



ICRC

independent competition and regulatory commission

THE INDEPENDENT COMPETITION AND REGULATORY COMMISSION SUBMISSION TO THE REVIEW OF INSTITUTIONAL ARRANGEMENTS FOR ACTEW CORPORATION LTD

1 OVERVIEW

The Independent Competition and Regulatory Commission (Commission) has recently considered some of the issues covered by the Review of Institutional Arrangements for ACTEW Corporation Ltd (ACTEW) (the Review) in conducting its own inquiries into secondary water use in the Territory and the provision of water and sewerage services in the Territory. In addition, the Commission periodically issues a price direction for the regulated retail tariff that ActewAGL is bound to offer as part of its standard customer contract.¹ This submission derives from the experiences of the Commission in discharging those regulatory functions.

In the first two inquiries noted above, the Commission's principal interest was in ACTEW's role as the provider of water and sewerage services. In the review into secondary water use, the Commission's principal interest in ACTEW was as the provider of the primary water, the principal alternative to secondary water.² In the review of the provision of water and sewerage services, ACTEW was the primary focus of attention, being the provider of these services. In providing a price direction for regulated electricity retail prices, the primary focus is on ActewAGL as the service provider and only incidentally on ACTEW as the indirect owner of a 50% interest in ActewAGL as described below.

In considering the role or potential role of secondary water use, the Commission was inevitably led to consider the wider question of the management of the Territory's water resources. One of the major findings to emerge from this review was that, although there is a substantial and diverse array of policies concerned with the management of water resources in the Territory, these are largely formulated and executed in isolation from each other and lack a well defined overall framework of objectives against which their individual and collective performance can be judged.

The consequence for ACTEW as provider of water services was that its own role was not clearly defined. The lack of an integrated and adaptive framework of water resources management means

¹ This tariff is sometimes referred to as the franchise tariff and customers electing to use it as franchise customers. ActewAGL and other electricity retailers operating in the Territory offer a range of other tariffs, sometimes referred to as negotiated tariffs.

² Definitions for primary and secondary water are given in the Commission's report on secondary water use. In the Territory, ACTEW have a monopoly in the provision of primary water.

that it is difficult to identify the role ACTEW should be playing, to assign appropriate objectives and to hold it accountable for performance against those objectives.³

The Commission was required to review ACTEW's role as provider of water and sewerage services to the community in order to make a price direction to govern the charges ACTEW may levy for the provision of those services. This responsibility is given to the Commission as part of its role of ensuring that market power is not exercised to the detriment of the community. ACTEW as the monopoly provider of the services under review would, in the absence of regulation, enjoy substantial market power.

The Commission notes that regulatory arrangements and structures are included in the terms of reference. Two points are worthy of note. As the analysis in the secondary water report made clear, it is highly likely that ACTEW will remain the monopoly supplier of primary water for the foreseeable future and will, therefore, require some form of regulation to curb the market power that it would otherwise wield. In its final price direction on water and sewerage services, the Commission has made major changes to the form of regulation and to arrangements for undertaking that regulation. These were changes aimed at achieving better performance from the regulatory arrangements and structures in terms of benefit delivered to the ACT community.

It became clear to the Commission early in the review of water and sewerage services that the sole ownership of the water and sewerage services portion of ACTEW by the ACT community made the making of a price direction for these services a particularly challenging task. This challenging task had two aspects: public versus private ownership and most of ACTEW's customers also being its owners and vice versa.

The Commission's role in the retail electricity market in the Territory, derives from concerns that arose at the time the Territory was in the final stages of introducing full retail competition to the electricity market. At that time, ActewAGL was the incumbent retailer and held a dominant position in the market. The concern was that it would take some time for competing electricity retailers to establish themselves in the ACT market and that, during this period, ActewAGL would enjoy a high degree of market power. To prevent this situation having adverse consequences for the ACT community, the Commission was asked to provide a price direction that established a default tariff for smaller customers, the so-called franchise tariff. At the time it was introduced, it was believed that it would only be necessary to maintain the franchise tariff for a limited period after which the entry of new, competing electricity retailers might be relied upon to reduce ActewAGL's market power. ActewAGL has, however, remained the dominant retailer and the ACT Government has chosen to retain the franchise tariff.

³ In its secondary water report the Commission recommended the development of an integrated and adaptive framework for the management of the Territory's water resources, integrated to bring the divisive range of policies deployed under a single umbrella and adaptive to respond to the changes impacted the delivery of water services to the community of the Territory.

2 ACTEW'S FUNCTIONS AND OBJECTIVES

In order to address any of the terms of reference for the Review or issues identified in the Issues Paper, it is essential to have a clear view of the purposes and objectives of ACTEW. ACTEW came into being as a result of the corporatisation of the ACT Electricity and Water Authority (ACTEWA) in 1995.⁴ ACTEWA was the vehicle through which the utility infrastructure owned by the Territory was held.⁵ These assets had passed to the Territory from the Commonwealth when the Territory became self governing and were subsequently enhanced by investments made by the Territory. These assets included all those involved in the provision of water and sewerage services to the Territory, assets involved in the distribution of electricity and gas in the Territory, and assets involved in retailing gas and electricity in the Territory.

