACT arrangements with respect to temporary restriction measures appear to have been established independently of any potential use of pricing mechanisms to encourage more efficient water use and provide signals for future investment in new water security infrastructure (see NWC, 2011: 31). However, any move to recognise the potential role of pricing to enable greater consumer choice and more efficient service provision would involve broader ICRC processes, and also require that attention be given to the potential such tools have to undermine the effectiveness of demand management measures by reducing community support.

Fourth, by vesting the power to impose restrictions in ACTEW, these arrangements inhibit the potential for third party providers to identify and promote potential new supply augmentations.

Fifth, the imposition of restrictions may create a conflict of interest as restrictions generally will not be consistent with a utility's short term incentive to supply water to cover operational costs and earn a return on its infrastructure asset. The extent to which such incentives will impact on decision-making with respect to restrictions is, however, not entirely clear. Giving a utility the responsibility to impose restrictions may create a bias against restrictions so as to enable more water to be

[19] Environmental Flow Guidelines are set based on scientific information and analysis. They are undertaken independently of the Murray-Darling Basin Authority but will affect the ACT's water Resource plan under the Basin Plan. The operation of the Guidelines will be affected by prevailing long term weather conditions such that in times of drought and temporary water restrictions the volume of required flows is eased.

sold in the short term. Conversely, the same utility may choose to impose restrictions so as to influence regulatory price outcomes – with the aim being to increase the price at which water may be sold in the future.

While these issues are all relevant to the allocation of responsibilities with respect to temporary water restrictions, the arrangements currently in place in the ACT are broadly consistent with the approach favoured by the PC (see PC, 2011a: Rec.7.1).[20] In particular, by placing responsibility for the imposition of temporary restrictions on the water utility, rather than in the hands of government, it allocates this responsibility to the entity also primarily responsible for water supply augmentation decisions.

While this Review considers there to be merit in the arguments for the water utility continuing to have responsibility for the imposition of water restrictions in the ACT consistent with its role as primary decision maker with respect to water supply augmentations, it is concerned that this is in effect allocating to the utility a power of a regulatory nature that is enforceable through the courts. Such an allocation of responsibility is inconsistent with broader NCP reforms, which seek a separation of operational and regulatory responsibilities. As such, while it is recognised that the ACT's publicly owned water utility would need to have significant input into any decision-making process, including with respect to determining the bases upon which restrictions may be imposed, and the nature and extent of those restrictions, this Review believes decisions as to the imposition (or removal) of restrictions would on balance better vest with the relevant Minister. To enable the water utility to appropriately undertake its planning responsibilities, however, it is essential that the nature and timing of these decisions are made transparently and according to a clearly established basis.

The Review also considers that decision making with respect to temporary restrictions would benefit if greater clarity was provided as to the ACT's water security objective (see above), and that such restrictions and related measures such as water efficiency initiatives would be undertaken more efficiently and cost effectively if implemented through a single publicly owned entity.

[20] In adopting their positions, the PC (2011a) and the NWC (2011) also argue that the use of water restrictions should be of short duration and limited to "emergencies" (PC) or "exceptional circumstances" (NWC).

Recommendation 4.2

Having regard to its water strategy 'Water for the future: striking the balance', the ACT Government should:

(a) allocate responsibility for the imposition of water restrictions to the relevant Minister, to be made based on advice provided by the ACT's publicly owned water utility as well as the relevant ACT Government directorate;

(b) clearly specify and periodically update the ACT's water security objective having regard to water consumption trends, water supply capacity and any variations in long-term climatic and rainfall patterns; and

(c) ensure a single public owned entity is responsible for implementing decisions made with respect to water conservation measures, temporary restrictions and water efficiency measures.

4.3.2 Clarifying water price regulation processes

In relation to the monopoly aspects of the services it provides, any ACT water and sewerage service licence holders are subject to an independent price regulation process. The nature and clarity of regulatory arrangements which apply to such licence holders can affect the way in which this process is undertaken. A related issue which may also arise is the capacity of the price regulation process to obtain information that clarifies the nature of these regulatory requirements or related policy objectives.

Given this Review's Terms of Reference, the Auditor-General's review of the ICRC pricing processes and ACTEW's appeal of the ICRC's pricing decision, discussion with respect to price regulation is limited to two issues:

- the general interaction of operational regulation and price regulation; and
- the means by which the regulator may achieve regulatory certainty for the purposes of pricing processes.

4.3.2.1 Interaction between operational regulation and price regulation

A tension which exists in price regulation generally is in the processes by which regulatory requirements are imposed on utilities, the compliance costs associated with those activities and how those costs are incorporated into pricing outcomes.

For pricing regulators, there is often a generic responsibility to establish pricing regimes which result in the efficient delivery of services. Hence, in the case of the ICRC, in making pricing directions it is required to protect consumers from abuses of

monopoly power in terms of prices, pricing policies and standard of regulated services (see s.20(2) ICRC Act).

In this context, however, questions arise as to which party is best positioned to determine the standard of regulated service required to be delivered by the regulated entity.

In the ACT the ICRC is responsible for issuing licences for the delivery of water and sewerage services. These licences are subject to a range of conditions, including that the licenced utility comply with each applicable industry and technical code (see s.25 Utilities Act).

Under the Utilities Act, the ICRC is responsible for approving or determining industry codes, which may deal with a range of matters including network boundaries, connections to a network, the protection of customers and consumers, metering, the termination or interruption of services, and disconnections (see Pt 4).

By contrast, responsibility for determining technical codes in the ACT lies with the Minister. These codes may relate to such matters as protecting the integrity of a network, protecting the health or safety of people operating or working on a network, the design features of networks, protecting public and private property and the environment, and emergency planning (see s.64 Utilities Act).

While the ICRC is required to consult with the Minister in relation to codes it determines, and the converse is the case for codes that the Minister approves, a tension may arise where standards established by a Minister have pricing implications which the regulator regards as onerous.

Moreover, this tension may result in uncertain pricing outcomes because the regulator is required to have regard to a range of matters in making a price direction (see s.20 ICRC Act), including:

(a) the protection of consumers from abuses of monopoly power in terms of prices, pricing policies (including policies relating to the level or structure of prices for services) and standard of regulated services;

(b) standards of quality, reliability and safety of the regulated services;

(c) the need for greater efficiency in the provision of regulated services to reduce costs to consumers and taxpayers;

(d) an appropriate rate of return on any investment in the regulated industry;

(e) the cost of providing the regulated services;

(f) the principles of ecologically sustainable development;

(g) the social impacts of the decision;

(h) considerations of demand management and least cost planning;

(i) the borrowing, capital and cash flow requirements of people providing regulated services and the need to renew or increase relevant assets in the regulated industry;

(j) the effect on general price inflation over the medium term; and

(k) any arrangements that a person providing regulated services has entered into for the exercise of its functions by some other person.

As a result, it is open for a regulator faced with a price outcome it considers undesirable due to standards imposed by codes which it does not control to reduce those prices by adjusting some other component – for example, the rate of return it considers appropriate for any investment in the regulated industry.

One possible approach to ensure greater focus on the cost-effectiveness of operational regulation would be for the ICRC to be required to approve any technical code applicable to entities licensed under the Utilities Act. This was the approach once adopted in Western Australia, for example, where the Economic Regulation Authority had been vested with the power to set minimum technical standards for the provision of water services and the undertaking, maintenance and operation of water services works: see s.38 *Water Services Licensing Act 1995* (WA) (repealed).[21] A key risk of such an approach, however, would be the capacity of the ICRC to oversee the formulation of such regulation given it would require specialist expertise. This would be a risk even if the ICRC was able to rely on input from other arms of the ACT Government as well as the utilities being regulated. For this reason, responsibility for technical regulation may be more appropriately vested with a specialist regulator (see, for example, South Australia (s.66 *Water Industry Act 2012* (SA))).

Alternatively, decision making processes with respect to regulation could be supplemented to require the ICRC to provide an estimate of the anticipated impact of any new operational or technical regulation on pricing, to be published when that requirement was imposed. This approach could operate whether the decision is being made by the ICRC itself, or by the Minister.

This would ensure that regard is being given to the costs of regulation, and the compliance and oversight activities associated with that regulation at the time it is being put in place. In turn, it would encourage more precise estimation of the costs associated with the technical regulator’s activities with respect to individual technical codes, as well as the imposts associated with those codes. To ensure that such a process did not become overly prescriptive, it would be appropriate to incorporate a materiality threshold, as well as requiring graduated levels of detail with respect to costing depending on the nature of the technical regulation envisaged.

[21] Similar arrangements operate in Tasmania (see s.20 *Water and Sewerage Industry Act 2008* (Tas)), whereas in the Northern Territory responsibility for approval of codes is split between the economic regulator, the Utilities Commission, which is responsible for approving the metering code: see s.72 *Water Supply and Sewerage Services Act* (NT), whereas the relevant Minister is responsible for approving codes for connections, upgrade of connections and acceptance of increased loads: see s.52 *Water Supply and Sewerage Services Act* (NT).

Such an approach would be consistent with the broader processes operating in the ACT with respect to the preparation of regulatory impacts statements for new subordinate laws or disallowable instruments which are likely to impose appreciable costs on the community (see ss.34-37 Legislation Act; ACT Treasury, 2003). These arrangements do not appear to have been applied to codes made under the Utilities Act.

4.3.2.2 Price regulation and regulatory certainty

Related to the issue of the interaction between regulatory compliance and pricing is the issue of regulatory certainty.

Price regulation in the ACT operates under the framework of the ICRC Act. Under the ICRC Act, the ICRC may be given a reference in relation to a variety of matters, including prices for regulated services (see s.15 ICRC Act). Such a reference may include a requirement that the ICRC consider specified matters (see ICRC Act s.16(2)(b) ICRC Act). In making a direction about prices at the conclusion of a reference which authorises it to make a price direction, the ICRC is required pursuant to section 20 of the ICRC Act to have regard to a range of factors (see above).

Given the factors of which the ICRC is required to have regard, issues may arise, for example, if there is lack of clarity or differences of view as to the standards of quality, reliability and safety of the regulated services required by legislation, licences, codes or other instruments, or relatedly differences of views how to most efficiently and effectively achieve those standards. This in turn creates difficulties for the regulator in determining whether or not the utility has engaged in prudent expenditure in meeting its obligations. Further uncertainty may arise where government sets policy objectives, but either does not clearly specify these objectives in regulation, or the manner in which they are to be achieved.

To a large extent, issues of regulatory clarity may be resolved where a clear process has been established to manage the interaction between operational or technical regulation and pricing impacts at the time those requirements are put in place (see above). This is because it will only have been possible for a proper assessment to be made of potential price impacts of such obligations if in the first instance the nature of the intended regulatory requirement has been clearly enunciated and understood.

Nevertheless, the potential still exists for regulatory burdens or policy goals to be imposed which may be open to interpretation, or whose meaning may vary over time as extraneous circumstances change. This may arise, for example, where the government sponsors:

- specific initiatives aimed at supporting sections of the community via the provision of water and sewerage services, which may not be specified in a regulatory instrument and in relation to which there may be doubt as whether it falls within the terms of a broader licencing arrangement; and/or

- policies intended to apply generically across the community, but which do not clearly specify if or how a regulated entity should comply. This may include policies whose objective is:
  - to achieve a specific policy outcome; for example, a reduction in greenhouse gas emissions; or
  - to apply common standards; for example, the application of common financial reporting arrangements on government agencies.

In the context of the ACT, there are a variety of ways that this issue may be addressed, including:

- ensuring policy statements are given effect through regulation such that obligations on water and sewerage utilities are sufficiently clear in the first instance;
- specifying the approach to be taken in relation to particular regulatory matters in any reference given to the ICRC which requires it to give a price direction (see s.16(2) ICRC Act);
- specifying the range of obligations a utility is required to meet, which the regulator must have regard to in any pricing decision; and/or
- providing a mechanism whereby the regulator may seek guidance from the government as to its intentions with respect to particular policy initiatives or regulatory burdens.

While the first of these approaches provides flexibility to government, and already has a legislative basis, its efficacy suffers in that it is an ad hoc process, and as such has the potential to undermine the independence of the price regulation process by giving the government a greater role in specifying how the regulator is required to assess a utility's performance.

Axiomatically, the second approach is more robust. However, a practical issue that arises is while a government and the respective utility may regard particular obligations as clear and binding, such a view may not be shared by the regulator. This may have particular consequences where action is taken and costs incurred by a utility during the course of a regulatory period in relation to which the regulator is subsequently unwilling to allow it to recover its expenses.

The third approach is similar to the second, save that the obligations are referenced directly to the utility as compared to the regulator. This is broadly the approach adopted in Victoria (see ss.4E, 4I *Water Industry Act 1994* (Vic)). It is also consistent with the approach advocated by the PC, which argued in support of establishing charters for water utilities which, inter alia, would set out a government's requirements for the performance of utilities (PC, 2011a:288-294, Rec. 10.7).[22] This

[22] As to similar approaches in other jurisdictions, see also s.37 *Government Business Enterprises Act 1995* (Tas) (ministerial charter); Ch 2 Pt 4 Div 5 *South East Queensland Water (Restructuring) Act 2007* (Qld) (statement of obligations).

approach has the benefit of enabling the government to impose requirements that may not be specified in regulation, or provide clarity as to the manner in which competing or opaque obligations may be met. However, potential issues associated with this approach include determining which Minister is responsible for determining such a charter and how the costs associated with obligations in such a charter may be assessed, particularly if they are based on policy statements but have not gone through a regulatory impact assessment process. Moreover, this process still does not preclude the possibility of uncertainty as to the scope of an obligation being imposed.

In such circumstances, ensuring there is capacity for a regulator to obtain guidance from government – at each party's initiative – as to the government's expectations with respect to the application of policy and regulation which would assist in ensuring that pricing processes appropriately capture all activities expected to be carried out by a water utility. To date it appears a similar outcome has been achieved through issues paper and draft reporting processes, in which the ICRC poses questions which interested parties, including government, may chose to respond. This process has the dual benefit of being done publicly, and being controlled by the independent economic regulator, but suffers in that there is no requirement for government to respond.

To protect the independence of the ICRC's pricing processes, any such advice provided by government should be required to be made transparently, and published by the ICRC as part of its regulatory process. Such an approach is broadly consistent with NCP reforms, which support, for example, the transparent specification and funding of CSOs by government. A corollary of such an approach is that an industry participant should also be able to approach the regulator prior to undertaking work for confirmation as to whether or not relevant expenditure falls within its existing obligations, and hence will be included in a price determination processes (unless there is a subsequent change to the regulatory framework under which the regulator's price determination is to be made). For ease of implementation, this would most likely best be limited to material expenditures only.

Recommendation 4.3

For the purposes of independent pricing processes, the Government should ensure:

(a) that any new technical regulatory requirement on a utility providing water and sewerage services in the ACT is subject to an assessment of its likely cost impact prior to its implementation; and

(b) there are transparent processes by which the ICRC is able to clarify any uncertainty as to the obligations the publicly owned entity providing water and sewerage services is required to meet under the ACT Government's regulatory and policy framework.

4.4 Specific regulatory enhancements

In addition to the general regulatory reforms highlighted above, there are also some more specific regulatory enhancements that may be considered to enhance the current regulatory framework. These relate to the technical regulation of the water and sewerage sector, and the integration of regulatory arrangements.

4.4.1 Technical regulation

The Utilities Act provides, inter alia, for the technical regulation of utility networks, which includes the water and sewerage networks (see Pt 5). Part 5 of the Utilities Act vests the relevant Minister with power to make technical codes, and establishes the functions of the Director-General with respect to those codes, including monitoring and enforcement of compliance, providing advice to the Minister and the ICRC, and reporting to the ICRC on the operation of technical regulation, including the costs incurred by the ACT.

During the course of this Review, various aspects of the current regulatory arrangements have been highlighted as warranting enhancement including that:

- there is a need to clarify the statutory objectives and the scope of technical regulation. This is because there are no such objectives currently specified in the Utilities Act;
- the current enforcement powers are constrained in that they are restricted to the monitoring of technical performance and the compliance of utilities with technical codes;
- more explicit technical performance and compliance requirements may be desirable; and
- the current Act does not adequately have regard to, or provide appropriate technical regulation for, emerging technologies such as secondary water.

Very limited direct evidence is available to the Review to determine the extent of change, if any, that is required in relation to the current arrangements. On the face of the legislation, it is clear that there are no statutory objectives currently specified in the relevant Act. Similarly there is no specific reference to a “Technical Regulator” in the Act, although this role may be implied from the functions allocated to the Director-General (see s.66 Utilities Act). Moreover, the scope of enforcement powers do not appear to include the power to issue infringement notices, or to impose penalties for breaching codes, although the Act does provide for fines for non-compliance with directions given by the Director-General to a utility to take action to ensure compliance with a technical code (see ss.70, 71 Utilities Act).

As reform of this part of the Act could potentially impact on utilities other than ACTEW, it is beyond the scope of this Review to make recommendation as to the specific changes that may be appropriate with respect to technical regulation.

However, the structure of the Utilities Act does point to potential issues as to scope of technical regulation in that this Act relates primarily to regulation of transmission and distribution networks, and the services provided through this infrastructure. This points to potential complexity and gaps in technical regulation insofar as it may relate to utility boundary issues.

Recommendation 4.4

The ACT Government should assess the effectiveness of provisions with respect to technical regulation under the Utilities Act with a view to reform, having regard to a range of factors including but not limited to the need to clearly state the objectives of technical regulation.

4.4.2 Streamlining and integration of legislation

Further issues highlighted for potential consideration in submissions relate to the streamlining and/or integration of legislation currently applying to the provision of water and sewerage services. Key enhancements sought include:

- *streamlining the implementation of the Dangerous Substances Act 1994* (ACT) *and the Work Health and Safety Act 2011* (ACT) *(see ACTEW Submission, p.71).*

  It is noted with respect to the *Dangerous Substances Act 1994* (AC*T*) that the duties arising under this Act in relation to dangerous substances are intended to apply in addition to duties in relation to them under any other law in force in the ACT (see s.8). Notes in the legislation relating to that provision make reference to a number of other Acts, being the *Dangerous Goods (Road Transport) Act 2009* (ACT); the *Emergencies Act 2004* (ACT); the *Environment Protection Act 1997* (ACT); the *Medicines, Poisons and Therapeutic Goods Act 2008* (ACT) and the *Work Health and Safety Act 2011*. It has not been possible to assess the veracity of the need for a more consistent and coordinated approach to the implementation of these related Acts with respect to ACTEW. As a general principle it is sensible that regulatory burdens be alleviated through such an approach; however, only if this can be done in a manner that ensures the objects of the relevant legislation are still achieved;

- *the integration of the Utilities Act, the Water and Sewerage Act 2000* (ACT) *and the Water Resources Act 2007* (ACT) *(see ACTEW Submission, p.74).*

  The Utilities Act provides, inter alia, for the licensing and technical regulation of utility services. In addition, it provides for:

  - rights with respect to access to utility services (see Pt 6);
  - the protection of networks (see Pt 8);
  - rules with respect to network operations (see Pt 7);

– the making of complaints to ACT Civil and Administrative Tribunal (ACAT) about utilities (see Pt 12); and
– the performance of network operations with respect to streetlighting and stormwater (see Pt 14).

In respect of its general licensing function, the Utilities Act applies with respect to electricity and gas services in addition to water and sewerage services (see Pt 2).

The *Water and Sewerage Act 2000* (ACT) regulates the supply of plumbing and drainage services. To this end, inter alia it makes provision for:
– the approval of plans by the responsible utility in relation to sanitary drainage work, sanitary plumbing work or water supply plumbing work respectively connecting to sewerage or water networks (see Pt 2);
– offences for non-compliance with the Act and related regulations (see *Water and Sewerage Act Regulations 2001* (ACT)) (see Pt 3); and
– enforcement, including appointment and powers of inspectors (see Pt 4).

The *Water Resources Act 2007* (ACT) provides for the sustainable management of the water resources of the ACT. Its objects are:
– to ensure that management and use of the water resources of the Territory sustain the physical, economic and social wellbeing of the people of the ACT while protecting the ecosystems that depend on those resources;
– to protect aquatic ecosystems and aquifers from damage and, where practicable, to reverse damage that has already happened; and
– to ensure that the water resources are able to meet the reasonably foreseeable needs of future generations.

More specifically, this Act provides, inter alia, for the establishment of environmental flow guidelines (see Pt 3), the grant of water access entitlements (see Pt 4) and licences (see Pt 5), as well as offence (see Pt 9A) and enforcement (see Pt 10) provisions.

In considering the potential integration of these three Acts, it is necessary to recognise at the outset that the Utilities Act's coverage extends beyond water and sewerage services. As such, integrating these three Acts within the Utilities Act has the potential to risk confusion in terms of the applicability of water and sewerage related provisions to other industries. It may also reduce the consistency of approach by which licensing arrangements are applied across industry sectors.

This risk is exacerbated by the fact the Utilities Act is currently structured to apply to the network elements of water and sewerage service provision, and the connection to such networks. As such, unilaterally extending the reach of this Act to water and sewerage functions within premises would mean the new

Act would be internally inconsistent to the extent that similar amendments (as required) were not made with respect to electricity and gas. Such an approach is made less feasible by the transfer of much of the regulatory responsibility for the energy industry to the national regulator.