2.1 FUNCTION AND STRUCTURE

In the years following corporatisation, ACTEW has been impacted by changes in the national regulation of energy markets and has entered into various partnership arrangements with other, privately-owned utilities. As a consequence, ACTEW now operates in five separate business areas:

- Provision of water and sewerage services
- Distribution of electricity
- Distribution of gas
- Retailing of electricity
- Retailing of gas.

The water and sewerage business is entirely owned and controlled by ACTEW. The distribution businesses are operated in a fifty-fifty partnership with Jemena known as ActewAGL Distribution.⁶ The retail businesses are operated in a fifty-fifty partnership with AGL Energy Limited known as ActewAGL Retail.⁷ These two partnerships conduct their operations through a fifty-fifty joint venture known as ActewAGL. By virtue of these arrangements the Territory has a 50% interest in ActewAGL.

⁴ References to events in ACTEW's history are based on the chronology provided in www.archives.act.gov.au/data/assets/file/0008/208844/ACTEW.rtf

⁵ ACTEWA was established by the Commonwealth as a statutory corporation through the Australian Capital Territory Electricity and Water Ordinance 1988 just prior to the granting of self government in December 1988.

⁶ Jemena is the brand used by SPI (Australia) Assets Pty Ltd (SPIAA) for its operations within Australia. SPIAA is a wholly owned subsidiary of Singapore Power International Pte Ltd and a member of the Singapore Power Limited Group. Ultimate ownership of the Group is vested in Temasek Holdings, an investment company owned by the Government of Singapore.

⁷ AGL Energy Limited is an Australian listed company.

In addition to the carrying on the distribution and retail businesses listed above, ActewAGL provides services, for example water meter reading and billing, to ACTEW under contract.⁸

As a consequence of these arrangements, ACTEW has two distinct functions. It is the sole owner and operator of the business providing water and sewerage services in the Territory and it is the vehicle through which the Territory owns its 50% interest in the four businesses operated within the ActewAGL joint venture. These are quite different sorts of functions carried out in quite different ownership and commercial environments and it is natural to ask whether combining these functions within a single corporate entity is the best institutional arrangement.

The water and sewerage services business is wholly publicly owned, a monopoly provider of an essential service, subject to regulation by the Commission, and run by staff directly employed by ACTEW. ActewAGL businesses are fifty-fifty public-private partnerships. ActewAGL's retail businesses face competition, albeit it to a somewhat restricted extent in electricity giving rise to regulation by the Commission.⁹ The distribution businesses are monopoly providers of essential services and subject to a national scheme of regulation operated by the Australian Energy Regulator. The businesses are operated by staff employed by ActewAGL. ACTEW is an Australian company subject to the *Corporations Act*. ActewAGL is a registered business name for an unincorporated joint venture governed by a joint venture agreement and not subject to the *Corporations Act*.

For the water and sewerage business, ACTEW is the operating entity. For the ActewAGL operated businesses, ACTEW's role is essentially that of an investment manager. It is difficult to see how ACTEW's expertise in managing a water and sewerage services utility contributes much of value to the management of the joint venture businesses.

On the distribution side of ActewAGL, the Territory's partner is Jemena, which manages more than \$5 billion worth of Australian utilities assets and specialises in both transmission and distribution of electricity and gas.¹⁰ Jemena's parent, the Singapore Power Group, is a leading energy utility company in the Asia Pacific with assets of S\$30.7 billion (\$26 billion) at end March 2010. It is one of the largest corporations in Singapore, owning and operating electricity and gas transmission and distribution businesses.¹¹ On the retail side, the Territory's partner is AGL Energy, which operates retail, merchant energy and upstream gas businesses and has over 3.5 million customer accounts. AGL is also one of Australia's leading renewable energy companies and is Australia's largest private

⁸ From 2000 until 30 June 2012, ACTEW contracted out the operation of the water and sewerage business to ActewAGL.

⁹ The gas retail market in the ACT is not regulated, but the Commission retains a monitoring role.

¹⁰ Jemena website, <http://jemena.com.au/about/>, accessed 16 September 2013.

¹¹ Singapore Power website, <http://www.singaporepower.com.sg/>, accessed 16 September 2013.

owner, operator and developer of renewable generation assets.¹² At 30 June 2013, AGL's total assets stood at \$13.4 billion.¹³

As previously mentioned and discussed further below, the regulation of a monopoly provider of an essential service that is owned by the community to which it provides the service confronts particular difficulties. These difficulties are compounded when the same entity is also involved in partnership and joint venture arrangements with privately owned entities, particularly when the joint venture entity is supplying services to the publicly-owned business. Under its joint venture agreement, the Umbrella Agreement, ActewAGL has a board of directors. The obligations of members of the board are set out in the Umbrella Agreement and members must perform their duties in good faith and in the best interests of the partnerships as a whole. Three members of the board are appointed by the ACTEW-owned partners and it appears from previous board composition that the practice is for membership to be drawn from the board of ACTEW.¹⁴ When ACTEW contracts services from ActewAGL, it is difficult to see how those who sit on both boards can be expected to simultaneously discharge their responsibilities under the Corporations Act as members of the ACTEW board and under the Umbrella Agreement as members of the ActewAGL board.