As noted in Chapter 1, there would be benefit if there was a more integrated approach to the provision of water and sewerage services in the ACT, including stormwater. This would include better specifying responsibilities for policy, regulatory and operational functions.

Further, the Review considers that if consideration is given to reviewing technical regulation as currently contained in Pt 5 of the Utilities Act and to place that regulation in a new Act (see above), there is likely to be benefit in taking the opportunity to also integrate relevant aspects of the *Water and Sewerage Act 2000* (ACT) and *Water Resources Act 2007* (ACT).

However, it is also the case that such a regulatory review would necessarily be quite an intensive exercise, requiring significant consultation with industry participants. As such, it is one that is best not undertaken if an industry was to be involved in bedding down other changes to its institutional arrangements.

Given these circumstances, it is recommended that if changes are being made to institutional arrangements, any integration of these three Acts should only occur following the more general review of institutional arrangements for all territory entities (see Rec 3.1). This is because the nature of regulatory arrangements may differ if the ACT's water and sewerage service provider is a corporation created by ACT statute as compared to a Corporations Act entity, reflecting the different capacities that may exist for entities established by ACT statute as compared to under the generic Commonwealth legislation.[23]

Recommendation 4.5

The ACT Government should work towards better integrating Acts governing the provision of water and sewerage services in the ACT. However, this will best occur following a review of the overarching legislative framework for all territory entities (see Rec. 3.1). This is because the manner in which regulatory arrangements may be structured may differ if the public entity providing water and sewerage services is a corporation created by ACT statute as compared to being a Corporations Act entity.

[23] In Victoria, for example, water retailers established under the Corporations Act did not have a power to compulsorily acquire land in their own right. However, when the water retailers were established as water corporations under the Water Act 1989 (Vic), this power was vested to them by virtue of section 130 of that Act.

5 ACTEW and the ACT Government – financial relationships

5.1 Introduction

The Review's Terms of Reference seek recommendations on potential approaches which could:

- improve the existing arrangements and structures (both legal and regulatory) under which ACTEW operates; and
- enhance communication and accountability mechanisms operating between ACTEW and ACT Government Directorates.

This chapter focuses on the financial relationships that exist between ACTEW[1] and the ACT Government, and considers potential reforms that could enhance the operation of these arrangements. To this end, the following issues are addressed:

- borrowings;
- major capital works;
- dividends;
- National Tax Equivalent Regime (**NTER**) payments; and
- community service obligations.

5.2 Borrowings

By operation of sections 24 and 25 of the TOC Act, ACTEW's borrowings are undertaken on its behalf by the ACT Government. As a result, ACTEW enjoys the benefits of the ACT Government's borrowing capacity in the form of lower rates than it would otherwise pay. At the same time it is arguable that this policy also enables the ACT Government's borrowing program to develop a more economic scale.

These borrowings relate to investments in ACTEW's water and sewerage business – for example, to fund capital works on water security projects. They also provide funding which facilitates ACTEW's capacity to make investments required under the ActewAGL joint venture. The TOC Act prescribes that ACTEW has no ability to borrow except through the ACT Government unless approved by the Treasurer.

ACTEW prepares its capital program and establishes its borrowing requirements over a two to three year period, confirmed on an annual basis through its budget process, which is then submitted to the Treasurer for approval. The Investment Branch of CMTD manages all the borrowings for the ACT Government and incorporates any borrowings required for ACTEW. Once approved, the Investment Branch facilitates

[1] For the purposes of this chapter, a reference to ACTEW is also a reference to any new publicly owned entity established to provide water and sewerage services in the ACT and/or where relevant any new publicly owned entity established to hold ACTEW's interests in the ActewAGL joint venture.

all loans and manages their ongoing administration. No borrowing levy is charged to ACTEW apart from a small 2 basis points administrative charge. ACTEW is also required to reimburse the ACT Government for dealer fees associated with an actual borrowing transaction.

Over the past decade, borrowings have increased from $363 million in 2000 to $1.35 billion at the end of the 2013 financial year, an increase of 367 per cent over that period. As a result of this increase in borrowing, ACTEW's gearing ratio[2] has increased from 29 per cent to just below 60 per cent over the same period (Table 5.1). Based on ACTEW's most recent SCI, ACTEW currently projects that its gearing will increase to 64 per cent over the next four years.

Table 5.1: Borrowings and gearing ratios

	2000 $m	2008 $m	2010 $m	2011 $m	2012 $m	2013 $m
Borrowings at 30 June[1]	362	602	921	1,219	1,359	1,352
Gearing[2]	29%	37%	49%	56%	59%	58%

Sources: 1 ACTEW Annual Reports; 2 Table 1.16.

As a consequence of this increased borrowing, the proportion of the total ACT's government debt which relates to ACTEW has risen from 15 per cent in 1998, to around 47 per cent in 2013 (Table 5.2). It is estimated that this proportion will fall to 43 per cent by the end of the 2014 financial year.

Table 5.2: ACT Government and ACTEW borrowings

	1995	1998	2001	2006	2007	2008	2009	2010	2011	2012	2013
ACT Govt ($m)	553	598	495	443	431	419	407	393	379	724	1,512
ACTEW ($m)	75	105	364	373	378	602	690	921	1,219	1,359	1,352
Total ACT ($m)	628	704	859	816	810	1,021	1,097	1,315	1,598	2,083	2,864
ACTEW as % of Total ACT	12%	15%	42%	46%	47%	59%	63%	70%	76%	65%	47%

Source: ACT Government; numbers may not equal due to rounding

Various issues arise in relation to ACTEW's borrowing activities, including:

- whether or not the ACT Government should impose a premium on those borrowings (see below);
- what role, if any, should the ACT Government have in assessing ACTEW's borrowing requirements with respect to major capital works (see section 5.3);
- having regard to ACTEW's gearing levels, what implications (if any) are there for the ACT Government's current dividend policy (see section 5.4); and

[2] Gearing ratio equals debt/(debt + equity).

- whether ACTEW should be able to borrow independently with respect to its participation in the ActewAGL joint venture. This issue is not specifically considered in this Review as it has been determined to be outside the Review's Terms of Reference.

5.2.1 Borrowing levy

Section 31 of the TOC Act provides that a borrowing levy must be paid to the Territory by a TOC as determined by the Treasurer in writing.

This requirement is consistent with the CPA (1995), which requires that to offset any competitive advantages a Government is to impose on its Government business enterprises debt guarantee fees if they are in receipt of concessional interest rates that reflect their government ownership rather than their commercial status (see cl.3(4)(b)(ii)). In accordance with the CPA, the ACT's Competitive Neutrality Policy (ACT Department of Treasury, 2010:13) provides:

> *"Territory owned corporations may be subject to a borrowing levy that reflects the value of any concessional borrowing rate by virtue of an implied government guarantee. The levy will increase the cost of debt to the level that the business would be required to pay if it was privately owned having regard to its financial position and risk portfolio.*
>
> *The level of the fee will take into account any new borrowing or capital injections as well as an estimate of the cost that would apply to past borrowings, based on the level of assets held."*

While the CPA sets out the competitive neutrality principles to be applied in relation to borrowing levies, it also allows governments freedom to determine their own agenda for the implementation of competitive neutrality principles having regard to implementation benefits and costs (see cl.3(6)). In making such an assessment, government may have regard to a range of factors including:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or of a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources (see cl.1(3) CPA; see also cl.5 of the ACT Competitive Neutrality policy ('The Cost Benefit and Public Benefit Tests')).

In relation to ACTEW, the ACT Government has determined it is a monopoly service provider of water and sewerage services and not in competition with other comparable businesses. As a consequence, ACTEW is not required to pay a levy to equalize its cost of debt with the private sector. ACTEW therefore enjoys the benefits of concessional interest rates obtained by the ACT Government for its borrowings.

In both its Draft and Final Reports on Regulated Water and Sewerage Services (see 2013a: Chapter 8; 2013b: Chapter 4), the ICRC considered various approaches to determining the weighted average cost of capital (WACC), including the rates to be applied for the cost of debt, in the context of pricing decisions. These included the traditional approach adopted by economic regulators around Australia that the rate to be applied is that incurred by a private sector firm engaged in a comparable business, as compared to the cost of debt that a government owned business such as ACTEW actually incurs.[3] In adopting an entity specific cost of debt, the ICRC argued in relation to the application of competitive neutrality principles that as ACTEW did not meet the requirement that there must be an actual or potential competitor, those principles did not apply to it.

It is beyond the scope of this Review to directly assess the ICRC's pricing decision, which in any event is at the time of writing the subject of an appeal. However, it is relevant to note that the effect of the ICRC's decision is that the outcomes of pricing decisions will vary depending on whether or not the ACT Government determines to impose a borrowing levy on ACTEW in accordance with section 31 of the TOC Act. This is because ACTEW currently enjoys a lower rate of debt as a result of it borrowing through the ACT Government than it would be able to borrow at in its own right or that which would be the rate at which equivalent private sector entities providing water and sewerage services would be able to borrow.

While it is difficult to quantify this difference, in a submission to the ICRC's pricing processes, ACTEW estimated the relevant commercial industry borrowing rate for like business would be around 7.8 per cent (see ACTEW, 2013:94). This compares to ACTEW's actual cost of debt at around that same point in time, which was estimated to be around 5.5 per cent by the ICRC (ICRC, 2013b:69). This figure should be regarded with caution, however, because in determining this rate the ICRC found that it was not straightforward to calculate a common or average rate as there is significant variation in the rates ACTEW pays on its debt across a range of debt facilities.[4]

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3 The ICRC's Draft Report (2013a:97) also considers the issue of gearing ratio. It notes that in previous reviews, the ICRC has assumed that a typical regulated firm will finance its capital through debt financing. For this pricing review, it has adopted a firm-specific methodology in which the actual level of gearing has been used.

4 The ICRC finally concluded that it would use the payment and accrual schedules provided by ACTEW for each of its existing borrowings and apply an inflation rate. On that basis it determined a cost of debt for the first two years of the regulatory period of 5.5 per cent. This presumed that ACTEW's current debt structure is likely to remain unchanged over the next period. If events turn out otherwise and ACTEW needs to undertake additional borrowings the ICRC assumes that it will be able to do so at interest rates lower than its existing borrowings.

In its Submission to the Review (pp.83-84), ACTEW acknowledges that it enjoys a benefit from borrowing through the ACT Government in the form of lower interest rates that the ACT Government is able to obtain from the market. ACTEW notes, however, that the ACT Government should not impose any premium that reflected the commercial market for the term of the current pricing determination unless there was a review of the pricing determination to allow ACTEW to pass on any increase in costs.

As the Government now receives dividends at 100 per cent of NPAT and tax equivalent payments any increase in the borrowing rates in the form of a levy would be revenue neutral as there would be a corresponding reduction in the dividend and tax equivalent payments. However, the potential application of any new policy with respect to borrowings should have regard to the possibility of a change in approach with respect to dividends (see further below).

In considering the merits of the ACT Government's current approach to the borrowing levy, it appears to derive in the first instance from the basic premise that ACTEW is not in competition with any other business for the provision of water services, and as such ACTEW should continue to enjoy the benefits of lower rates through its borrowings through the ACT Government. In this regard, the approaches taken by both the ACT Government and the ICRC appear consistent.

However, in adopting the approaches that they have, both the ACT Government and the ICRC are assuming there is not even the potential for competition for the provision of water and sewerage services.

The Review acknowledges the prospects of any such competition in water and sewerage provision is likely to be very limited given the scale and physical nature of the ACT water and sewerage systems (see Chapter 1), and the inherent complexities associated with introducing competition in the water sector (see, for example, PC, 2011a:74). Nevertheless, it is generally the case that secondary water systems operate in the ACT that are not owned or operated by ACTEW (see ICRC, 2012: sec.3.3). Further, the potential for competition is also already recognised in legislation (see, for example, the ICRC Act which provides generally for access agreements (see Pt 5) and the arbitration of access regime disputes (see Pt 6)).

For the foreseeable future though, perhaps more important is that the approach taken by the ACT Government with respect to cost of debt may impact on the comparability of ACTEW's internal costs relative to that of third party service

A further complication in making this assessment is that a proportion of ACTEW's borrowing relates to the fact that investments required with respect to its interests in the ActewAGL joint venture are internally funded, which in turn requires borrowing to fund dividend payments. This aspect would not impact borrowing calculations if the joint venture interests were held in a separate entity from the one providing water and sewerage services. If this approach is not adopted, this would provide an additional reason for the ACT government to ensure a commercial cost of debt was applied to ACTEW borrowing, or at least in relation to that proportion which relates to any energy investments.

providers – both in relation to services ACTEW provides to its water and sewerage customers, and separately with respect to services ACTEW provides to others (for example, the maintenance of TAMS stormwater assets). Ensuring that borrowings to ACTEW are provided at commercial rates will mean that competition for the provision of such services is undertaken on a more even footing, consistent with competitive neutrality principles.[5]

Finally, it is necessary to recognise that ACTEW currently holds interests in the ActewAGL joint venture, and a proportion of its borrowing relates to the capital requirements associated with that joint venture. In ACTEW's 2012-13 Annual Report, the liabilities ascribed to its joint venture interests were $371 million,[6] of which $257 million are borrowings (see Table 1.17). If the ACT Government chooses not to separate out these interests (see Chapter 3), then as a portion of ACTEW's borrowings will relate to investments in an industry with substantial competition (at least on the retail side) and very significant private sector involvement. As such, a borrowing rate more clearly relevant to a comparable commercial entity would be appropriate for at least that proportion of its debt funding.

Recommendation 5.1

Depending on the outcome of the appeal to the ICRC's pricing decision with respect to ACT water and sewerage prices, and the ACT Government's responses to other recommendations, the ACT Government should review the rates at which publicly owned utilities are charged for borrowings undertaken by the ACT Government on their behalf, with a view to charging commercial rates – particularly where borrowings relate to the provision of energy services.

5.3 Major capital works

ACTEW has an ongoing capital works program to continually maintain and improve its ageing asset base and to keep pace with the needs of Canberra's growth.

ACTEW develops its capital works program through an Asset Management Planning process which covers 20 year and 5 year programs. Over the past twelve months ACTEW has instigated an enhanced capital expenditure planning and approval process which includes the publication of a Capital Expenditure Initiation and Approval Manual. This process also includes the formation of a new Capital

[5] This issue could also be addressed through a complaint in relation to breach of the ACT's Competitive Neutrality principles.

[6] See Note 4, ACTEW Annual Report 2012-13, Financial Report, p. 31. By comparison, Note 10 of the ACTEW Distribution Pty Ltd Financial Report (p.20) refers to a $438 million non-interest bearing intercompany loan, and the ACTEW Retail Pty Ltd Financial Report (p.19) refers to $28 million non-interest bearing intercompany loan.

Expenditure Review Committee which oversights the development of the capital program and regularly meets to review progress of projects.

The capital works program is scrutinised by the ICRC as part of its pricing determinations. To this end, ACTEW identifies its capital requirements in conjunction with the review of the water and sewerage price path by the ICRC and submits them to the ICRC to be included in its price path determination over the next regulatory period. ACTEW is required to report annually to the ICRC on its expenditure against each of the items listed.

The capital works program for the five year period from 2013-14 to 2017-18 is $465 million for some 93 individual projects, $161 million for water and $304 million for the sewerage system (ICRC 2013b:134-135). This does not include any further provision for the suite of major water security projects which are now mostly complete.

As provided for under the TOC Act the ACT Government approves the loans necessary to fund the capital works program. It monitors the program through the Board papers and other ACTEW briefings provided to the Government (see further Chapter 6).

On an annual basis ACTEW then develops its capital works program for inclusion in each annual budget. This is reviewed and agreed by ACTEW's Capital Expenditure Review Committee and presented to the ACTEW Board for a program approval. Each individual new project is then developed with a business case and presented to the appropriate delegate for approval to proceed with the project. Any project with a total project cost of $10 million or more is required to be submitted to the ACTEW Board for approval (this was increased from $3 million in 2011). Projects of lesser value are submitted to the Managing Director or his delegate for approval depending on the level of delegation required.

In the main ACTEW's capital works program involves projects with comparatively low project cost. Occasionally, however, ACTEW is required to implement a major or significant project such as recently seen with the suite of major water security projects which ranged in cost from tens of millions to over four hundred million dollars.

The issue that arises in relation to the more significant or larger capital projects is whether and to what extent the Voting Shareholders or the Treasurer should be involved in the capital works approval process on behalf of the ACT Government.

Under the TOC Act there is a requirement for TOCs to seek the agreement of the Voting Shareholders when disposing of or acquiring an undertaking that could reasonably be expected to become a main undertaking, or to advise the Voting Shareholders about significant events. However, TOCs are not required to seek approval from the Voting Shareholders for any of its operational activities including its capital works program.

In the case of the major water security projects, the steps that were taken in determining which projects would proceed suggests ACTEW consulted heavily with the Voting Shareholders, the ACT Government was influential in this decision making process, and that ACTEW did not give final approval to the projects until the Government had also indicated its support for them (see Chapter 4).

The extent to which government should be involved in water planning processes was considered in detail in Chapter 4. In that context, it was considered that a residual role exists for government where it retains a liability with respect to the borrowings of its water utility, as is the case with respect to ACTEW. As illustrated above, ACTEW's borrowings currently account for just under half of the total ACT Government debt (see Table 5.2). Moreover, even if the ACT Government had not chosen to act as ACTEW's borrower, it is unlikely given the nature of the services ACTEW provides that it would be able to divorce itself from its liabilities were there to be an issue as to ACTEW's capacity to provide those services on an ongoing basis.

While continuing to recognise and respect the ACTEW board's decision making responsibilities, this suggests that there is a potential role for the ACT Government with respect to ACTEW's capital works program. However, such a role is only likely to be relevant to the extent that it relates to capital works that could significantly impact on ACTEW's borrowing requirements.

An issue arises here as to whether this assessment should relate to overall levels of borrowing, or whether it should be based having regard to individual projects and the extent to which each individual project will affect debt levels and overall gearing ratios. In considering potential options, the Review is advised that the processes that apply to the approval of capital works projects in other jurisdictions include:

- ***NSW***: Whilst NSW does not formally require its state owned corporations to submit their business cases for approval by Government there is an understanding that where new projects are of a reasonable size in terms of cost, the corporations generally would submit a business case for these to the Ministers for approval. Depending on the project the Minister will decide which ones should then go to Cabinet for approval;
- ***Queensland***: The water body in Queensland is a statutory authority and there is a notification threshold of $10 million and an approval threshold of $40 million. However, shareholding Ministers retain the discretion to request projects below the threshold levels to be submitted for approval;
- ***South Australia***: SA Water is a statutory corporation, and in line with all SA government agencies is required to submit its capital works programs to Cabinet for approval as part of the budget process. Any individual capital project over $11 million then requires specific cabinet approval;
- ***Victoria***: Water corporations are required to submit a detailed business case and seek Treasurer's approval for capital investment projects. For the various water bodies there is a threshold over which the approval must be sought. For

the larger corporations it is $50 million and for the smaller bodies there are three thresholds of $5 million, $10 million and $20 million; and

- ***Western Australia***: The WA Water Corporation is a state owned corporation and whilst there is no prescribed requirement for it to seek Government endorsement on a major capital undertaking, there is an expectation the Corporation would work with Government agencies on any such project.

Having regard to the practices adopted in other jurisdictions, the Review supports a role for government in assessing major capital works in the water and sewerage sector in the ACT.

Critical to any such role is that it be transparent, so as to maximize the benefits of having a independent, commercially focused utility. For the same reason, it would be anticipated that such a process would only relate to major capital works projects that would materially impact on the utility's balance sheet. It is beyond the scope of this Review to determine the exact value to which such a process should apply, which in any event is likely to vary over time. Having regard to the current supply-demand balance for water, it is unlikely that it would apply to many projects in the near future – the most realistic prospect being enhancement to the LMWQCC, for which the need for and timing are at best uncertain.

An issue which arises if this approach is to be adopted is the process by which CMTD would effectively assess the merits of a particular capital project, and its capacity to do so. Assessment may focus on ensuring ACTEW has undertaken the appropriate capital planning steps needed for a project of the nature being assessed; alternatively it may look specifically at the substantive merits of the project. Having regard to the specialist skills relating to capital works projects in the water and sewerage sector, it would be anticipated that the former approach would be more relevant in all but the largest of projects.

Recommendation 5.2

As the ACT Government is borrowing on behalf of public owned utilities to fund their investments in major capital works, the ACT Government should require such entities to put a detailed business case to the Treasurer for approval for new capital projects where the total project cost exceeds a materiality threshold established by the Treasurer.

5.4 *Dividends*

5.4.1 Current Dividend Policy

According to the ACT's Competitive Neutrality Policy (ACT Department of Treasury, 2010:13), the process of corporatisation seeks to subject government business enterprises such as ACTEW to disciplines, incentives and sanctions which are effectively the same as those applying to private business enterprise.

To give effect to this outcome, this policy provides that the capital structure and dividend policy of each relevant entity is to be assessed to determine whether they are comparable to similar private firms. Further, where the business is not subject to full market competition, performance targets for return are required to be set with control of overall price levels to ensure targets are met by real productivity improvements and not simply by taking advantage of monopoly pricing.

In the case of ACTEW the power to determine dividends is vested with the Voting Shareholders (see cll.83-87 ACTEW Constitution).[7] This power is subject to the provisions of the Corporations Act which, inter alia, provide for the circumstances in which dividends may be paid (see s.254T), and the TOC Act, which provides that dividends may only be paid out of profits (see s.32).

Since 1997 the Voting Shareholders have directed ACTEW to pay its dividends at the rate of 100 per cent of its NPAT. This is substantially in excess of the minimum dividend rate of 50 per cent specified in the ACT's Competitive Neutrality Policy. The dividend is required to be paid in two parts – 80 per cent in the year it pertains to and the balance of 20 per cent in the first half of the following financial year once the dividend amount is known. Each year the Directors declare the dividend at the 100 per cent rate, which is then submitted to the AGM which then adopts the dividend.

Table 5.3: ACTEW dividends paid to ACT Government ($'000)

	2009-10	2010-11	2011-12	2012-13
Dividends ($'000s)	91,445	60,811	73,899	79,580

Source: ACTEW Annual Reports

The TOC Act requires dividends to be paid out of profits. ACTEW's NPAT includes an equity accounted share of profits from the ActewAGL joint venture. However, cash distributions from the ActewAGL joint venture are generally lower than reported profits as it retains a portion of cash earned to fund capital expenditure. As ACTEW's NPAT is not equivalent to its cash earnings, the ACT Government's current dividend policy requires ACTEW to borrow funds to meet a portion of the dividend payment.

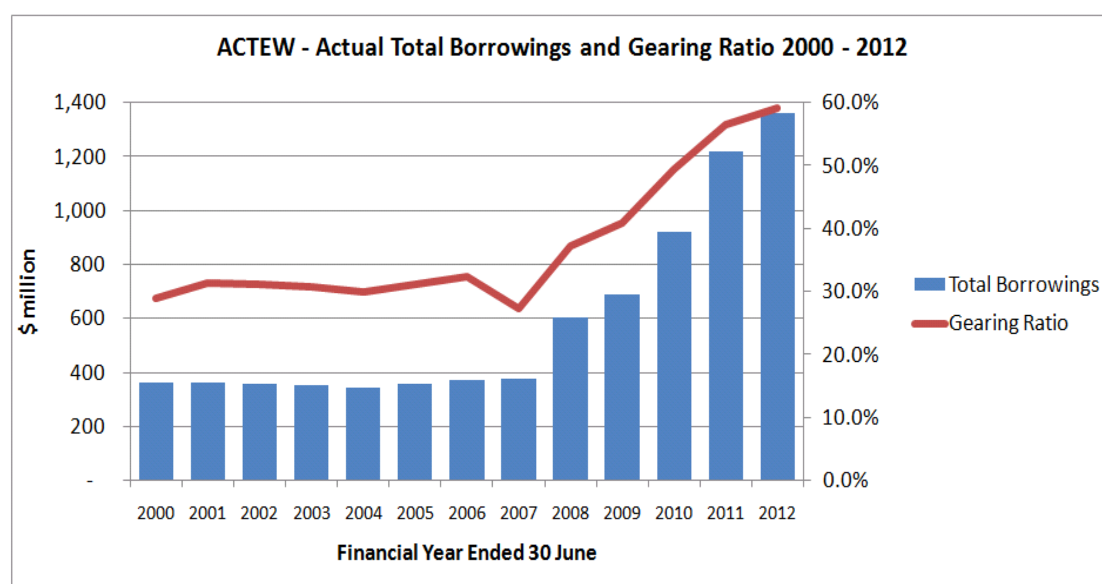
[7] By virtue of clause 8 of ACTEW's Constitution, the power of directors to determine that a dividend is payable pursuant to section 254U of the Corporations Act does not apply; see also Sch 3 Pt 3.1 Cl.6 TOC Act.

This situation is exacerbated because each year ACTEW receives a number of 'gifted assets'. Gifted assets are water and sewerage assets built in new, primarily greenfield developments by either the LDA or private developers, then given free of charge to ACTEW when completed. Under the current accounting framework ACTEW must record gifted assets as revenue, therefore its pre-tax profit is increased by the full amount of the value of the assets gifted. Over recent years the value of these assets has been between $3 million and $5 million per annum.

The ICRC does not include gifted assets when it calculates ACTEW's asset base, which is a key determinant in setting price paths for ACTEW's water and sewerage businesses. At the same time, the receipt of gifted assets leads to its tax bill and dividend payments increasing by the value of the gifted assets. As ACTEW does not receive any cash for these assets, it must borrow to meet the increased payments. Over time these arrangements also lead to a situation where ACTEW is not able to earn a commercial return on an increasing portion of its assets, which will reduce its dividends and the cash available to pay for them, or increase its borrowings.

Until ACTEW had to undertake the three major water security infrastructure projects (see Chapter 4), it had been conservatively geared relative to other infrastructure companies. Hence, the reasoning behind the current dividend policy was that if only a modest dividend was required to be paid, this would result in ACTEW accumulating substantial cash and liquid investments which could otherwise be made available for distribution to government. Further, to the extent that funds have been required to be borrowed to fund dividends, this could also be characterized as borrowing to fund ACTEW's reinvestment into the joint venture. This is conceptually recognised in ACTEW's accounts, which allocate a proportion of overall debt to ACTEW's interests in the ActewAGL joint venture.

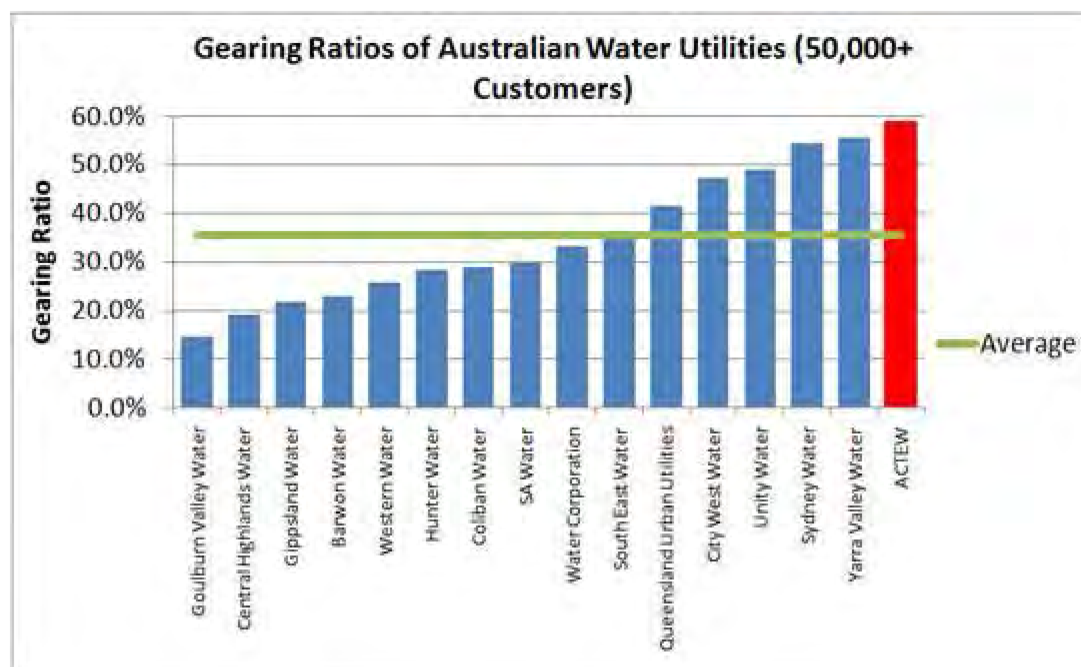
Figure 5.1: Borrowings and gearing levels



Source: ACTEW Submission to the Review. Figure 12

Largely as a result of the borrowing required to fund the three major water security projects, the level of gearing for ACTEW has risen to 59 per cent as at 30 June 2012 and in accordance with the 2013-14 SCI, ACTEW's level of gearing is expected to reach 64 per cent in 2017. According to ACTEW (Submission, p.83), this level of gearing means that ACTEW now has the highest gearing ratio of any major water utility in Australia (although as noted previously, this is in part due to the values placed on some of ACTEW's interests in the ActewAGL joint venture, which would be expected to be below net realizable value (see Chapter 1)).

Figure 5.2 Gearing Ratios of Australian Water Utilities



Source: ACTEW Submission, Figure 14

According to the Independent Pricing and Regulatory Tribunal (**IPART**) (2011:10) and the Water Services Regulation Authority (UK) (**OFWAT**) (2011:36) between 60 per cent and 70 per cent is generally considered an acceptable gearing level for infrastructure companies. In periods of high capital expenditure the gearing level for some companies has risen in excess of 90 per cent and has still been accepted as suitable by credit rating agencies given future growth prospects and the inherent lumpiness of major infrastructure projects.

Although ACTEW may prefer dividends being paid exclusively from cash profits, it is not unusual for infrastructure utilities to pay dividends in excess of reported profits, recognising these businesses generally have long term underlying revenue growth. This has been the basis on which certain utilities have been required to borrow to pay dividends when capital expenditure has limited the availability of cash that has been generated by the business. This approach allows future profits to be brought forward for the benefit of shareholders and can be sustained providing there is sufficient capacity to service the loan funds.

In its Submission, and on number of previous occasions (e.g. 2013-14 ACTEW SCI), ACTEW has expressed concern about having to continue to pay 100 percent of its NPAT as its gearing levels have risen.

In 2009 Treasury undertook a review of the dividend policy that applied to ACTEW and concluded that there was not a compelling case to support a revision of the dividend policy at that time. It recommended that the 100 per cent dividend policy be maintained until matters with potential to significantly impact ACTEW's revenue and cash position were resolved.

Now that the major water security projects are largely complete, this Review considers the time is suitable to assess the sustainability, or otherwise, of ACTEW continuing to pay 100 percent of NPAT in dividends.

If dividend arrangements are not changed, ACTEW will have to continue to borrow to cover the cash shortfall in payments from the joint venture and it will have little ability to make any substantive repayments of its debt burden. If institutional arrangements change, the manner in which debt is allocated to new entities might impact on the timeliness with which a change in dividend policy would be required. This would in part depend on the valuations that could be placed on the interests ACTEW currently holds in the ActewAGL joint venture, which may in turn depend on how reform took place – and in particular whether those energy assets were transferred to a new entity, or whether they continued to be held in the current structure while a new entity was created with respect to the water and sewerage assets and operations.

In determining how debt may be allocated, and also the impact of any change in dividend policy, regard will also need to be given to the impact of the ICRC's pricing decisions. To the extent that those decisions are based on a low or minimum return on capital and costs of debt, funds available for dividend distributions will likely be lower. However, the higher the cost of capital and debt applied in the pricing decision, the greater the likely impact in terms of price adjustment.

Recommendation 5.3

The ACT Government should review the dividend policy as it currently applies to ACTEW to ensure that any public owned entity directly or indirectly involved in the provision of utility services in the ACT is able to cover its operational requirements and manage its debt profile on an ongoing basis. This may impact on the dividends that would otherwise be payable to the ACT Government under the current dividend policy. Gifted assets should be excluded from calculations of profitability for the purposes of determining dividends.

5.5 *National Tax Equivalent Regime (NTER)*

Government businesses are not subject to Commonwealth income tax. However, under the NCP reforms significant government business enterprises are required to pay Commonwealth tax equivalents to the State or Territories that own them (see CPA, 1995). This is designed to place them on an equivalent footing with private sector entities, consistent with other competitive neutrality principles.

The NTER is the administrative arrangement under which relevant Commonwealth taxation laws are notionally applied to NTER entities as if they were subject to those laws. In the ACT, these arrangements are given effect by operation of the *Taxation (Government Business Enterprises) Act 2003 (ACT)*.

As a significant government business enterprise, ACTEW is subject to the NTER tax regime. ACTEW is assessed annually as to its tax equivalent liability and is required to make these payments to the ACT Government. ACTEW budgets and pays the ACT Government 30 per cent of its gross profit in income tax equivalents.

Table 5.4: Commonwealth Tax Equivalents paid by ACTEW to the ACT Government ($'000s)

	2009-10	2010-11	2011-12	2012-13
Tax Equivalents ($'000s	35,906	33,257	30,873	41,498

Source: ACTEW Annual Reports

In 2012-13, the total tax equivalents paid by ACTEW to the ACT Government was just under $41.5 million – around half the amount paid as dividends. The significant level of tax equivalent payments highlights the importance of ACTEW's status, including the manner in which it holds its interests in the ActewAGL joint venture, as being subject to the NTER rather than directly liable for Commonwealth tax. Care needs to be taken with any reform to ensure that no changes are made which inadvertently impact on this situation.

Recommendation 5.4

The ACT Government should ensure any reforms to institutional arrangements have regard to and do not inadvertently result in adverse financial impact to the ACT given the operations of the National Tax Equivalent Regime.

5.6 Community service obligations (CSOs)

At the Special Premiers' Conference (1991), community service obligations (CSOs) were defined as obligations which arise:

> *"… when a government specifically requires a public enterprise to carry out activities relating to outputs or inputs, with identified public benefit objectives, which it would not elect to do on a commercial basis, and which the Government does not require other businesses in the public or private sector to undertake, or which it would only do commercially at higher prices"* (ACT Government, 2013b:134).

The ACT Government's power to require entities to provide CSOs is prescribed under Part 13 of the Utilities Act. Under these provisions, government funds those entities for the provision of CSOs to the community.

The CSOs provided by the ACT Government with respect to water and sewerage services generally relate to rebates for pensioners and reduced costs for schools, churches, hospitals, benevolent and charitable institutions. The ACT Budget states that the separate identification of CSOs provides transparency on the full costs of services and the financial implications of ACT Government decisions in the provision of services to specific targeted groups in the community (ACT Government, 2013b:134).

In relation to water and sewerage services, and also energy services, the ACT Government has agreements in place with the ActewAGL joint venture to provide its services to a range of selected recipients at a reduced cost. The cost of implementing these agreements, and foregone revenue, is paid for by the Government. As ACTEW has taken over responsibility for the provision of water and sewerage services, these arrangements are being revised so that ACTEW will now directly receive funding from the Government for the provision of CSOs with respect to these services.

The total funding provided by the ACT Budget for water and sewerage related CSOs paid to ACTEW was $11.5 million in 2012-13, an increase of 26 per cent from 2009-10 (see Table 5.5). The largest categories of CSOs relate to concession for health benefit card holders, followed by concessions to schools and charitable organizations for water and sewerage services. Around $10 million was provided in 2012-13 for electricity concessions, while relatively limited concessions were provided with respect to gas services (see Table 5.5).

Table 5.5: CSOs paid to ACTEW/ActewAGL ($'000s)

	2009-10	2010-11	2011-12	2012-13
Water and sewerage	9,015	9,167	10,073	11,476
Electricity	4,478	5,160	7,831	9,986
Gas	58	65	62	77
Admin Costs/Other	424	473	379	389
Total	13,975	14,865	18,345	21,928

Source: CSD

The costs of providing CSOs have been growing over time as the Canberra community grows and the population ages. As well as assisting disadvantaged groups, with the increasing number of people advancing into their senior years it will become increasingly important for the ACT Government to continue to provide these concessions. To ensure ongoing community support for such programs, it is beneficial that these arrangements are transparently made. To this end, the ACT Government has set out the policy principles which underpin the provision of concessions – equity, effectiveness, accessibility and transparency (see ACT Government, undated).

Table 5.6: CSOs paid to ACTEW/ActewAGL ($'000s)

		1996-97	1997-98	1998-99	1999-2000	2000-01	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
Water consumption of schools etc at close to half price	Budget	490	501	722	836	667	690	715	675	816	1,054	1,257	1,560	2,228	2,349	2,577	3,666	na
	Actual	na	na	na	na	na	na	na	na	na	908	1,200	1,187	1,234	1,692	1,320	1,447	1,691
Sewerage services to schools etc at close to half price	Budget	1,460	1,420	1,266	1,335	1,380	1,716	1,783	1,965	1,828	1,935	2,748	2,471	2,588	2,883	2,712	3,280	na
	Actual	na	na	na	na	na	na	na	na	na	1,961	2,049	2,155	2,203	2,594	2,805	3,105	3,378
No charge for water or sewer rates for land granted under (repealed) Church Land Leases Act 1924-32	Budget	30	25	51	53	48	50	51	47	37	40	48	58	83	88	247	290	na
	Actual	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na
Discount on general electricity supply charge	Budget	35	40	32	0	15	10	10	10	11	11	11	0	0	0	0	0	na
	Actual	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na
Administration cost where rebates funded by Govt	Budget	83	102	105	115	120	124	133	140	147	142	161	304	293	291	185	178	na
	Actual	na	na	na	na	na	na	na	na	na	237	282	352	424	423	463	369	382
Rebate on electricity/gas bills to health benefit card holders	Budget	2,349	2,950	2,950	3,000	3,100	3,240	3,567	3,850	3,946	4,426	4,700	4,673	4,356	4,353	4,737	5,472	na
	Actual	na	na	na	na	na	na	na	na	na	4,044	4,523	4,358	4,618	4,662	5,235	7,902	10,069
Rebate on water and sewer charges to health benefit care holders	Budget	2,062	2,413	2,301	2,500	2,875	3,267	3,318	3,595	3,498	3,607	3,623	3,804	4,180	5,258	4,810	5,156	na
	Actual	na	na	na	na	na	na	na	na	na	3,239	3,660	3,814	4,316	4,729	5,042	5,522	6,408
Essential services remissions - electricity write offs	Budget	na	na	25	0	23	20	100	80	80	138	138	105	0	0	0	0	na
	Actual	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na
Essential Services Customer Council (electricity, water, gas)	Budget	na	na	na	na	na	na	na	na	na	na	na	na	166	239	318	335	na
	Actual	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na	na

Source: Budget estimates are taken from ACTEW Statements of Corporate Intent, 1996-2013, the actual expenditure numbers were provided by CSD.

6 ACTEW and the ACT Government – communications and accountability mechanisms

6.1 Introduction

The Review's Terms of Reference seek recommendations on potential approaches which could enhance communication and accountability mechanisms operating between ACTEW[1] and ACT Government Directorates.

To this end, this chapter first briefly outlines the range of interactions which currently operate between ACTEW and the ACT Government. It then assesses the scope for enhanced communications and accountability mechanisms given the various capacities in which the ACT Government interacts with ACTEW. Broadly these interactions are categorized as those involving:

- Voting Shareholder and Portfolio Minister responsibilities;
- Treasury responsibilities;
- policy making responsibilities;
- acting as a regulator of ACTEW's operations;[2]
- acting as a consumer of ACTEW's services; and
- acting on behalf of constituents.

For completeness, it is noted that this chapter does not address communication issues associated with emergency management. Emergency management is undertaken in accordance with the ACTEW Water Supply and Sewerage Emergency Plan produced by ACTEW and approved by the ACT Government.[3] While it is recognized that emergency management can potentially involve significant interactions between the ACT Government, ACTEW and the ActewAGL joint venture, as was the case during the 2003 bushfires, it is beyond the capacity of this Review to provide specialist advice in relation to matters of this nature.[4]

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1 For the purposes of this chapter, a reference to ACTEW is also a reference to any new publicly owned entity established to provide water and sewerage services in the ACT and/or where relevant any new publicly owned entity established to hold ACTEW's interests in the ActewAGL joint venture.

2 Given ACTEW's appeal of the ICRC's water and sewerage pricing determination and the Auditor-General's performance review of the ICRC's processes (see Chapter 4), the Review does not consider matters relating to information and accountability mechanisms in detail in this context.

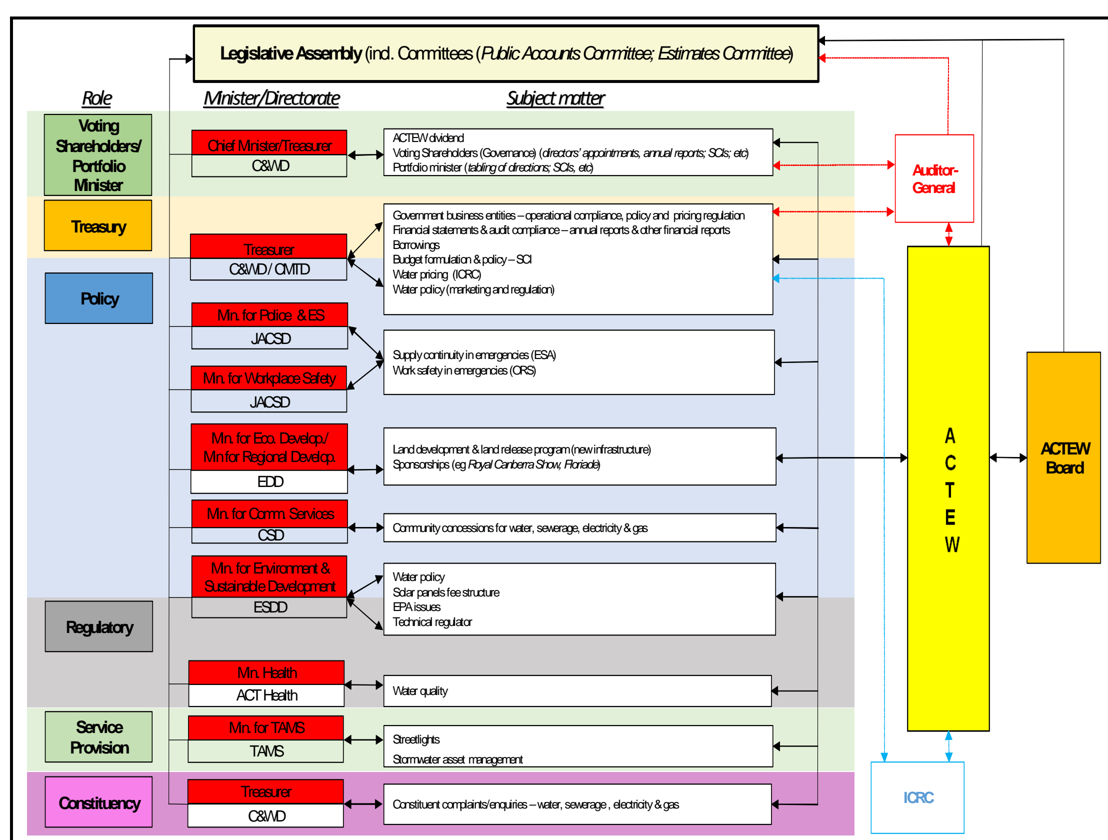
3 As to ACTEW's obligations to develop and maintain an emergency plan, see generally the *Utilities Act 2000* (ACT) and the *Utilities-Emergency Code 2011*.

4 There are protocols in place to help manage potential incidents, for example dam emergencies, supply continuity in emergencies, and work safety in emergencies. ESDD and JACSD are the main directorates responsible for the development and implementation of these policies.

6.2 *Current interactions between ACTEW and the ACT Government*

ACTEW provides water and sewerage services to the ACT, and through its interests in the ActewAGL joint venture, is also indirectly involved in the provision of energy services. These operations are regulated, to various degrees, by the ACT Government (see Chapter 4), and this regulatory framework is in turn established to give effect to the ACT Government's policy agenda. The ACT Government is also a consumer of ACTEW's services – both for water and sewerage services, and also through service contract arrangements for the maintenance of the ACT's stormwater assets. ACTEW is also 100 per cent publicly owned, and as a consequence the ACT Government has both ownership and treasury responsibilities.

Figure 6.1: Relations between ACTEW and the ACT government



Most ministers and directorates are allocated roles and responsibilities in relation to the ACT Government's interactions with ACTEW (see *Administrative Arrangements 2013 (No. 1)*). Noting that individuals often hold a number of portfolios, Ministerial responsibilities that have interaction with ACTEW's activities include:

- the Chief Minister, both in a ministerial capacity and as a Voting Shareholder;
- the Treasurer, both in a ministerial capacity (as Treasurer and also Portfolio Minister) and as a Voting Shareholder;
- the Minister for Police and Emergency Services;
- the Minister for Community Services;

- the Minister for Economic Development;
- the Minister for the Environment and Sustainable Development;
- the Minister for Health;
- the Minister for Regional Development;
- the Minister for Territory and Municipal Services; and
- the Minister for Workplace Safety and Industrial Relations.

The extent and nature of the interactions that exist between ACTEW, these ministers and their directorates is illustrated in Figure 6.1. The Attorney-General also has responsibility for public accountability mechanisms which apply to ACTEW; for example, with respect to the ombudsman and public record keeping.

As Figure 6.1 shows, a single minister may interact with ACTEW for various purposes. Having regard to the size of the ACT Government's ministry, an individual minister may do so in a variety of capacities. Similarly, directorates interact with ACTEW on a wide range of issues, and these interactions occur across many different levels within and across directorates.

The nature of these interactions, and opportunities to enhance communications and accountability mechanisms are considered further below. Generally, however the range and variety of issues that arise involving the ACT Government and ACTEW indicate that their interactions will necessarily occur in a multi-layered fashion, with the seniority or specialist skills required from personnel dependent both on the nature and significance of the issues to be addressed.

6.3 Options for enhancing communications and accountability mechanisms

6.3.1 Voting shareholder and portfolio minister responsibilities

ACTEW's governance framework is established under the Corporations Act and the TOC Act. Pursuant to section 13 of the TOC Act, a minister may be authorised by the Chief Minister to hold voting shares in ACTEW. Currently, the two holders of voting shares in ACTEW are the Chief Minister and the Treasurer (**Voting Shareholders**). The Treasurer is also the Portfolio Minister by operation of the *Administrative Arrangements 2013 (No. 1)*).

ACTEW directors are appointed by, and are accountable to, the Voting Shareholders.

Under clauses 47 to 53 of ACTEW's Constitution, the Voting Shareholders are required to approve the number, appointment, and removal of directors, as well as the appointment of the Chair and Deputy Chair of ACTEW's board. When issues relating to these matters are required to be dealt with by Voting Shareholders, the Commerce and Works Directorate (CWD) is responsible for providing support to the Voting Shareholders.

ACTEW normally holds eight to ten Board meetings each year. It also holds an Annual General Meeting (**AGM**), as required under section 250N(2) of the Corporations Act. ACTEW's Constitution also provides that additional general meetings may be held at the request of the board (see cl.28) or the Voting Shareholders (see cl.29). Separately the Corporations Act also contains provisions with respect to meetings of members of companies (see Pt 2G.2). No business is able to be transacted at a general meeting for ACTEW unless the Voting Shareholders are present either in person or by proxy (see cl.32 ACTEW Constitution).

In addition to these general responsibilities with respect to directors and meetings, the TOC Act establishes a number of specific obligations for ACTEW and its board with respect to Voting Shareholders. These include obligations with respect to:

- the provision of information by ACTEW to Voting Shareholders (see s.15 TOC Act);
- requiring the written consent of Voting Shareholders prior to sale or acquisition by ACTEW of any major undertaking (see s.16 TOC Act);
- requiring ACTEW directors to keep Voting Shareholders informed about significant events as soon as practicable after becoming aware of the event including new ventures, significant changes to existing activities, activities involving significant risk or likely to attract adverse publicity (see s.16A TOC Act);
- the provision of an annual Statement of Corporate Intent (ss.19, 20 TOC Act); and
- the provision of an annual report (s.22 TOC Act).

Obligations operating pursuant to the TOC Act are in addition to, and in some instance vary from, the obligations operating with respect to ACTEW, its directors and officers under the Corporations Act including, for example, the requirement to prepare annual financial reports and directors' reports (see Pt 2M.3).

These arrangements reflect ACTEW's status as a wholly government owned entity established as a public company under the Corporations Act, and also governed by the provisions of the TOC Act. As ACTEW is an entity prescribed under the TOC Act, there are also responsibilities vested in the Portfolio Minister, who is the Minister who has administrative responsibility in relation to the corporation. These include tabling information before the Legislative Assembly in relation to:

- the establishment of a company as a TOC (s.9);
- consents given in relation to the acquisition or disposal of subsidiaries and undertakings (s.16);
- any directions given (s.17);
- SCIs (s.19); and
- annual reports (s.22).

Reforms to streamline these processes or facilitate their performance are now considered in the context of these various obligations and responsibilities required to be undertaken by ACTEW's Voting Shareholders and the Portfolio Minister, the directorates supporting them, ACTEW's directors, other officers of the company, and the company itself.

6.3.1.1 Provision of information

Section 15 of the TOC Act requires TOCs to provide periodic financial statements, performance reports and any other information about the corporation or subsidiary if asked for by Voting Shareholders in writing.

The Review is advised that information requested from ACTEW by Voting Shareholders under this provision includes:

- budget information for input to the ACT Government's Budget;
- budget performance update information throughout the financial year;
- quarterly reports on the progress with respect to major capital projects; and
- information relating to requests made by the Legislative Assembly, either through questions without notice or questions on notice, or by Legislative Assembly Committees.

In addition to information formally requested, ACTEW also provides a wide range of additional information to the ACT Government on a regular basis, including:

- ACTEW's Board papers, which are provided to Voting Shareholders in advance of each meeting. These are referred by the Voting Shareholders to CWD for analysis and provision of briefs. The copies of the board papers are then held by that directorate. The Finance and Budgets Division of CMTD also receives a copy from which they draw information in relation to the financial performance of ACTEW;
- a report from ACTEW's Managing Director to Voting Shareholders after each ACTEW board meeting outlining the main items discussed at that meeting and offering to discuss or provide further information if required; and
- a quarterly report to Voting Shareholders setting out the performance for ACTEW and its controlled entities, and a covering letter which includes additional advice on matters of importance that might have occurred outside the reporting period.

Further, ACTEW's Managing Director meets with the Chief Minister and/or Treasurer from time to time to discuss key issues. ACTEW also consults with and advises the Voting Shareholders on material issues as they arise and seeks the approval of the Voting Shareholders as necessary. The CWD assists this process by providing the Voting Shareholders with supplementary issue briefings on items of importance.

In considering the appropriate level of information that should be provided by a TOC to Voting Shareholders, regard must be given in the respective roles and responsibilities of senior management, the board, Voting Shareholders, the Portfolio Minister and directorates in the context of the entity being wholly publicly owned, with the Voting Shareholders holding their shares on trust for the Territory (see s.13(5) TOC Act).

As such, a balance needs to be struck so as to ensure the provision of information respectively enables:

- senior management, particularly the Chief Executive, to provide leadership of the organisation, to develop its strategic direction (in conjunction with the board) and to manage its day-to-day operations;
- the board to supervise the activities of management, monitor the performance of the entity and hold management accountable for its performance. This task will include, but not be limited to, ensuring management institutes adequate reporting systems, internal controls and systems for managing risk, as well as roles in the appointment and removal of the Chief Executive, and the approval of major capital allocations;
- Ministers in their capacity as Voting Shareholders to fulfil their obligations under the TOC Act, any duties or obligations that may arise under the Corporations Act, and more generally their obligations of accountability to the Parliament;
- the Portfolio Minister, to fulfil his or her obligations with respect to administrative responsibilities primarily associated with ensuring the provision of information to the Legislative Assembly; and
- directorates to fulfil their responsibilities to provide advice and support to Ministers as Voting Shareholders and/or as Portfolio Minister. This may relate to a variety of matters, including issues associated with the governance of the TOC, its overall performance or specific situations that arise in the course of its activities. As the Uhrig Report (2003:64) notes, this ministerial advisory and support role:

  > *"… enable[s] Ministers to receive advice on matters relating to statutory authorities from a more objective source; that is, a source removed from the day-to-day operations of … [the entity] but informed about whole-of-government policies and priorities and with the responsibilities to provide a Minister with the best possible advice."*

In the first instance, how this balancing exercise should operate will depend on the legislative framework under which the entity is established. Hence, the greater the autonomy prescribed by the Legislative Assembly, the more limited the flow of information required or desired between the entity and the government.

In the case of TOCs, there is a range of information required to be provided – both to government and to the Legislative Assembly itself. This includes, inter alia, annual

reports, SCIs, significant events and with respect to acquisitions and disposals of major undertakings. This Review makes no recommendations intended to result in any reduction in the level of information currently provided to the Legislative Assembly.

However, as TOCs are established as Corporations Act entities, this suggests a desire on the part of the Legislative Assembly for them to operate with a significant degree of autonomy, and in particular greater autonomy than, say, a territory authority established under ACT statute and governed by the FM Act.

Nevertheless, the retention of these TOCs in public ownership also indicates an intention that there be an ongoing role for the Legislative Assembly in overseeing their activities. Further, it establishes ongoing roles and responsibilities for Voting Shareholders and/or the Portfolio Minister. Information flows between ACTEW and the ACT Government will be required for Ministers to undertake these allocated tasks, and to ensure information is available so that the accountability requirements with respect to the Legislative Assembly are also met.

The balancing of the flow of information requires that it be sufficient for each participant to undertake these respective roles, but not so excessive as to provide them with information that is not relevant or suitable for those purposes – for example, for Voting Shareholders if it relates to day-to day operational activities – or such that its provision undermines the effectiveness of the governance structure established for the entity or the roles played by other participants in that structure.

It is not possible to prescribe the exact nature of information required to be provided to Ministers in their capacity as Voting Shareholders in this context. However, based on the factors outlined above, the Review considers there are opportunities to streamline the provision of information between ACTEW and the ACT Government so as to ensure Ministers receive information they require, while reinforcing directors and senior management responsibilities for overseeing the day to day operations of the business. Generally this would involve:

- the Managing Director of the entity providing a short monthly summary of key matters for the entity, to be provided following board meetings;
- quarterly performance reports being provided to the Voting Shareholders;
- the Managing Director and the Chair meeting periodically with the Voting Shareholders to discuss key matters; and
- the provision of board papers to the Voting Shareholders being discontinued. Such papers are internal to the business, and their retention by the board and management would more clearly indicate both their independence and the responsibilities expected of them by the owners of the business.

This is in addition to existing requirements as specified in the TOC Act as they relate to Voting Shareholders, the Portfolio Minister and the Legislative Assembly.

Under these arrangements, significant information would continue to be provided. As such, directorate support will be required by both Voting Shareholders and the Portfolio Minister. Having regard to the issues this information will relate to, and in particular financial issues, this Review considers that it would be beneficial if this advice was coordinated and undertaken through a single directorate. It is proposed that this role be given to CMTD, given the role it also plays in providing advice on financial matters to the Treasurer in that capacity (see further below).

In establishing a coordinated process of advice through a single directorate on issues of this nature, it would also be appropriate for a single person to be given overarching responsibility for interacting with ACTEW on these and related matters, with such necessary support as is required given the range of issues that may arise in relation to ACTEW. In establishing such an arrangement, however, it also needs to be recognized that not all issues involving interactions between ACTEW and the ACT Government relate to ownership issues, the portfolio ministry role and treasury matters, and hence it is neither feasible nor sensible for all interactions to occur just through the CMTD.

Recommendation 6.1

The ACT Government should streamline internal business reporting processes to government by public entities providing utility services, so that:

(a) a short monthly summary of key matters for the entity is provided by the Managing Director to the Voting Shareholders following Board meetings;

(b) quarterly performance reports are provided to the Voting Shareholders;

(c) the Managing Director and the Chair meet periodically with the Voting Shareholders to discuss key matters; and

(d) the provision of board papers to the ACT Government is discontinued.

Other information needs should be assessed on a case-by-case basis as specific issues arise.

Recommendation 6.2

To facilitate the coordination of advice to Voting Shareholders and the Portfolio Minister with advice being provided to the Treasurer, corporate governance support should be provided through the Chief Minister and Treasury Directorate (CMTD).

6.3.1.2 Statement of Corporate Intent (SCI)

Sections 19 and 20 of the TOC Act require ACTEW to prepare a SCI annually. ACTEW's SCI is intended to establish an annual operating framework by providing an overview of its broad strategic direction, along with its projected financial performance. The process by which its SCI is prepared is as follows:

- each year, ACTEW's directors must submit a draft SCI to the Voting Shareholders for comment within twelve months of the previous one (see s.19(1) TOC Act);
- ACTEW's directors must then consider any comments made by Voting Shareholders within one month of the draft's submission and consult with the Voting Shareholders on any comments that they do not agree with, with a view to reaching agreement (see s.19(2)(b) TOC Act);
- ACTEW's directors must then make changes to the draft SCI necessary to give effect to matters agreed with the Voting Shareholders (see s.19(2)(c) TOC Act);
- ACTEW's directors must submit the final SCI to the Voting Shareholders within two months of delivery of the initial draft; (s.19(2)(d) TOC Act);
- the Portfolio Minister is then required to present the final SCI to the Legislative Assembly within 15 sitting days after receiving it (s.19(3) TOC Act); and
- section 21 of the TOC Act provides for the directors, with the agreement of the Voting Shareholders, to modify an SCI.

At present the SCI is a brief high level document describing ACTEW's main undertakings, commercial objectives, business and corporate strategies, key issues, future activities, broad expectations concerning performance targets and any other information that may be requested by the Voting Shareholders in writing.

Based on an examination of these procedural requirements, the processes by which SCIs are prepared and ACTEW's SCIs since it was created in 1995, there are three key reform issues to be considered in relation to the current SCI arrangements:

- who should be responsible for approving the SCI – ACTEW's board or the Voting Shareholders;
- what should be contained in the SCI; and
- when should the SCI be prepared.

<u>Who should be responsible for approving the SCI</u>

In the ACT the directors of a TOC must submit a SCI annually under section 19 of the TOC Act. It is the responsibility of the directors to develop and approve a draft SCI. Voting Shareholders may comment on the draft SCI and refer any comments back to the directors who are either to agree with them or if not, discuss any areas of disagreement with the Voting Shareholders with a view to reaching agreement. The final SCI is then approved by the directors and submitted to the Voting Shareholders for tabling in the Legislative Assembly within fifteen sitting days of receiving it.

For major water utilities across Australia, arrangements with respect to SCIs and related corporate planning documents vary considerably. In South Australia, for example, the board appears to be solely responsible for the preparation of its strategic plan with no prescribed involvement by a minister (see s.14 *Public*

Corporations Act 1993 (SA)), while in most other jurisdictions finalization of statements of corporate intent (and related corporate plans) are subject to agreement of the board and relevant Ministers (see, for example, Vic, WA), and also often subject to a specific power of direction with respect to the inclusion or exclusion of information (see, for example, NSW, NT) (see Table 6.1).

Table 6.1: Approvals for annual corporate plans/statements of intents

State	Entity	Approval responsibility
ACT	ACTEW	SCI approved by directors of TOC; modification requires approval of Voting Shareholders: ss.19-21 TOC Act
NSW	Hunter Water Corporation Sydney Water Corporation	SCI approved by directors of State owned corporation; content subject to direction by shareholders; modification subject to veto by shareholders: ss.21, 22 *State Owned Corporations Act 1989* (NSW)
NT	Power and Water Corporation	SCI approved by directors of Government owned corporation; content subject to direction by shareholders; modification subject to veto by shareholders: ss.39-41 *Government Owned Corporations Act* (NT)
QLD	Queensland Bulk Water Supply Authority (trading as "Seqwater")	Strategic or operational plan approved by board in agreement with responsible Ministers, subject to direction by responsible Ministers: Pt 4, Div 4 *South East Queensland Water (Restructuring) Act 2007* (Qld)
	Central SEQ Distributor-Retailer Authority (trading as "Queensland Urban Utilities") Northern SEQ Distributor-Retailer Authority trading as "Unitywater" Southern SEQ Distributor-Retailer Authority (trading as "Allconnex Water"	Distributor-retailer agreement requires preparation of plan by the entity: see s.21 *South East Queensland (Distribution and Retail Restructuring) Act 2009* (Qld)
SA	South Australian Water Corporation	Board to prepare strategic plans: s.14 *Public Corporations Act 1993* (SA)
TAS	Tasmanian Water and Sewerage Corporation Pty Ltd ("Taswater")	na
VIC	Barwon Water City West Water Melbourne Water South East Water Yarra Valley Water	Water corporation to approve corporate plan (containing SCI); content subject to direction of the Minister: see s.247 *Water Act 1989* (Vic)
WA	Water Corporation (WA)	Strategic development plans and SCI approved by agreement of Board and Minister; content subject to direction by Minister: see Pt 4 Divs 1, 2 *Water Corporation Act 1995* (WA)

For government entities generally, arrangements differ again and vary across jurisdictions. For Corporations Act entities, procedures range from SCIs requiring the agreement of shareholding Ministers (e.g. QLD)[5] through to not requiring an SCI to be prepared at all (e.g. Vic) (see Appendix A).

[5] See Ch 3 Pt 8 *Government Owned Corporation Act 1993* (QLD), pursuant to which both corporate plan and statement of content required, both approved by board in agreement with shareholding Ministers, subject to direction by responsible Ministers

For Corporations Act entities, the approval of SCIs logically rests best with the boards of those entities in that they are established so as to operate at arm's length from government. While the TOC Act does not specifically provide for the giving of directions in relation to SCIs in the way that operates for many other jurisdictions, it would appear this capacity exists under the general power of direction. However, unlike other jurisdictions, if this power was utilised in relation to SCIs it would open up a requirement for compensation to be provided.

Until such time as the ACT Government may wish to consider the legal form of the entity responsible for the provision of water and sewerage services following a review of its regulatory framework for territory authorities (see Rec. 3.1), this Review does not propose that any change be made to the current framework with respect to the preparation of SCIs. Should the ACT Government take the approach of establishing a corporation by ACT statute for this role, a direction power in relation to the contents of SCIs of the kind that applies for most major urban utilities in Australia would be appropriate.

What should be contained in the SCI

The contents of ACTEW's SCIs have been the subject of reform in recent times. The ICRC in its Draft Report on Regulated Water and Sewerage Services (2013a:xix) recommended that ACTEW's SCI should be enhanced to institute a more transparent review of the performance of ACTEW against the tasks identified in the SCI and a clearer process for holding the board responsible for those outcomes.

Following this draft recommendation, in early May 2013 the Voting Shareholders reviewed the requirements for content of the SCI and wrote to ACTEW providing enhanced guidelines for the preparation of the 2013-14 SCI and set out additional information for ACTEW to provide. These new guidelines aimed to provide more granular or clearer information compared to what had previously been included in their SCI by seeking ACTEW to:

- provide more focus on clearly aligning the corporate objectives with the objectives stipulated by the TOC Act (see Chapter 3);
- provide an improved perspective about the planned activities directed at meeting the defined objectives such as the initiatives to improve efficiency;
- provide segregated high level financial estimates and performance targets on each of the main business segments;
- improve the transparency of the capital expenditure program by providing a separate section and table identifying current and future major capital expenditure items by project and category;
- clearly identify community service obligations including level of Government funding and any specific environmental objectives and programs;
- include a section on major/high level risk factors and the mitigation strategies;

- include a section on the main organisational/staffing structures; and
- review existing performance measures for possible improvement.

In late May 2013 ACTEW submitted its draft SCI which addressed these elements. The Voting Shareholders then provided comments to ACTEW which requested some further information in relation to the above, and a request to meet with ACTEW to discuss these. Subsequently the Voting Shareholders met with the ACTEW Board and a final consensus was reached on the SCI. ACTEW submitted its final SCI in July 2013 and it was subsequently tabled in the Assembly on 6 August 2013.

Given these enhanced SCI processes have only recently been implemented and the 2013-14 SCI incorporated these new elements, it would be appropriate to allow some time to pass before assessing the results and deciding if further enhancements are required. This assessment should include determining how effectively future SCIs detail ACTEW's actual performance against the targets set in each SCI.

Recommendation 6.3

The recently introduced enhanced Statement of Corporate Intent processes for ACTEW should be allowed to operate and be reassessed at a future date, possibly either at the time of completion of review of the TOC Act and related governance arrangements for territory authorities (see Rec 3.1) or in the process of determining whether the ACT publicly owned entity providing water and sewerage services should be established as a corporation by ACT statute following that review.

When should the SCI be prepared

Section 19 of the TOC Act sets out the consultation requirements for the preparation of ACTEW's SCI.

Up until the 2012-13 Budget, normal practice was for the TOCs' SCIs to be tabled in the Assembly in August, having provided them to Government in May after the annual Budget is finalised. This timing is too late for the SCIs to be available for Ministers and the Legislative Assembly's Estimates Committee for consideration of the TOCs' budgets and forecasts contained in the ACT Budget papers.

Given that the Budget is now being produced in early June, rather than May, both TOCs have indicated they would be able to provide SCIs to the Government in early May, and table these in the Legislative Assembly in June or July each year.

The Estimates Committee commented on the timing of SCIs being tabled at the 2012-13 hearings on ACTEW (see ACT Legislative Assembly, 2012:149). All FM Act authorities are required to submit a Statement of Intent within the normal budget timeframes (see s.62 FM Act).

The Review considers it would assist the Legislative Assembly's committee processes if TOCs were able to submit their draft SCIs at the same time as their budgets to CMTD and for those SCIs to be finalised in time for the Legislative Assembly Committee hearings on the Budget.

Recommendation 6.4

The ACT Government should require publicly owned entities subject to the TOC Act to submit their draft Statements of Corporate Intent at the same time as their draft budgets, and for the Statements of Corporate Intent to be finalized and tabled in time for the Legislative Assembly committee hearings on the Budget.

6.3.1.3 Annual reporting requirements

ACTEW's obligations with respect to annual reports arise under both the Corporations Act and the TOC Act.

Under the Corporations Act ACTEW is required to submit a report for each financial year, within five months of the end of the financial year. This annual report consists of the financial statements and notes for the year for ACTEW and its controlled entities, a directors' report and declaration and an auditor's report (see Pt 2M.3).

Under section 22 of the TOC Act ACTEW is also required to submit an annual report to the Voting Shareholders within three months of the end of the financial year (ie by late September) that includes the financial information as required under the Corporations Act, additional information as required under the TOC Act (including with respect to executive remuneration (see s.22(2)(g)) and any other information as requested by the Voting Shareholders (see s.22(2)(b)). This includes information for the ACTEW group as a whole.

The ACTEW annual report to the ACT Government prepared pursuant to the TOC Act includes the financial statements for ACTEW, its two subsidiaries and for the ActewAGL Joint Venture. For this report ACTEW is required to comply with the requirements of the *Annual Reports (Government Agencies) Act 2004* (ACT) (**Annual Reports Act**). Any requirements of that Act which are not applicable to ACTEW are listed at the back of the report. The report must also include a copy of the Auditor-General's report on the accounts, reports and financial statements stating that they give a true and fair view of the profit and loss and state of affairs and that they comply with applicable accounting standards. It also is required to include particulars of compliance with any directions given under section 17 of the TOC Act, and the cost of any compliance.

ACTEW's Constitution requires that it hold an AGM at least once every calendar year, at which both Voting Shareholders are present in person or by proxy (see cll.27, 32). The business of the AGM includes the receipt and consideration of the annual

financial report prepared according to the requirements of the Corporations Act, the directors' report, the Auditor's report and any other business as required (see cl.33 ACTEW Constitution). The AGM is generally held in September/October of each year.

In the past, the annual report prepared in accordance with the requirements of the TOC Act has not been provided at the AGM. Rather it has been provided separately to the Voting Shareholders in late September and submitted to the Legislative Assembly. This report is subject to Legislative Assembly review processes through the Public Accounts Committee, and ACTEW is required to attend their hearings as required.

As the timing for completion and lodgment of the annual report required to be prepared in accordance with the TOC Act and the Annual Reports Act (see s.13 (*within 3 months after end of financial year*) is before the required time to finalise the annual report under the Corporations Act (see s.315 (*earlier of 21 days prior to AGM or 4 months after end of financial year*) and the time in which an AGM is required to be held (s.250N (*within 5 months of the end of its financial year*), it is not clear why the AGM could not be held when both reports are available.

There is generally no other fixed opportunity for the two Voting Shareholders to meet with the ACTEW Board and discuss the matters that are raised in the report prepared in accordance with the TOC Act. As such the Review considers it would be beneficial if the AGM could be held when both reports are available so that they can be discussed at that time.

A second issue which potentially arises is if there are requirements under the TOC Act and the Annual Reports Act which impose reporting standards different from those applicable under the Corporations Act. Such inconsistency has the potential to create controversy – as occurred in a related fashion in relation to the misreporting of ACTEW's Managing Director's remuneration. The Review is not aware of any actual or anticipated changes to accounting standards which could produce such an outcome. However, one area where this may arise is if there are changes in requirements with respect to reporting requirements for officers' remuneration. While such issues should best be addressed internally by ACTEW, there may be benefit in establishing a process by which ACTEW is required to confirm to the Portfolio Minister each year that its annual report has been prepared having regard to any inconsistencies in standards that which may have arisen during that year.

Recommendation 6.5

The ACT Government should ensure that the annual report as required under the Territory-owned Corporations Act 1990 (ACT) *and the Annual Reports (Government Agencies) Act 2004* (ACT) *is available at the time of the scheduled annual general meeting for any publicly owned entity subject to the TOC Act.*

6.3.2 Treasury responsibilities

In addition to his responsibilities as a Voting Shareholder and Portfolio Minister, ACTEW interacts with the Treasurer in relation to financial matters. This includes issues relating to the ACT Government's budget processes and its borrowing activities. If the recommendations with respect to major capital works are accepted, there will also be a task of ensuring appropriate information flows are established in relation to such matters (see Chapter 5).

6.3.2.1 ACT Government budget processes

ACTEW does not receive any funding from the ACT Government Budget for its operations, other than funding for community service obligations (CSO) (see Chapter 5). However, as a TOC it is required to produce an annual budget, which after approval by the ACTEW Board is included in the ACT Government's Budget (see s.10(c) FM Act). ACTEW's budget is subject to Legislative Assembly review processes, and ACTEW is required to attend their hearings as required.

The ACT Government's Budget process is coordinated by CMTD each year and formally structured into different milestone stages across the year for all government departments and agencies. Given ACTEW's business activities, its budget development differs slightly to that of other government agencies in terms of the information provided by ACTEW. However, the Budget timeline still applies to it. Like all government owned entities, ACTEW is delegated a specific Treasury contact who is responsible for ensuring all milestone tasks are completed as required to assist with the budget finalisation.

In addition to forming part of the Budget papers submitted to the Legislative Assembly, various elements of ACTEW's financial information are directly or indirectly incorporated into the ACT Government's Budget – in particular, ACTEW's actual and estimated dividend and tax equivalent payments to be made to the ACT, the borrowings which the ACT undertakes on behalf of ACTEW and the estimated CSO payments made by the Government to ACTEW.

Budget processes may be impacted upon by the most recent ICRC price determination. Under the ICRC's decision, this process is to occur every two years. While this may have implications for the capacity of ACTEW to provide information as part of the Budget processes, as this decision is the subject of an appeal, it is not possible to make recommendations in relation to this matter at this stage.

6.3.2.2 ACT Government borrowing processes

Pursuant to Part 4 of the TOC Act the Treasurer approves any borrowings or guarantees that ACTEW wishes to undertake.

Borrowings are currently undertaken by the ACT Government on ACTEW's behalf. The process involves ACTEW preparing a debt program and submitting it to the

Treasurer for approval and then a loan can be formally arranged by Treasury. Policy issues and recommendations associated with borrowings are discussed in detail in Chapter 5.

While no issues were raised with the Review with respect to the nature and timing of information provided with respect to borrowing requirements, the flow of relevant information is likely to occur earlier should the Treasurer have a greater role in decision-making in relation to major capital works (see Rec 5.2).

6.3.3 Policy responsibilities

ACTEW currently liaises with a number of Ministers and government directorates on policy matters affecting various aspects of ACTEW's activities. The main interactions are in relation to:

- *water policy, for which the Minister for Environment and Sustainable Development and ESDD are responsible*

  The Hawke Report stated in 2011 that water policy was a matter that spread across a number of different ACT Departments (now Directorates), with overall coordination for water governance and regulation overseen through the Chief Executives Water Group (which included the Managing Director of ACTEW) (Hawke, 2011:177). As a result of administrative changes following the Hawke Report, the Minister for ESD, with the support of the ESDD, is now primarily responsible for the development of water policy for approval by Cabinet.

  In its submission ACTEW outlined its vision of a strategic partnership with the ACT Government, in which it plays a critical role in informing the government on water policy and then assisting in implementing it. ACTEW expressed concern that it may not always be consulted sufficiently on water policy matters or other matters that impact on the organization when they are being prepared for Cabinet consideration (see ACTEW Submission, p.76). ACTEW also noted that in the past certain mechanisms were in place that gave consideration to water policy issues, such as the Chief Executives Water Group. This process has not been active of late and if reactivated could give ACTEW an ability to be able to formally input into key decisions on water.

  Generally the Review recognizes that water policy may be developed which requires action to be taken by ACTEW. Further, it is also the case that ACTEW possesses knowledge and technical skills are not easily replicated within government in relation to key aspects related to water policy.

  For both these reasons, it is critical that ACTEW is able to be constructively involved in policy development processes.

In the first instance, this would be the case for any industry participant who may be affected by government policy decisions. More broadly, the Review considers that as a publicly owned entity it is also the case that ACTEW is able to be utilised by the ACT Government as a significant and trusted source of input and advice.

However, in doing so it also needs to be recognised that ACTEW is established as a corporate entity to operate independently of government, consistent with NCP reforms which aim to separate operational and regulatory roles. As such, a balance needs to be struck in terms of its involvement in policy development and decision making processes. For example, in this context the Review would not consider it to be appropriate for ACTEW as an independent corporate entity to have access to papers being prepared for Cabinet. ACTEW should however be consulted where any matters going to Cabinet that impact materially on ACTEW are being contemplated.

- *land development and land release program, for which the Minister for Economic Development, EDD and the Land Development Authority (LDA) are responsible.*

  In respect of land development EDD prepares the ACT Governments' 4 year Indicative Land Release Programs (**ILRP**), while the LDA is responsible for undertaking development activities to ensure that land is released in accordance with the ILRP.

  ACTEW is an important stakeholder for land development in the ACT as it plays a key role in the provision of infrastructure design approvals and asset acceptance, ownership and maintenance. Key elements of the interactions involved in this role are as follows:
  - the LDA and other developers are responsible for the design and construction of water and sewerage assets. However, once this process is complete, these assets are handed over to ACTEW at completion as a gifted asset;
  - during the design process for these water and sewerage assets, ACTEW has involvement by ensuring that developers' consultants design the assets in accordance with its standards. ACTEW's engineers review the designs and provide comments back to the consultant. Once the consultant and ACTEW have agreed on the final design, ACTEW stamps the design drawings, issues Design Acceptance and construction is allowed to commence.
  - during construction, the contractor is required to produce quality records and carry out certain testing on the assets. Once the construction is completed and ACTEW is satisfied with the quality records and testing, the contractor will produce Work as Executed (**WAE**) drawings which ACTEW keeps as records of their Assets. The WAEs provide details and specifications, and also the location of the assets;

- once ACTEW has all the required documentation (Quality Records, Test Results, WAEs etc) ACTEW will issue Operational Acceptance where the assets become property of ACTEW and residents can connect to the Assets. All constructed assets are subject to a 12 month defects liability period where the contractor is responsible to rectify any defects within the 12 months following Operational Acceptance;
- at the end of the 12 month Defects Liability Period, an ACTEW inspector will inspect the assets and identify any defects. Once the contractor rectifies the defects and ACTEW is satisfied, ACTEW will issue a Final Acceptance certificate which is the completion of the design and construction process.

ACTEW (and the ActewAGL joint venture) are also key stakeholders in the proposed Light Rail project as substantial survey work is required to be done to identify the utility services under the proposed route, and significant implementation works can be anticipated to be required following the commencement of the project.

Given the critical involvement of ACTEW in land development processes, and the need to ensure that these processes operate as efficiently as possible, it is important there be ongoing communication between ACTEW and the government directorates and bodies responsible for their implementation.

To this end, the Review considers there would be benefit in formalizing processes to ensure periodic communication between senior members of each organization. This should not preclude ongoing interaction that will occur to deal with day-to-day operational matters.

Recommendation 6.6

The ACT Government should ensure:

(a) that any relevant entity involved in utility service provision is consulted in relation to any policies or proposed new regulation that may materially impact upon it, prior to the measure's adoption; and

(b) the publicly owned entity providing water and sewerage services in the ACT maintains priority working relationship with relevant government bodies with respect to land development and other major civic projects.

6.3.4 Regulatory responsibilities

There are four main areas of regulation that ACTEW interacts with the ACT Government in relation to the provision of water and sewerage services:

- *technical regulation*

  The technical regulation under which ACTEW, and the ActewAGL joint venture, operates is established under the Utilities Act. Under this Act, the Director-General of ESDD is responsible for:

  – monitoring and enforcing compliance with technical codes;[6]
  – providing advice to the Minister and ICRC about technical codes, including advice about compliance by utilities with the codes; and
  – reporting to ICRC, at least annually, about the operation of technical regulation and the costs incurred by the ACT in relation to the operation to the operation of technical regulation.

  The Director-General, as the technical regulator, and his or her delegates communicate with both ACTEW and ActewAGL when necessary. In addition to submissions of documentation and the annual reports to the technical regulator against licence requirements, ACTEW and the ActewAGL joint venture are required to report individual incidents as they occur.

- *environmental regulation*

  ACTEW is also subject to environmental regulation, which is administered by the Environment Protection Authority (EPA). The person who serves as the EPA is appointed by the Director-General of ESDD (s.11 *Environment Protection Act 1997* (ACT)).

  In large part, environmental regulation applicable to ACTEW is established under the *Environment Protection Act 1997* (ACT) and subordinate instruments (see Chapter 4). Pursuant to these instruments, ACTEW's wastewater treatment and discharge activities operate under environmental authorisations issued by the EPA.[7] In addition, ACTEW's activities are required to comply with:

  – environmental flow guidelines established pursuant to the *Water Resources Act 2007* (ACT). Guidelines are prepared by the EPA for approval by the Minister pursuant to Pt 3 of that Act;
  – licences issued under the *Water Resources Act 2007* (ACT); and
  – environmental conditions contained in any licence issued under the Utilities Act.

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[6] Technical codes are made in accordance with Pt 4 of the *Utilities Act 2000* (ACT) save that they are approved by the Minister, following consultation with the ICRC and any utility affected by the code: see s.65 *Utilities Act 2000* (ACT).

[7] For further detail, see Authorisation originally issued 7 August 2000 (as varied) (re: LMWQCC); No 0754 (re: sewage treatment) and No. 0792 (re: petroleum storage).

Under current arrangements, ACTEW's performance with respect to environmental regulations is monitored under an annual review. In addition to this ACTEW has both monthly/annual and non-compliance report obligations which are provided to the EPA.

ACTEW is also required to report annually in relation to environmental issues under industry licensed issued under the Utilities Act. The ICRC is required to provide those elements of these annual performance reports to the EPA (see s.54 Utilities Act).

- *drinking water quality regulation*

  Drinking water quality is regulated under the *Public Health Act 1997* (ACT). Pursuant to this Act, the supply of drinking water has been declared '*a licensable public health risk activity*', As a result, ACTEW – as an operator of a drinking water system – is required to obtain a Drinking Water Utility licence under the *Public Health Act 1997* (ACT). As such a licence holder, ACTEW is also required to comply with the ACT Drinking Water Code of Practice 2007 (DWCoP).

  Various reporting requirement operate under the DWCoP, including:

  – notification to the Chief Health Officer (CHO) or a nominated person within specified time periods in relation to a notifiable event or incident (see Appendix 1 DWCoP) and the maintenance of a 24-hour incident management contact list for the coordination of responses to any incident (see generally cl. 5 DWCoP ('Notification Requirements'); and
  – annual reporting of its drinking water quality monitoring program (see cl.8 DWCoP).

  The Review has been advised that generally these reporting and accountability arrangements function effectively.

- *industry regulation, including price determinations*

  Industry regulation, including water and sewerage price determinations, is undertaken by the ICRC pursuant to the ICRC Act. In relation to pricing determinations for water and sewerage, currently the Treasurer (being the Minister responsible for the ICRC Act) is responsible for initiating the determination by providing the ICRC with a reference (see s.3A ICRC Act). Moreover, once a determination has been made, the Treasurer, as referring authority, can request a review of that determination (see Pt 4C ICRC Act).

  During the determination process, however, the Government's role is limited as the ICRC operates independently of it. The Government may, however, make submissions to the process.

> As the most recent ICRC water and sewerage pricing determination is currently the subject of appeal, and the Auditor-General is also conducting a performance review in relation to ICRC processes, this Review does not consider issues related to these interactions.

Generally, the ACT's Government's regulatory role with respect to ACTEW is undertaken by specialist personnel within the relevant public sector bodies. These roles require direct interaction with ACTEW. To ensure these regulatory tasks are carried out appropriately, it would be both unnecessary and inappropriate for such interactions to be conducted through a single intermediary within government. Based on the information made available during this process, the Review does not make any specific recommendations with regard to communications in this area. The Review further notes that in doing so it has not sought to consider issues specifically related to industry regulation, including price determinations involving the ICRC and any interactions this gives rise to between ACTEW, the ICRC and the ACT Government more generally. Finally, it is noted that while no specific recommendations are made with respect to communications in respect of the ACT Government's regulatory oversight responsibilities given the information available to this Review, these arrangements should be periodically reassessed to ensure their ongoing transparency and effectiveness.

6.3.5 ACT Government as a consumer of ACTEW's services

The ACT Government is a consumer of ACTEW services in two key areas – directly as a customer in relation to utility services (that is, water and sewerage) and also in relation to maintenance services in relation to stormwater assets owned by TAMS and operated by ACTEW under contract. Accountability and reporting mechanisms are set out in the contractual arrangements that underpin both these activities. The contractual arrangements for stormwater are currently up for renewal.

ACTEW, through its interest in the ActewAGL joint venture, historically also had interest in the provision of electricity to the ACT Government. Procurement processes in 1998, 2001 and 2005 were through an authorised single select process with ActewAGL holding the contract for all sites. Under these processes, best value for money was assessed using industry pricing and contract benchmarks. By 2012 the Government assessed that the market for these services had sufficiently matured to warrant putting this contract to open tender. In 2012, and in accordance with its Competitive Neutrality Policy, the ACT Government undertook the first competitive tender process for this contract and ActewAGL retained the small market sites (those below 80Mwh per year) and the unmetered market sites (street and traffic lights). The large market contract (accounts for around 75 per cent of the total energy consumption) was awarded to another company**.**

In Chapters 1 and 2, the Review has highlighted the potential to integrate operational water services in a single publicly owned entity. In doing so, it has also indicated that these arrangements need to be undertaken consistent with the ACT's

Competitive Neutrality Policy so as to enable third party providers to be given opportunities to participate in service delivery. No other recommendations are sought to be made in this context.

6.3.6 ACT Government acting on behalf of constituents

Customer service delivery is a central aspect of ACTEW's business. Currently members of the public have the ability to raises issues, including complaints, directly to ACTEW or to do so directly to Ministers and other Members of the Legislative Assembly.

Where the latter occurs, constituent concerns are provided to the Treasurer's office for appropriate action by their Departmental Liaison Officer (DLO). The DLO is the central point in the Minister's office responsible for coordinating and monitoring information-flow between the various Ministers' offices, CWD and ACTEW.

ACTEW also has a nominated contact for ministerial and government liaison and works closely with the DLO to ensure the constituent concerns are addressed in a timely manner. It is important to note that only ACTEW liaises directly with the ActewAGL joint venture for assistance regarding any constituent matters.

ACTEW has its their own internal executive approval processes to adhere to before any written advice is provided back to both CWD and the Treasurer's DLO for further action. The Ministers' offices operate on a 10-day response timeframe but tend to offer flexibility to ACTEW and ActewAGL for the more complex matters, as long as they are advised in a timely matter. However, there are instances where the Chief Minister has requested more urgent attention to particular constituent complaints from ACTEW via the Treasurer's DLO. These are often quickly resolved directly between the Ministers' offices and ACTEW.

Constituent complaints generally range from billing account issues, faulty residential/commercial water and sewerage services, gas and electricity service problems, streetlight complaints, pensioner concession enquiries, ACTEW-related community construction work concerns and ACTEW staff service complaints.

As this work is undertaken by the Treasurer in his capacity as Portfolio Minister, given the recommendation above with respect to coordinating advice through a single directorate, this activity should also be undertaken through CMTD.

Appendix A: Governance arrangement for state owned corporations across Australia

In all jurisdictions in Australia there is legislation providing for the establishment and governance of public entities, and in particular public corporations. These include, but are not limited to:

- *Territory-owned Corporations Act 1990* (ACT) (**TOC Ac**t);
  Financial Management Act 1996 (ACT) (**FM Act**);
  Annual Reports (Government Agencies) Act 2004 (ACT) (**ARGA Act**);
- *State Owned Corporation Act 1989* (NSW) (**SOC Act**);[1]
  Public Authorities (Financial Arrangements) Act 1987 (NSW) (**PAFA Act**);
- *Government Owned Corporations Act* (NT) (**GOC Act (NT)**);
  Public Sector Employment And Management Act (NT) (**PSEMA Act**);[2]
  Financial Management Act (NT) (**FM Act (NT)**)); [3]
- *Government Owned Corporations Act 1993* (Qld) (**GOC Act (Qld)**);
  Public Service Act 2008 (Qld) (**PS Act (QLD)**);[4]
- *Public Corporations Act 1993* (SA) (**PC Act**);
  Public Sector Act 2009 (SA) (**PS Act (SA)**);[5]
- *Government Business Enterprises Act 1995* (Tas) (**GBE Act**);
  State Service Act 2000 (Tas) (**SS Act**);[6]
- *State Owned Enterprises Act 1992* (Vic) (**SOE Act**);
  Borrowing and Investment Powers Act 1987 (Vic) (**BIP Act**);
  Financial Management Act 1994 (Vic) (**FM Act (Vic)**)
  Public Administration Act 2004 (Vic) (**PA Act**);[7]
- *Statutory Corporations (Liability Of Directors) Act 1996* (WA) (**SC(LoD) Act**); [8]
  Public Sector Management Act 1994 (WA) (**PSM Act (WA)**);[9]
- *Financial Management and Accountability Act 1997* (Cth) (**FMA Act**);
  Commonwealth Authorities and Companies Act 1997 (Cth) (**CAC Act**);
  See also Public Governance, Performance and Accountability Act 2013 (Cth) (**PGPA Act**).

Table A1 compares these Acts against the TOC Act, FM Act and the Annual Reports Act. This is done at a general level only because the structure and wording of this legislation varies markedly across jurisdictions. It is beyond the scope of this Review to compare all elements of these arrangements, or to encompass reference to legislation establishing individual entities. Key aspects of these arrangements are discussed in the body of the text.

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1 The NSW Government has initiated a review of the legislative framework governing state owned corporations, with the intention that public consultation take place in the first quarter of 2014 and a White Paper be delivered to Cabinet by mid-2014.

2 Corporations subject to this Act include the Darwin Port Corporation and the Land Development Corporation: see Administrative Arrangements Order (NT) dated 16 September 2013.

3 Corporations subject to this Act include the Darwin Port Corporation, the Land Development Corporation and the Northern Territory Treasury Corporation: see Administrative Arrangements Order (NT) dated 16 September 2013.

4 By operation of s.24 (what is a government entity).

5 By operation of s.3 (meaning of "public sector" and "public sector agency").

6 By operation of s.3 (meaning of "Agency" and "State authority").

7 See s.5 (What are public entities?).

8 The scope of this legislation is more limited than in the other jurisdictions, and operates primarily with respect to directors' duties and ministerial directions. Further, it does not appear to apply to the Water Corporation in Western Australia.

9 As to scope of operation, see s.3 re: definitions of "agency", non-SES organisation", "Public Sector" and "SES organisation".

Table A1: Scope of legislation applicable generically across publicly owned entities[1]

	ACT	NSW	NT[2]	QLD	SA	TAS	VIC	WA	CTH
Legislation applicable to Corporations Act companies									
– sets general objectives for entities covered	Yes s.7 TOC Act	Yes s.8 SOC Act	na	Yes s.17 GOC Act (QLD)	na	na	Yes s.69 SOE Act	na	No
– directors' duties	Yes per Corporations Act; see also s.10 TOC Act	Yes ss.33A, 33AA Sch 10 Pts 2, 3 SOC Act	na	Yes per Pt 2D.1 Corporations Act; see also ss.123, 124 GOC Act (Qld)	na	na	Yes per Corporations Act; see also Sch 1 SOE Act	na	Yes per Pt 2D.1 Corporations Act
– statements of corporate intent / corporate planning	Yes ss.19-21 TOC Act	Yes ss.21, 22 SOC Act	na	Yes Ch 3, Pt 8 GOC Act (QLD)	na	na	No	na	Yes s.42 CAC Act
– powers of direction	Yes s.17 TOC Act	Yes ss.7A (re transfers), 11 (non-commercial activities) SOC Act	na	Yes ss.35 (charter preparation); 47 (charter implementation); 48 (functions) ; 115 (public interest) GOC Act (QLD)	na	na	No	na	No
– application of government policies	Yes s.17A TOC Act	No	na	Yes s.114 GOC Act (Qld)	na	na	No	na	Yes ss.43, 48A CAC Act
– sets borrowing constraints	Yes ss.24-28A TOC Act	Yes see PAFA Act	na	No	na	na	Yes see s.64; Sch 1 cl.8 SOE Act	na	Yes see s.37 FMA Act
– constraints on scope of activities	Yes ss.14, 16 TOC Act	Yes ss.18-20 SOC Act	na	Yes Ch 3 Pt 15 GOC Act (Qld)	na	na	Yes see s.64; Sch 1 cll.3-5 SOE Act	na	No
– notification of significant events	Yes s.16A TOC Act	No	na	Yes s.122 GOC Act (Qld)	na	na	No	na	Yes s.40 CAC Act
– financial reporting and auditing	ss.18, 22 TOC Act; see also ARGA Act	s.24 SOC Act	na	ss.118-121 GOC Act	na	na	ss.73-75 SOE Act; see also s.53A FM Act (Vic)	na	ss.36-38 CAC Act
Legislation applicable to statutory corporations									
– sets general objectives for entities covered	Na	Yes s.20E SOC Act	Yes s.4 GOC Act (NT)	na	Yes s.11 PC Act	Yes s.7 GBE Act	Yes s.18 SOE Act	na	No

	ACT	NSW	NT[2]	QLD	SA	TAS	VIC	WA	CTH
– directors' duties	Yes ss.85-88 FM Act	Yes ss.33A, 33AA, Sch 10 Pts 1, 3 SOC Act	Yes s.20 GOC Act (NT) (application of Pt 2D.1 Corporations Act	na	Yes Pt 4 PC Act	Yes Pt 5 GBE Act	Yes see s.36 SOE Act (re: state business corporations); see also Code of Conduct issued under s.63 PA Act	Yes see SC(LoD) Act	Yes Pt 3 Div 4 CAC Act
– statements of corporate intent / corporate planning	Yes ss.61, 62 FM Act	Yes ss.21, 22 SOC Act	Yes ss.39-41 GOC Act (NT)	na	Yes see s.14(2)(b),(d) PC Act	Yes ss.39, 40 (corporate plan) 41 (Statement of corporate intent) GBE Act	Yes ss.41 (Corporate Plan) 42 (Statement of Corporate Intent) SOE Act	na	Yes s.17 CAC Act
– powers of direction	Yes ss.102 (re: financial and other statements), 106 (re transfers) FM Act	Yes ss.20D (re transfers); 20N (non-commercial activities), 20P (public interest) SOC Act	Yes s.30 GOC Act (NT)	na	Yes s.6 PC Act	Yes s. 65 GBE Act (community service obligation)	Yes ss.16C (state bodies); 45C (state business corporations) SOE Act	Yes see Pt 3 Div 4 SC(LoD) Act	No
– application of government policies	Yes s.103 FM Act	Yes s.20O SOC Act	Yes s.29 GOC Act (NT)	na	No	No	No	na	Yes ss.28, 48A CAC Act
– sets borrowing constraints	Yes s.59 FM Act	Yes see PAFA Act	Yes s.35 GOC Act (NT); s.32 FM Act (NT)	na	Yes see s.12(2)(c)(iv) PC Act	Yes ss.45,47 GBE Act[3]	Yes see BIP Act	na	Yes see s.37 FMA Act; see also s.28A(3) CAC Act
– constraints on scope of activities	Yes ss.98, 99 FM Act	Yes ss.20W-20Y SOC Act	Yes ss.37, 38 GOC Act (NT)	na	Yes see s.12(2) PC Act	Yes see Pt 6 Div 1 (Ministerial charter)	Yes see s.43 (in accordance with corporate plan) SOE Act	na	No
– notification of significant events	Yes ss.101 FM Act	No	Yes see s.15 GOC Act (NT)	na	Yes s.14(2)(h) PC Act	Yes s.13 GBE Act	Yes s.54 SOE Act	na	Yes s.15 CAC Act
– financial reporting and auditing	ss.63-66 FM Act; see also ARGA Act	s.24A SOC Act	ss.42-47 GOC Act (NT)	na	Yes ss.32-33 PC Act	Pt 8 GBE Act	Yes see FM Act (Vic)	na	ss.9-13 CAC Act

1 This table is limited to generic legislation; other powers may be specified in Acts establishing a publicly owned entity.

2 Generally, the Corporations Act is excluded from operating, but a statutory corporation may be subject to Corporations Act in relation to matters declared by regulation: s.6 *Government Owned Corporations Act* (NT); as to equivalent provisions, see, for example, s.20G *State Owned Corporation Act 1989* (NSW).

3 See also s.16 *Tasmanian Public Finance Corporation Act 1985* (Tas).

Appendix B: ACT territory authorities

This Appendix briefly summarises the structure and functions of ACT statutory authorities as provided for by their establishing Acts. These authorities are also subject to other generic legislation, including the FM Act and the Legislation Act.

ACT Gambling and Racing Commission

The ACT Gambling and Racing Commission is an independent body established pursuant to s.5 of the *Gambling and Racing Control Act 1999* (ACT) (**GRC Act**). Generally, the functions of ACT Gambling and Racing Commission are set out in s.6 of the GRC Act, and are:

(a) to administer the gaming laws;

(b) to control, supervise and regulate gaming in the GRC Act; and

(c) to exercise any other function given to the commission under the GRC Act or any other territory law.

More specifically, the functions of the ACT Gambling and Racing Commission incorporate:

- regulating the activities of casinos, machine gaming, lotteries and racing (as provided in the *Racing Act 1999* (ACT)), betting and interactive gambling;
- approving gaming and racing activities;
- monitoring and researching the social effects of gambling and of problem gambling;
- providing education and counseling services;
- engaging in community consultation, as appropriate, on matters related to its functions;
- reviewing legislation and policies related to gaming and racing and making recommendations to the Minister on those matters;
- monitoring, researching and funding activities relating to gaming and racing;
- investigating and conducting inquiries into—
  - issues related to gaming and racing; and
  - activities of people in relation to gaming and racing, for the purpose of exercising functions under a gaming law; and
- collecting taxes, fees and charges imposed or authorised by or under gaming laws.

The ACT Gambling and Racing Commission has a governing board of 5 (see ss.11, 12 GRC Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Racing and Gaming (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of the Legislation Act.

The ACT Gambling and Racing Commission is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

***ACT Insurance Authority* (ACTIA)**

ACTIA is established pursuant to s.7 of the *Insurance Authority Act 2005* (ACT) (**IAA Act**). The functions of ACTIA are set out in s.8 of the IAA Act, and are:

(a) to carry on the business of insurer of territory risks;

(b) to take out insurance of territory risks with other entities;

(c) to satisfy or settle claims in relation to territory risks (including claims that may not necessarily be valid in law);

(d) with the Treasurer's approval, to take action for the realising, enforcing, assigning or extinguishing rights against third parties arising out of or in relation to its business, including, for example
– taking possession of, dealing with or disposing of, property; or
– carrying on a third party's business as a going concern;

(e) to develop and promote good practices for the management of territory risks;

(f) to give advice to the Minister about insurance and the management of territory risks; and

(g) to exercise any other function given to it under this Act or another territory law.

According to the ACTIA Annual Report 2012-13 (ACTIA, 2013), all government directorates and statutory authorities, unless exempted by the Treasurer, are insured with ACTIA. An Agency Agreement sets out the cover provided and the level of excess (deductible) required to be met by the agencies. The insurance coverage provided is broad form cover that includes:

- public liability;
- medical malpractice;
- professional indemnity;
- property damage; and
- others including standing timber, specialised motor, overseas travel, directors and officers and financial crime.

ACTIA is a corporation by operation of ss.54 (1), 72 (definition of “relevant territory authority”), 73 and ‘Dictionary’ (definition of “territory authority”) FM Act. It has an advisory board (see s.12 IA Act). According to the ACTIA Annual Report 2012-13 (pp.2, 3), ACTIA reports to the Treasurer through the Director-General Commerce and Works, who also heads ACTIA’s management structure.

ACT Teacher Quality Institute

The ACT Teacher Quality Institute is established pursuant to s.10 of the *ACT Teacher Quality Institute Act 2010* (ACT) (**TQI Act**). Generally, the functions of ACT Teacher Quality Institute are set out in s.11 of the TQI Act, and are:

(a) to register, or grant permits to teach to, eligible people;

(b) to keep a register of, and records relating to, teachers working or intending to work in the ACT;

(c) to promote and encourage—
– the continuous professional learning and development of teachers; and
– increased levels of skill, knowledge, expertise and professionalism of teachers;

(d) to determine standards for, and to facilitate, the professional learning and development of teachers;

(e) to develop and apply codes of practice about the professional conduct or practice of teachers;

(f) to determine standards, including assessment and certification standards, for the teaching profession within a framework of nationally recognised professional standards;
(g) accredit education programs for pre-service teachers and teachers; and
(h) to monitor compliance with and enforce the TQI Act.

The Teacher Quality Institute has a governing board of at least 12, and not more than 14 members, one of whom is the chief executive officer (see ss.14, 15 TQI Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Education and Training (see s.78 FM Act; Sch. 2 Administrative Arrangements 2013 (No.1) (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of Legislation Act.

The Teacher Quality Institute is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

Australian Capital Territory Compulsory Third Party Insurance Regulator **(CTP Regulator)**

The CTP Regulator is an independent territory authority established under section 14 of the *Road Transport (Third-Party Insurance) Act 2008* (ACT) (**CTP Act**). The role of the CTP regulator is to regulate the CTP insurance scheme in the ACT under the CTP Act (see s.5A CTP Act ("Objects"). Its functions are specified in s.14A of the CTP Act and include:

- regulating the licensing of CTP insurers;
- monitoring the behaviour of licensed CTP insurers in relation to their obligations under the Act;
- improving health outcomes for claimants; and
- monitoring the efficiency of the CTP scheme under the Act and identifying areas for amendment.

As the CTP Act is administered by the Chief Minister & Treasury Directorate, the Director-General of that Directorate is the CTP Regulator (see s.14(2) CTP Act). The CTP Regulator is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

Australian Capital Territory Public Cemeteries Authority **(Public Cemeteries Authority)**

The Public Cemeteries Authority is an independent statutory authority established under Pt 3 of the *Cemeteries and Crematoria Act 2003* (ACT) (**C&C Act**). The functions of the Public Cemeteries Authority are to effectively and efficiently manage public cemeteries and crematoria for which the authority has been appointed as the operator by the Minister (see s.28A C&C Act). The Authority currently manages and operates three public cemeteries at Gungahlin, Woden and Hall. It is working towards the development of the new Southern Memorial Park and replacement interment services for South Canberra.

The Public Cemeteries Authority has a governing board of at least 4, and not more than 12 members, one of whom is the chief executive officer (see ss.29, 29A C&C Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Territory and Municipal Services (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with

Pt 19.3 of Legislation Act. The Public Cemeteries Authority is subject to Ministerial direction about the exercise of its functions (s.30 C&C Act).

The major corporate objectives of the Public Cemeteries Authority include:

- operating as an efficient government business with a strong customer service focus;
- maintaining burial capacity in the medium to long term for the ACT community;
- adopting operating practices that safeguard the environment and health and safety of staff; and
- ensuring the equitable availability of interment options for the entire ACT community (see Public Cemeteries Authority Annual Report 2012-13).

Building and Construction Industry Training Fund Authority **(Training Fund Authority)**

The Training Fund Authority is established by operation of s.4 of the *Building and Construction Industry Training Levy Act 1999* (ACT) (**BCITL Act**). Pursuant to s.5 of the BCITL Act, the Training Fund Authority's functions are:

(a) administering the training fund established and maintained pursuant to s.23 of the BCITL Act (**the fund**). The fund is financed by a Training Levy of 0.2 per cent on the value of work in respect of which the Training Levy is payable by the Project Owner;

(b) making payments, or directing that payments be made, from the fund in accordance with training plans; and

(c) exercising any other function given to the authority under the BCITL Act or any other territory law.

The Training Fund Authority has a six member governing board, including the chief executive officer as a non-voting member (see ss.6, 7 BCITL Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Education and Training (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of the Legislation Act.

The Training Fund Authority is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

Canberra Institute of Technology **(CIT)**

According to the CIT Annual Report 2012-13 (CIT, 2013), the CIT is a publically owned technical and further education (TAFE) institute, providing vocational education and training (VET) to the ACT and region. CIT is the largest registered training organisation (RTO) in the Australian Capital Territory, and the fifteenth largest nationally.

The CIT is established pursuant to s.4 of the *Canberra Institute of Technology Act 1987* (ACT) (**CIT Act**). Pursuant to s.5 of the CIT Act, CIT's functions are:

(a) to conduct, mainly in the ACT, an educational institution to foster excellence in study in the fields of technical and further education that the director, with the Minister's written approval, decides or the Minister requires;

(b) to provide courses and programs, and to use the facilities and resources of the institute, to advance and develop knowledge and skill in the fields of technical and further education; and

(c) to support industry and commerce, and to assist the development of industry and commerce and the community, in the ACT;

(d) to promote the development of community awareness and appreciation of technical and further education;

(e) to confer awards to people who have completed courses of studies at the institute;

(f) to confer honorary awards;

(g) to consult and cooperate with other entities in relation to the provision of technical and further education;

(h) to make suitable financial arrangements with industry and commerce for the purposes of its functions under paragraphs (a) to (g); and

(i) to do anything incidental to its functions under paragraphs (a) to (h).

The CIT Act provides for the appointment of a Director for the CIT (see Pt 3) and a 12 member CIT Advisory Council (see Pt 5). The CIT is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act. The CIT is subject to Ministerial direction about the exercise of CIT's functions (see s.6 CIT Act).

The CIT wholly owns CIT Solutions Pty Ltd. CIT Solutions Pty Ltd provides short courses and qualifications in government, business management and languages, for both the government and corporate sectors, in the Canberra region. The company also delivers market leading adult community education programs. CIT Solution Pty Ltd reports to the Australian Securities and Investments Commission (ASIC) in accordance with the Corporations Act.

***Cultural Facilities Corporation* (CFC)**

The CFC is established by operation of s.5 of the *Cultural Facilitation Corporation Act 1997* (ACT) (**CFC Act**). Pursuant to s.6 of the CFC Act, the CFC's functions are:

(a) to manage, develop, present, coordinate and promote cultural activities at designated locations and other places in the ACT;

(b) to establish and research collections;

(c) to conserve and exhibit collections in the possession or under the control of the corporation;

(d) to undertake activities, in cooperation with other people if appropriate, to exercise its other functions; and

(e) to exercise other functions given to the corporation under the CFC Act or another territory law.

It is responsible for:

- the Canberra Theatre Centre;
- the Canberra Museum and Gallery (CMAG);
- the Nolan Collection Gallery @ CMAG; and
- three Historic Places : Lanyon, Calthorpes' House and Mugga Mugga.

The CFC has a governing board of 7 members, one of whom is the chief executive officer of the corporation (see ss.10, 11 CFC Act). Board members are appointed by the responsible

Minister, in this case the ACT Minister for the Arts (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of the Legislation Act. In exercising its functions, the CFC must consider:

- any cultural policies or priorities of the Executive known to the CFC; and
- other cultural activities in the ACT

The CFC is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

Exhibition Park Corporation **(EPC)**

The EPC is established by operation of s.4 of the *Exhibition Park Corporation Act 1976* (ACT) (**EPC Act**). Pursuant to s.5 of the EPC Act, the EPC's functions are:

(a) managing the national exhibition centre;

(b) conducting, at the national exhibition centre, exhibitions, conventions and shows and sporting, recreational and cultural activities;

(c) conducting, at the national exhibition centre, other activities that the Minister approves;

(d) providing, at the national exhibition centre, buildings, structures, arenas and facilities, whether permanent or temporary, necessary for, or incidental to, the conduct of the exhibitions, shows and activities mentioned in paragraph (b) or (c);

(e) conducting, on land held by the corporation under lease, the activities or undertakings authorised by the lease that the corporation considers appropriate; and

(f) exercising any other function given to the corporation under this Act or any other territory law.

The EPC may do a range of prescribed activities in the exercise of its functions (see s.6(2),(3) EPC Act), but must not do any of the following without the Minister's written approval:

- hold land under a lease other than a lease granted by the Commonwealth;
- erect buildings (other than temporary buildings) on corporation land;
- enter into a contract involving the payment or receipt of a total amount larger than $100 000;
- carry out, or join in carrying out, works on land other than corporation land;
- assign or mortgage a lease; and
- grant a sublease for a term of longer than 1 year (s 6(4) EPC Act).

The EPC has a governing board of at least 3, but not more than 5 members, one of whom is the chief executive officer of the corporation (see ss.8, 9 EPC Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Tourism and Events (see s.78 FM Act; Sch. 2 Administrative Arrangements 2013 (No.1) (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of the Legislation Act.

According to the EPC Annual Report 2012-13 (p.5)(EPC, 2013), the EPC's mission is to provide an economic and environmentally sustainable venue facility, enriching the economic and cultural development of Canberra and the region by providing indoor and outdoor opportunities for entertainment, recreation and commercial interests.

To this end, the EPC manages Exhibition Park in Canberra (EPIC). EPIC is a Territory-owned national exhibition centre. This major events venue is the largest of its kind in the Australian Capital Territory and surrounding region. EPIC hosts indoor and outdoor events for businesses and the community. EPIC hosts a number of high profile events throughout the year such as the Royal Canberra Show, Summernats Street Machine Car Festival, the National Folk Festival and the Capital Region Farmers' Market.

Pursuant to s.13 EPC Act, the EPC may with the Minister's approval, make by-laws for this Act in relation to the management and control of the National Exhibition Centre (known as Exhibition Park in Canberra). These by-laws may make provision in relation to:

- the regulation or prevention of the possession, supply and consumption of liquor within the meaning of the *Liquor Act 2010* at the National Exhibition Centre;
- the regulation of admission of people to, the removal of people from, and the conduct of people at, the National Exhibition Centre;
- the regulation of traffic at the National Exhibition Centre;
- the by-laws may prescribe offences for contraventions of the by-laws and prescribe maximum; and
- penalties of not more than one penalty unit for offences against the by-laws.

The EPC is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act.

***Independent Competition and Regulatory Commission for the Australian Capital Territory* (ICRC)**

The ICRC is established by operation of s.5 of ICRC Act. Pursuant to s.7 of the ICRC Act, the ICRC has the following objectives in relation to regulated industries, access regimes, competitive neutrality complaints and government-regulated activity:

(a) to promote effective competition in the interests of consumers;

(b) to facilitate an appropriate balance between efficiency and environmental and social considerations; and

(c) to ensure non-discriminatory access to monopoly and near-monopoly infrastructure.

Key aspects of the ICRC's role are also set out in the Utilities Act in relation to the regulation of electricity, natural gas, water and sewerage utility services. Pursuant to s.3 of the Utilities Act, the ICRC objects under that Act are:

(a) to encourage the provision of safe, reliable, efficient and high quality utility services at reasonable prices;

(b) to minimise the potential for misuse of monopoly power in the provision of utility services;

(c) to promote competition in the provision of utility services;

(d) to encourage long-term investment, growth and employment in utility service industries;

(e) to promote ecologically sustainable development in the provision of utility services;

(f) to protect the interests of consumers;

(g) to ensure that advice given to ICRC by the ACAT, or the director-general under part 5 (Technical regulation), is properly considered;

(h) to ensure the Government's programs about the provision of utility services are properly addressed; and

(i) to give effect to directions of the Minister under section 19.

The ICRC has a statutory function under the Electricity Feed-in (Renewable Energy Premium) Act 2008 (ACT) in providing the minister with advice relevant to the determination of the premium payable by electricity suppliers to renewable energy generators.

Land Development Agency **(LDA)**

The LDA is the ACT Government agency responsible for the development and release of Territory owned land for residential, commercial, industrial, community and non-urban purposes (LDA, 2013)).

More specifically, the LDA is established pursuant to s.31 of the *Planning and Development Act 2007* (ACT) (**P&D Act**). Pursuant to s.32 of the P&D Act, its functions are:

(a) to develop land;

(b) to carry out works for the development and enhancement of land; and

(c) to carry out strategic or complex urban development projects.

The LDA has a governing board with at least 5, but not more than 8, members (see ss.42, 43 P&D Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Economic Development (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of Legislation Act. The LDA is subject to Ministerial direction about the about the principles that are to govern the exercise its functions (s.37 P&D Act).

According to the LDA Annual Report 2012-13 (LDA, 2013:8), the chief executive officer (CEO) of the LDA holds all the powers of a CEO of a Territory instrumentality under the PSMA. The CEO is a statutory office holder appointed under the FM Act and is a member of the LDA Board. The role of the CEO is combined with the role of the Director-General (DG), Economic Development Directorate (EDD), to manage the LDA in accordance with governance arrangements determined by the LDA Board.

Finally, the LDA operates as a public trading enterprise.[1] Consistent with the ACT Government's policy statement on competitive neutrality (Competitive Neutrality in the ACT, October 2010), the LDA applies similar costing and pricing principles, taxation and debt guarantee requirements and appropriate regulations as a fully corporatised business (see LDA Annual Report 2012-13 (p.24)),

Legal Aid Commission (A.C.T.) **(Legal Aid ACT)**

Legal Aid ACT is established pursuant to s.6 of the *Legal Aid Act 1977* (ACT) (**LAA Act**), and is created as a body corporate (s.6(2)(a) LAA Act). The primary function of Legal Aid ACT is to provide legal assistance in ACT matters in accordance with the LAA Act (s 8(1) LAA Act).

[1] As to the meaning of "public trading enterprise", see ABS Cat No. 1350 Australian Economic Indicators, 1993, Major ABS Classifications.

Legal Aid ACT is governed by an eight member board, appointed by the Attorney General (see Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)), whose constitution is prescribed pursuant to s.16 LAA Act, and whose functions are:

- to determine the broad policies, priorities and strategies of Legal Aid ACT for the provision of legal assistance under the LAA Act; and
- to ensure that Legal Aid ACT's affairs are managed in accordance with the LAA Act (see ss. 14, 15 LAA Act).

According to Legal Aid ACT's Annual Report 2012-13 (Legal Aid ACT, 2013), the purpose of Legal Aid ACT is to promote a just society in the Australian Capital Territory by:

- ensuring that vulnerable and disadvantaged people receive the legal services they need to protect their rights and interests;
- developing an improved community understanding of the law; and
- seeking reform of laws that adversely affect those assisted by the Legal Aid ACT.

Legal assistance provided by Legal Aid ACT includes legal information and advice, duty lawyer services, minor legal assistance, advocacy, grants of financial assistance for more substantial legal representation, and dispute resolution services.

As Legal Aid ACT's Annual Report 2012-13 (p.12) notes "*While the Commission is accountable to the ACT Attorney-General for the exercise of its statutory functions, it operates with a high degree of autonomy. This is necessary because of the Commission's role in protecting the legal rights and interests of individuals, many of whom are parties to actions by, or against, the executive branch of government. The Commission's lawyers are required by the Act to observe the same rules and standards of professional conduct as private lawyers, and are subject to the same professional duties. This means that their professional duties are owed to the law, the court and clients, rather than to executive government*".

Legal Aid ACT also has a responsibility under the LAA Act to make recommendations to the Attorney-General concerning the reform of laws the desirability of which have come to its attention in the course of performing its functions (see s 10(2)(a) LAA Act), and to initiate and carry out educational programs designed to promote an understanding by the public, and by sections of the public who have special needs in this respect, of their rights, powers, privileges and duties under the law in force in the ACT (see s 10(2)(b) LAA Act).

Pt 9 of the FM Act (Governance of territory authorities) does not apply to Legal Aid ACT (s.94A(2) LAA Act).

Long Service Leave Authority

The ACT Long Service Leave Authority established pursuant to s.16 of the *Long Service Leave (Portable Schemes) Act 2009* (ACT) (**LSL (PS) Act**). Pursuant to s.18 of the LSL (PS) Act, the ACT Long Service Leave Authority's functions are:

(a) administering the long service leave benefits schemes established under the LSL (PS) Act;

(b) making payments under the LSL (PS) Act;

(c) keeping the employers registers and workers registers for covered industries; and

(d) any other function given to the authority under the LSL (PS) Act or another territory Law.

Currently the ACT Long Service Leave Authority administers portable long service leave schemes for the following industries:

- construction;
- cleaning;
- community sector; and
- security.

The ACT Long Service Leave Authority has a governing board of at least 3, but not more than 7 members, one of whom is the chief executive officer of the corporation (see ss.20, 21 LSL (PS) Act). Board members are appointed by the responsible Minister, in this case the ACT Minister for Workplace Safety and Industrial Relations (see s.78 FM Act; Sch. 2 *Administrative Arrangements 2013 (No.1)* (ACT)). These board appointments are also required to be made in accordance with Pt 19.3 of the Legislation Act.

The ACT Long Service Leave Authority is a corporation by operation of ss.54 (1), 72 (definition of "relevant territory authority"), 73 and 'Dictionary' (definition of "territory authority") FM Act. However, the authority is not a territory instrumentality and does not represent the ACT (s.17 LSL (PS) Act; see also s.3A *Public Sector Management Act 1994*).

Public Trustee for the Australian Capital Territory **(Public Trustee)**

The Public Trustee is the person exercising the functions of public trustee (however described) in the public service (s.5 *Public Trustee Act 1985* (ACT) (**PT Act**). The Public Trustee is a corporation sole pursuant to s.8 of the PT Act.

Under the *Administrative Arrangements 2013 (No 1)* (ACT), the ACT Attorney-General is responsible for the administration of justice including the Public Trustee Act 1985 and the Trustee Act 1925. The Public Trustee is a Senior Executive in the ACT Public Service remunerated under the *Remuneration Tribunal Act 1995* (ACT) and is responsible for the overall administration of the Public Trustee including exercising the relevant statutory responsibilities. Each of Public Trustee's four business units Estates/Trusts, Finance, Financial Management Services and Investment/Funds Management is headed by a Deputy Public Trustee who, together with the Public Trustee, form a Management Committee.

The services provided by the Public Trustee include:

- will services (as executor);
- enduring Powers of Attorney services (as attorney);
- estate Administration (as executor or administrator);
- trust Administration;
- financial Management for persons with a decision-making disability;
- funds administration/investment for government and non-government trusts;
- asset management under the *Confiscation of Criminal Assets Act 2003* (ACT);
- unclaimed Money - administration under the *Unclaimed Money Act 1950* (ACT);
- examination of accounts prepared by private financial managers appointed by the ACT Civil and Administration Tribunal (ACAT); and
- administration of GreaterGood - the Capital Region Community Foundation.

The Public Trustee has been appointed as ex officio Chair of the Official Visitor's Board established under the *Official Visitor Act 2012* (ACT) with effect from 1 September 2013.

***University of Canberra* (UC)**

The UC is established pursuant to s.4 of the *University of Canberra Act 1989* (ACT) (**UC Act**). Pursuant to s. 5 of the UC Act, the University of Canberra's functions include:

(a) to transmit and advance knowledge by undertaking teaching and research of the highest quality;

(b) to encourage, and provide facilities for, postgraduate study and research;

(c) to provide facilities and courses for higher education generally, including education appropriate to professional and other occupations, for students from within Australia and overseas;

(d) to award and confer degrees, diplomas and certificates, whether in its own right, jointly with other institutions or as otherwise decided by the council;

(e) to provide opportunities for people, including those who already have post-secondary qualifications, to obtain higher education qualifications; and

(f) to engage in extension activities.

The University of Canberra is a body corporate (see s.4(3) UC Act). The governing authority of the University of Canberra is the Council, which is responsible for the entire management of the university (see ss. 9, 10 UC Act). The Council comprises 15 members, eight of whom are appointed by the Chief Minister of the ACT (see ss 11, 11A UC Act, see also Pt 19.3 Legislation Act).

Appendix C: Powers of direction, CSOs and application of government policy

Table C1: Powers of directions, States and Territories

Entity	Legislation	Who can initiate direction	Who can authorize direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
ACTEW	s.17 *Territory-owned Corporations Act 1990* (ACT)	Voting Shareholders	Voting Shareholder	Perform, cease to perform or refrain from performing an activity or to perform it in a different way than the directors intend to perform the activity.	Yes, if agreed by the Treasurer and the company or failing that, is decided by the Chief Minister	Net reasonable expense	Yes, within 15 sitting days of the direction
Sydney Water **Hunter Water**	s.20N *State Owned Corporation Act 1989* (NSW)	Portfolio Minister	Portfolio Minister with the approval of the Treasurer	To perform or cease to activities or not perform activities that is not in the entity's commercial interests	Yes, from money advanced by Treasurer or appropriated by parliament	Net cost, including cost of capital and cost of compliance. Potentially also net revenue forgone.	No
	s.20P *State Owned Corporation Act 1989* (NSW)	Portfolio Minister	Portfolio Minister with the approval of the Treasurer, after consultation with the board	Direction in the public interest	Yes, from money advanced by Treasurer or appropriated by parliament	Estimated net cost of complying, or net revenue forgone	No, published in Gazette within 1 month of direction
Sydney Catchment Authority	s.11 *Sydney Water Catchment Management Act 1998* (NSW)	Minister	Minister, if need reimbursement, then Treasurer must approve reimbursement	Any direction, subject to review.	Yes from public revenue, from money advanced by Treasurer or appropriated by parliament	Estimated financial loss incurred	No, published in Gazette as soon as practicable after direction
Power and Water Corporation	s.30 *Government Owned Corporations Act* (NT)	Portfolio Minister	Portfolio Minister with approval of Shareholding Minister after consultation with and advice from the board	Matter of public interest	No	N/A	Yes, within 6 sitting days
Queensland Bulk Water Supply Authority (trading as "Seqwater")	s.58 *South East Queensland Water (Restructuring) Act 2007* (Qld)	Responsible Ministers, after consultation with the board	Responsible Ministers	Not to dispose of a stated asset	No	N/A	No, but published in gazette within 21 days

Table C1: Powers of directions, States and Territories (*cont.*)

Entity	Legislation	Who can initiate direction	Who can authorize direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
	s.61 *South East Queensland Water (Restructuring) Act 2007* (Qld)[1]	Responsible Ministers, after consultation with the board	Responsible Ministers	Public interest	No	N/A	No, but published in gazette within 21 days
Central SEQ Distributor-Retailer Authority (trading as "Queensland Urban Utilities") Northern SEQ Distributor-Retailer Authority trading as "Unitywater" Southern SEQ Distributor-Retailer Authority (trading as "Allconnex Water"	s.49 *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)	Distributor-retailer's participating local governments, after asking advice from board	Local Governments unanimously or with the required majority	Manner of performing functions, if necessary and in the public interest for the area.	No	N/A	No
	s.49A *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)	A participating local government of a distributor-retailer	A participating local government	Manner of performing functions – charges, annual capital works	Yes (by local government)	Under section 99BZD *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)	N/A
Provisions generally applicable to QLD GBEs	ss.112, 113, *Government Owned Corporations Act 1993* (Qld)	Shareholding ministers	Shareholding ministers	Direction, notice or duty relating to modification to corporate plan, SCI, notification about public sector policies, public interest, not to dispose of asset, to perform an activity,	Yes	Under the SCI process	No
Provisions generally applicable to QLD GBEs	s.115 *Government Owned Corporations Act* (Qld)	Shareholding ministers after consultation with and advice from the board	Shareholding ministers after consultation with and advice from the board	Public interest	No	N/A	No, but published in gazette within 21 days, and included in Annual Report

[1] The Minister has an additional direction power with respect to matters required to be done by entity or board for restructuring of the entity: see s.107 *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009* (Qld)

Table C1: Powers of directions, States and Territories (*cont.*)

Entity	Legislation	Who can initiate direction	Who can authorize direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
South Australian Water Corporation	s.6 *Public Corporations Act 1993* (SA)	Minister	Minister	Matters not prescribed	No	N/A	Published in gazette within 14 days then within 6 sitting days, and included in Annual Report
TasWater	No equivalent provisions						
Barwon Water Corporation **City West Water Corporation** **Melbourne Water Corporation** **South East Water Corporation** **Yarra Valley Water Corporation**	ss.307, 307A *Water Act 1989* (Vic)[2]	Minister after consultation with Treasurer	Minister after consultation with the Treasurer	Performance or exercise of power, conditions in a bulk entitlement	Yes, with approval of the Minister administering the FMA and consultation with the board	Determined by the Minister, referencing costs incurred and revenue foregone	No, but to be published in Gazette, and included in Annual Report
Provision generally applicable to Victorian State business corporations	Section 45, *State Owned Enterprises Act 1992* (Vic) (see also ss.9 (reorganization); 16C (state bodies) *State Owned Enterprises Act 1992* (Vic))	The Minister after consultation with the Treasurer	The Minister after consultation with the Treasurer	Public interest	Yes, net cost. with approval of the Minister administering the FMA and consultation with the board	Determined by the Minister	N/A
Water Corporation (WA)	ss.63-66, *Water Corporation Act 1995* (WA)	Minister	Minister, but if objected to by board, then Minister in consultation with Treasurer.	Performance of functions	No	N/A	Yes, within 14 days of direction

[2] A general direction power exists under s.45 *State Owned Enterprises Act 1992* (Vic), but this provision does not currently apply to any of these entities.

TableC2: CSOs for water entities, States and Territories

Entity	Legislation	Who can initiate direction	Who can authorise direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
ACTEW	ss.219-225 Utilities Act	Minister for the CSO Program	Minister for the CSO program	Community Services, Environment, Social issues	Yes	By agreement with the Utility and the cost of complying with the direction	No
Sydney Water Hunter Water	s.20N *State Owned Corporation Act 1989* (NSW)	Portfolio Minister	Portfolio Minister with approval of the Treasurer	To perform or cease to perform activities or not perform activities that is not in the entity's commercial interests	Yes, from money advanced by Treasurer or appropriated by Parliament	Net cost, including cost of capital and cost of compliance. Potentially also net revenue forgone.	No
Power and Water Corporation	s.28 *Government Owned Corporations* Act (NT)	Jointly by portfolio Minister, Shareholding Minister and the GBE.	Portfolio Minister, Shareholding Minister	Activity of community or social benefit	Yes	Appropriate financial arrangement	Within 6 sitting days
Queensland Bulk Water Supply Authority (trading as "Seqwater")	ss.56, 57 *South East Queensland Water (Restructuring) Act 2007* (Qld)	Board	Responsible Minister, after consultation with the Board	Community service obligations	Yes (under its operational plan)	In the manner as set out under its operational plan	No
Water Corporation (WA)	ss.50-58 *Water Corporation Act 1995* (WA)	Minister	Minister with concurrence of the Treasurer, after consultation with Board	Community service obligations (to be included in Statement of Corporation Intent)	No	N/A	Yes, within 14 days of direction in relation to Statement of Corporate Intent
Provisions generally applicable to Tasmanian GBEs	ss.59-64A *Government Business Enterprises Act 1995* (Tas)	Portfolio Minister at the request of the board	Treasurer, after consultation with the Portfolio Minister	Function, service, concession	Yes	In accordance with the Treasurer's instructions, reviewed annually	No
Provision generally applicable to Tasmanian GBEs	s.65 *Government Business Enterprises Act 1995* (Tas)	Portfolio Minister jointly with Treasurer	Portfolio Minister jointly with the Treasurer	Function, service, concession	No	N/A	Within 5 sitting days after the GBE objects

TableC2: CSOs for water entities, States and Territories (*cont.*)

Entity	Legislation	Who can initiate direction	Who can authorise direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
Provisions applicable to Victorian state business corporations	s.45 *State Owned Enterprises Act 1992* (Vic)	Relevant minister	Relevant minister with approval of the Treasurer	Non-commercial activities	Yes	Amount of financial detriment determined by Minister, with approval of Minister administering Pt 2 of the *Financial Management Act 1994* (Vic), and after consultation with board	No
Provisions applicable to Victorian state owned companies	s.72 *State Owned Enterprises Act 1992* (Vic)	Relevant minister	Relevant minister with approval of the Treasurer	Non-commercial activities	Yes	By agreement	No

Table C3: Application of government policy, States and Territories

Entity	Legislation	Who can initiate direction	Who can authorize direction	What type of direction is included	Is reimbursement paid	How is reimbursement calculated	Is a direction tabled before parliament
ACTEW	s.17A TOC Act	Voting shareholders	Voting shareholders, after consulting with Board	General government policies to be applied	No (though compliance only as far as practicable required)	N/A	Notice in accordance with s.61 Legislation Act as a notifiable instrument
Sydney Water **Hunter Water**	s.20O, *State Owned Corporation Act 1989* (NSW)	Portfolio Minister	Portfolio Minister with the approval of the Treasurer	To comply with public sector policy	Yes, from money advanced by Treasurer or appropriated by parliament	Estimated net cost of compliance or net amount of revenue foregone through compliance	No but notice published in Gazette within 1 month
Power and Water Corporation	s.29 *Government Owned Corporations Act* (NT)	Portfolio Minister	Portfolio Minister with approval of the shareholding Minister, after consultation with and advice from the board	Public sector policy to apply to corporation	No	N/A	Yes, within 6 sitting days

Appendix D: Objectives provisions for state owned corporations and major urban water utilities, States and Territories

ACT

s.7 TOC Act (*Main objectives of corporations*)

(1) The main objectives of a territory-owned corporation or subsidiary are—
  (a) to operate at least as efficiently as any comparable business; and
  (b) to maximise the sustainable return to the Territory on its investment in the corporation or subsidiary in accordance with the performance targets in the latest statement of corporate intent of the corporation; and
  (c) to show a sense of social responsibility by having regard to the interests of the community in which it operates, and by trying to accommodate or encourage those interests; and
  (d) if its activities affect the environment—to operate in accordance with the object of ecologically sustainable development.

(2) The main objectives of the company are of equal importance.

(3) In this section:

"ecologically sustainable development" means the effective integration of environmental and economic considerations in decision-making processes achievable through implementation of the following principles:

(a) the precautionary principle;
(b) the inter-generational equity principle;
(c) conservation of biological diversity and ecological integrity;
(d) improved valuation and pricing of environmental resources.

"inter-generational equity principle "means that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

"precautionary principle "means that, if there is a threat of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

cl.2 ACTEW Constitution

The objects for which ACTEW is established are:

(a) to supply energy, including electricity, and water;
(b) to promote and manage the use of energy and water;
(c) to provide sewerage services;
(ca) the provision of communications services; and
(d) to undertake other related business activities which may be undertaken by a natural person.

No object is to be construed to limit the extent of any other object.

NSW

<u>ss.6, 20E *State Owned Corporations Act 1989* (NSW) (*Principal objectives of company SOCs; statutory SOCs*)</u>

(1) The principal objectives of every company / statutory SOC are:
  (a) to be a successful business and, to this end:
    (i) to operate at least as efficiently as any comparable businesses, and
    (ii) to maximise the net worth of the State's investment in the SOC, and
  (b) to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates, and
  (c) where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the *Protection of the Environment Administration Act 1991*, and
  (d) to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates.
(2) Each of the principal objectives of a company / statutory SOC is of equal importance.

<u>s. 21 *Sydney Water Act 1994* (NSW) (*Objectives of Corporation*)</u>

(1) The principal objectives of every company / statutory SOC are:
  (a) to be a successful business and, to this end:
    (i) to operate at least as efficiently as any comparable businesses, and
    (ii) to maximise the net worth of the State's investment in the SOC, and
    (b) to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates, and
  (b) to protect the environment by conducting its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the *Protection of the Environment Administration Act 1991*, and
  (c) to protect public health by supplying safe drinking water to its customers and other members of the public in compliance with the requirements of any operating licence.
(2) Despite section 8 of the State Owned Corporations Act 1989, each of the Corporation's principal objectives is of equal importance.

<u>s.14 *Sydney Water Catchment Management Act 1998* (NSW) (*Objectives*)</u>

(1) The principal objectives of the SCA are as follows:
  (a) to ensure that the catchment areas and the catchment infrastructure works are managed and protected so as to promote water quality, the protection of public health and public safety, and the protection of the environment,
  (b) to ensure that water supplied by it complies with appropriate standards of quality,
  (c) where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the *Protection of the Environment Administration Act 1991*,
  (d) to manage the SCA's catchment infrastructure worksefficiently and economically and in accordance with sound commercial principles.

(2) In implementing its principal objectives, the SCA has the following special objectives:
   (a) to minimise risks to human health,
   (b) to prevent the degradation of the environment.
(3) Nothing in this section gives rise to, or can be taken into account in, any civil cause of action.

Hunter Water Act 1991 (NSW) (*No equivalent provision*)

NT

s.4 *Government Owned Corporations Act* (NT) (*Objectives of Government owned corporation*)

The objectives of a Government owned corporation are:
(a) to operate at least as efficiently as any comparable business; and
(b) to maximise the sustainable return to the Territory on its investment in the corporation.

Power and Water Corporation Act (NT) (*No equivalent provision*)

QLD

s.11 *South East Queensland Water (Restructuring) Act 2007* (Qld)(*Functions to be carried out commercially*)

(1) The Authority must carry out its functions as a commercial enterprise.
(2) Subsection (1) does not apply to the extent the Authority is required under this Act to perform a community service obligation other than as a commercial enterprise.

South East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Qld)) (*No equivalent provision*)

s.17 *Government Owned Corporations Act 1993* (Qld) (*Key objectives of GOC under corporatisation*)

(1) Under corporatisation the key objectives of a GOC are to be commercially successful in the conduct of its activities and efficient in the delivery of its community service obligations.
(2) The commercial success and efficiency of a GOC are to be measured against its financial and non-financial performance targets.

SA

s.11 *Public Corporations Act 1993* (SA) (General performance principles)

(1 A public corporation must perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

(2) A public corporation must perform its non-commercial operations (if any) in an efficient and effective manner consistent with the requirements of its charter.

(3) Where a public corporation's charter identifies any operations of the corporation as non-commercial operations, the operations are to be regarded as such for the purposes of this section.

South Australian Water Corporation Act 1994 (SA)(No equivalent provisions)

TAS

s.7 *Government Business Enterprises Act 1995* (Tas) (*Principal objectives of Government Business Enterprises*)

(1) The principal objectives of a Government Business Enterprise are –

   (a) to perform its functions and exercise its powers so as to be a successful business by –

      (i) operating in accordance with sound commercial practice and as efficiently as possible; and

      (ii) achieving a sustainable commercial rate of return that maximises value for the State in accordance with its corporate plan and having regard to the economic and social objectives of the State; and

   (b) to perform on behalf of the State its community service obligations in an efficient and effective manner; and

   (c) to perform any other objectives specified in the Portfolio Act.

(2) On the request of the Portfolio Minister, the Treasurer may, by notice published in the Gazette, specify the economic and social objectives of the State relevant to the Government Business Enterprise specified in the notice.

(3) On the request of the Portfolio Minister, the Treasurer may, by order, exempt the Government Business Enterprise specified in the order from the application of subsection (1)(a)(ii).

(4) The provisions of section 47 (3), (3A), (4), (5), (6) and (7) of the *Acts Interpretation Act 1931* apply to an order under subsection (3) as if the order were regulations within the meaning of that Act.

s.6 *Water And Sewerage Corporation Act 2012*(Tas) (*Principal objectives of Corporation*)

(1) The principal objectives of the Corporation are as follows:

   (a) to efficiently provide water and sewerage functions in Tasmania;

   (b) to encourage water conservation, the demand management of water and the re-use of water on an economic and commercial basis;

   (c) to be a successful business and, to this end –

(i) to operate its activities in accordance with good commercial practice; and
(ii) to deliver sustainable returns to its members; and
(iii) to deliver water and sewerage services to customers in the most cost-efficient manner.

(2) Each of the principal objectives of the Corporation is of equal importance.

VIC

ss.18, 93 *State Owned Enterprises Act 1992* (Vic) (*Objective (state business corporations/ state owned company*)

The principal objective of each State business corporation / state owned company is to perform its functions for the public benefit by-

(a) operating its business or pursuing its undertaking as efficiently as possible consistent with prudent commercial practice; and
(b) maximising its contribution to the economy and well being of the State.

s 93 *Water Act 1989* (Vic) (*Sustainable management principles for water corporations*)

Each water corporation, in performing its functions, exercising its powers and carrying out its duties must have regard to the following principles-

(a) the need to ensure that water resources are conserved and properly managed for sustainable use and for the benefit of present and future generations; and
(b) the need to encourage and facilitate community involvement in the making and implementation of arrangements relating to the use, conservation and management of water resources; and
(c) the need to integrate both long term and short term economic, environmental, social and equitable considerations; and
(d) the need for the conservation of biological diversity and ecological integrity to be a fundamental consideration; and
(e) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty as to measures to address the threat should not be used as a reason for postponing such measures

s 94 *Water Act 1989* (Vic) (*Business objective for water corporations*)

Each water corporation, in performing its functions, exercising its powers and carrying out its duties has the objective that the water corporation must act as efficiently as possible consistent with commercial practice.

WA

Water Corporation Act 1995 (WA)(*No equivalent provisions*)

No other applicable legislation.

Appendix E: Regulatory framework for the provision of water and sewerage services in the ACT

The regulatory framework within which ACTEW operates, and within which water, sewerage, and energy services are provided in the Territory, encompass an extensive number of legislative and other instruments which include, but are not limited to:

- the ***ACTEW/AGL Partnership Facilitation Act 2000*** **(ACT)**, which facilitated the establishment of the ActewAGL partnerships for the provision of gas and electricity;
- the ***Annual Reports (Government Agencies) Act 2004*** **(ACT),** which provides for the making of annual reports by directors-general, public authorities and the commissioner for public administration;
- the ***Auditor-General Act 1996*** **(ACT)**, which provides the ACT Auditor-General with powers to conduct performance audits of ACTEW at any time;
- the ***Competition and Consumer Act 2010*** **(Cth)**, which imposes obligations on ACTEW in relation to business, trade practices and consumer rights matters;
- the ***Corporations Act 2001*** **(Cth)**, which regulates ACTEW's financial reporting and governance, and imposes corporate related obligations on ACTEW;
- the ***Dams Safety Act 1978*** **(NSW)**, which establishes the Dams Safety Committee and confers upon the Dams Safety Committee certain functions relating to the safety of specific dams in NSW, including those for which ACTEW is responsible such as the Googong Dam;
- the ***Dangerous Substances Act 2004*** **(ACT)**, which regulates ACTEW's activities in relation to dangerous substances, like asbestos (see also *Dangerous Substances (General) Regulation 2004* (ACT));
- the ***Discrimination Act 1991*** **(ACT)**, which makes it unlawful for a person to discriminate against another on prohibited grounds (such as sex, sexuality, relationship or parental status, pregnancy, race, disability, age, industrial activity and spent criminal convictions) in certain areas of activity (such as in work, the provision of goods and services, and in access to premises) (see also *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth*)*);
- the ***Electricity (National Scheme) Act 1997*** **(ACT),** which makes provision for the operation of a national electricity market with respect to the ACT;
- the ***Electricity Feed-in (Large-scale Renewable Energy Generation) Act 2011*** **(ACT)**, which is designed to promote large-scale generation of electricity from renewable energy sources;
- the ***Electricity Feed-in (Renewable Energy Premium) Act 2008*** **(ACT)**, which regulates the supply of electricity from solar and other renewable energy sources to electricity distributors;
- the ***Electricity Safety Act 1971 (ACT)***, and the ***Gas Safety Act 2000*** **(ACT)***,* which respectively provide for the safe use of electricity and gas (see also *Electricity Safety Regulation 2004* (ACT); *Gas Safety Regulation 2001* (ACT));
- the ***Environment Protection and Biodiversity Conservation Act 1999*** **(Cth)**, which aims to protect the environment and conserve biodiversity;
- the ***Environment Protection Act 1997*** **(ACT)**, which provides, amongst other things, for the regulation of water quality, and for ACTEW to take practicable and reasonable

steps to prevent or minimise environmental harm and nuisance caused by an activity of ACTEW (see also *Environment Protection Regulation 2005* (ACT));

- the ***Fair Trading (Australian Consumer Law) 1992* (ACT)**, which generally regulates with respect to fair trading and consumer protection, and specifically applies the Australian Consumer Law set out in Sch 2 of the *Competition and Consumer Act 2010* (Cth) to the ACT.
- the ***Fair Work Act 2009* (Cth)**, which provides for the regulation of industrial relation including establishing a scheme for the negotiation and approval of enterprise agreements, and various institutions such as the Fair Work Commission and the Fair Work Ombudsman;
- the ***Financial Management Act 1996* (ACT)**, which provides, inter alia, for the financial management of the government of the Territory, to provide for the scrutiny of that management by the Legislative Assembly, to specify financial reporting requirements for the government of the Territory;
- the ***Freedom of Information Act 1989* (ACT)**, which gives members of the public rights of access to ACTEW documents (other than those relating to ACTEW's competitive commercial activities), subject to certain exemptions (see also *Freedom of Information Regulation 1991* (ACT));
- the ***Gas Safety Act 2000* (ACT)**, which provides for the safety in relation to the use of gas in the ACT;
- the ***Human Rights Act 2004* (ACT)**, which provides for the protection and promotion of human rights;
- the ***Independent Competition and Regulatory Commission Act 1997* (ACT)**, which establishes an an independent commission to regulate pricing, access and other matters in relation to industries involving the provision of water, electricity and sewerage services, and other industries, and to investigate competitive neutrality complaints and government-regulated activities;
- the ***Lands Acquisition Act 1994* (ACT)**, which provides for the acquisition of interests in land by the Executive and certain authorities and for dealings with land so acquired;
- the ***National Energy Retail Law Act 2012* (ACT)**, which among other things establishes the ACT's participation in a national energy customer framework for the regulation of the retail supply of energy to customers and makes provision for the relationship between the distributors of energy and the consumers of energy (see also *National Energy Retail Law* (ACT) *Regulation 2012*);
- the ***National Gas Act 2008* (ACT)**, which amongst other things establishes the ACT's participation in a framework that enables third parties to gain access to certain natural gas pipeline services;
- the ***Nature Conservation Act 1980* (ACT)**, which makes provision for the protection and conservation of native animals and native plants, and for the reservation of areas for those purposes;
- the ***Ombudsman Act 1989* (ACT)**, which establishes the office of the ACT Ombudsman, and provides the Ombudsman power to investigate complaints made against ACTEW;
- the ***Planning and Development Act 2007* (ACT)**, which provides for a planning and land system that contributes to the orderly and sustainable development of the ACT. This includes water related regulation, for example with respect to water-sensitive urban design;

- the ***Privacy Act 1988* (Cth)**, which regulates the handling of personal information by ACTEW and establishes the Information Privacy Principles with which ACTEW must comply;
- the ***Public Health Act 1997* (ACT)**, which provides, inter alia, for public health requirements with respect to the supply of drinking water and processing of sewage;
- the ***Public Interest Disclosure Act 2012* (ACT)**, which is designed to enable people to raise concerns about significant wrongdoings in the public sector without fear of reprisal;
- the ***Taxation (Government Business Enterprises) Act 2003* (ACT)**, which gives effect to the National Tax Equivalent regime in the ACT with respect to ACTEW Corporation Ltd, ACTEW Distribution Ltd and ACTEW Retail Ltd (see also *Taxation (Government Business Enterprises) Regulations 2003* (ACT));
- the ***Territory-owned Corporations Act 1990* (ACT)**, which imposes certain additional reporting and corporate governance requirements on ACTEW, its directors and its voting shareholders;
- the ***Territory Records Act 2002* (ACT)**, which applies to ACTEW as a Territory-owned corporation, and which imposes on ACTEW obligations in relation to record creation, keeping, protection, preservation, storage and disposal or and access to its records (see also *Territory Records Regulation 2009* (ACT));
- the ***Tree Protection Act 2005* (ACT)**, whose objects include protecting individual trees in the urban area that have exceptional qualities because of their natural and cultural heritage values or their contribution to the urban landscape and ensuring trees of value are protected during periods of construction;
- the ***Utilities Act 2000* (ACT)**, which regulates the provision of certain gas, electricity, water and sewerage utility services in the Territory (see also various regulatory instruments);
- the ***Utilities (Network Facilities Tax) Act 2006* (ACT)**, which provides for the imposition of a tax on owners of utility network facilities;
- the ***Water Act 2007* (Cth)**, which makes provision for the management of the water resources of the Murray-Darling Basin, and for other matters of national interest in relation to water and water information;
- the ***Water and Sewerage Act 2000* (ACT)**, which regulates the supply of plumbing and drainage services (see also *Water and Sewerage Regulation 2001* (ACT));
- the ***Water Resources Act 2007* (ACT)**, which provides for the sustainable management of the water resources of the Territory. Matters covered include water access rights, water sharing, environmental flow provisions, water licensing requirements, resource management and monitoring responsibilities, and penalties for improper actions (see also *Water Resources Regulation 2007; Water Resources Environmental Flow Guidelines 2013*;
- the ***Work Health and Safety Act 2011* (ACT)** and the ***Work Health and Safety Act 2011* (NSW)**, which impose obligations on ACTEW, its decision makers and others with a view to ensuring, as far as reasonably practicable, the health and safety of workers and other persons at the workplace;
- the ***Workplace Privacy Act 2010* (ACT)**, which regulates the surveillance of workers within and outside the workplace.

Appendix F: Consultations and Submissions

Consultations

Organisation	Name	Position[1]
ACT Government	Andrew Barr MLA	Treasurer/Voting Shareholder/Portfolio Minister
ACTEW Board		
	Michael Easson	Acting Chair
	Wendy Caird	Acting Deputy Chair
	Mark Sullivan	Managing Director
	Allan Hawke	Director
	Jenny Goddard	Director
	Carole Lilley	Director
	Rachel Peck	Director
ACTEW Staff		
	Mark Sullivan	Managing Director
	Ian Carmody	Deputy Chief Executive Officer
	Chris Webb	Acting Deputy Chief Executive Officer
	Michele Norris	Company Secretary/Group Manager Governance
	Simon Wallace	Chief Financial Officer
	Liam Shepherd	Senior Manager Energy Business
	Amanda Lewry	Group Manager Water
	Simon Webber	Tour Lower Molongolo Waste Treatment Works
	Duncan Edgehill	Group Manager Business Development
	Kirilly Dickson	Group Manager Environment, Quality & Regulatory
ActewAGL	Michael Costello	Chief Executive Officer
AGL Energy	Paul Frazer	Head Group Business Development
Jemena	Paul Adams	Managing Director

[1] The positions noted below were current at the time the interviews took place. Some may have changed since then.

ACT Government Agencies

Chief Minister and Treasury Directorate

Andrew Cappie-Wood	Director-General/Head of Service
Karen Doran	Executive Director Investment and Economic Division
Brett Wilesmith	Senior Manager Economic Branch
Pat McAuliffe	Director Investment Branch
Floyd Kennedy	Director Infrastructure and Budget Management Branch, Finance and Budget Division

Community Services Directorate

Meredith Whitten	Executive Director Policy and Coordination

Commerce and Works Directorate

Megan Smithies	Director-General
Tony Hays	Senior Manager Government Business Enterprises

Economic and Development Directorate

Dan Stewart	Deputy Director-General
Hamish McNulty	Executive Director-Infrastructure and Works
Chris Reynolds	Executive Director Land Development Agency

Environment and Sustainability Development Directorate

Dorte Ekelund	Director-General
Stewart Chapman	Senior Manager Water Policy
Craig Simmons	Director Regulation and Services Division

Environment Protection Authority

David Power	Manager Environment Protection
Heath Chester	Manager Water Regulation

Health Directorate

John Woollard	Director Health Protection Service

Justice and Community Safety Directorate

Peter Garrisson	Solicitor General for the ACT

Territory and Municipal Services Directorate

	Gary Byles	Director-General
	Ken Marshall	Senior Manager Roads Maintenance
	Fluer Flannery	Director Parks and City Services

ACT Auditor-General's Office

	Maxine Cooper	Auditor-General

Office of the Commissioner for Environment and Sustainability

	Robert Neil	Commissioner

Human Rights Commission

	Helen Watchirs	Commissioner

Independent Competition and Regulatory Commission

	Malcolm R Gray	Senior Commissioner
	Mike Buckley	Commissioner
	Ranjini Nayager	Chief Executive Officer

National Capital Authority

	Andrew Smith	Acting Chief Executive

Queanbeyan City Council

	Gary Chapman	Chief Executive Officer
Roger Broughton	Managing Director, Ironbridge Consulting Services	
Ross Knee	Management Consultant	
Steve Thomas		

Submissions[2]

ACTEW Corporation Limited

Human Rights and Discrimination Commission

Independent Competition and Regulatory Commission

Mr Roger Broughton, Ironbridge Consulting Services

Mr Steve Thomas

2 Not including any confidential submissions received.

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