It is clear from casual observation of commentary and exchanges in the media that there is substantial confusion in the public mind in the ACT about the roles and functions of ACTEW and ActewAGL. It was clear from the public consultation conducted by the Commission during the water and sewerage services inquiry that the confusion around the roles and functions of ACTEW and ACTEWAGL has served to undermine public confidence in the governance of the publicly owned entities involved.¹⁵

For all these reasons and to achieve greater clarity and transparency in the management of community-owned assets valued at \$2.7 billion at 30 June 2012, the Commission recommended that the water and sewerage business of ACTEW be separated from the businesses falling under the Umbrella Agreement.¹⁶

The Commission notes that the terms of reference for the Review require that, if changes to the structure of ACTEW are contemplated by the Review, recommendations on the most appropriate entity to hold the Territory's interest in the joint venture be made. In considering this question, the point made above, that holding the Territory's interest in the joint venture is essentially an

¹² AGL website, <http://www.agl.com.au/about-agl/who-we-are/our-company>, accessed 16 September 2013.

¹³ AGL Financial Report, ASX Release 28 August 2013.

¹⁴ As at 16 September 2013, these were Michael Easson, Mark Sullivan and Wendy Caird: ActewAGL website, <http://www.actewagl.com.au/About-us/Who-is-ActewAGL/Our-joint-venture-board.aspx>.

¹⁵ For evidence of this, consult the transcripts of the consultation and public hearings held on the draft report into water and sewerage services available on the Commission's website.

¹⁶ ACTEW Corporation, Annual Report 2012. For the Commission recommendation, see the Commission's draft and final reports on water and sewerage services.

investment management function rather than an operational management one, should be borne in mind. Given that the enterprises in question are partnerships with privately-owned entities, it would also align the interests of all the parties if those charged with safeguarding the Territory's interests were given an explicit mandate to pursue profit maximisation. Give that the markets in which these enterprises operate are either competitive or regulated, this would also be in the communities best interests. It is not clear that a company structure is required to hold these interests. A statutory corporation with a small secretariat and three officers whose chief function is to occupy those positions on the board of the joint venture reserved for representatives of the Territory might suffice.¹⁷

Since one of the objectives of separation of ACTEW's water and sewerage services business from its distribution and retailing businesses is to achieve clarity about function and relationship, it would be highly desirable to change the name of ActewAGL to remove all reference to ACTEW. With separation ACTEW would no longer have any interest in electricity and, therefore, might become ACT Water.

2.2 ACTEW'S OBJECTIVES

Whilst ACTEW's current objectives are set in several legislative and constituting documents, the definition of ACTEW's objectives must be based largely on the role it is expected to play in achieving the objectives of the water policy adopted by the Territory. Developing that policy is therefore an essential step in achieving better performance from ACTEW in its most demanding role of providing water and sewerage services to the Territory. The Commission's views on the development of water policy in the Territory were developed at length in its report on secondary water use and summarised in its draft report on water and sewerage services. The following paragraphs drawn from the latter report succinctly express the Commission's views.

Issues relating to water policy were given extensive discussion in the Commission's report on secondary water use. In that report the Commission recommended that the Territory establish an integrated and adaptive system for the management of its water resources. Water policy has many aspects, in some of which ACTEW is closely involved and in others of which its involvement is at best marginal. The aim of integrated management is that all aspects of water policy, ranging from building dams through to water-sensitive urban design, be set within a common framework with activity in each particular area having regard to what is happening in all others and informed by an overarching statement of the objectives of policy. Only within such a framework can the role of ACTEW be properly defined and objectives for the organisation be set.

¹⁷ The Commission notes that the terms of the reference for the Review preclude the reviewing of the structure of the ActewAGL joint venture itself. It is difficult to see how properly based advice about the best kind of entity to hold the Territory's interest in the joint venture can be given without considering its structure. The Commission notes that very considerable changes in the private sector partners within the entity and in energy markets in Australia have occurred since the Umbrella Agreement was signed in 2000.

The absence of such a framework has created a range of difficulties which are discussed in the secondary water use report. The Commission highlighted in that report that a major problem has been a lack of clear definition of what was expected of ACTEW. For example, water security began to emerge as a critical issue for the Territory early in this century. The initial response of government was to concentrate attention on water conservation measures as the principal policy response. ACTEW, as the supplier of primary water to the Territory, began work on the responses it might be able to provide. This work was unconnected to the main thrust of water policy at the time and had to be done without benefit of a clear specification of the level of water security that the Territory was aiming to achieve. As the situation became more acute through the middle of the decade, attention shifted rapidly from conservation to supply augmentation measures and the work that ACTEW had done came to occupy centre stage.

The negative consequences of this disorderly process are documented elsewhere in this report. For present purposes it is most important to note that to lay all the blame for these consequences at ACTEW's door would be to do the entity a grave injustice. If we are to avoid such outcomes in the future and get the best out of ACTEW, we need to provide it with a much clearer specification of its role and objectives.

While ACTEW is the keystone of the Territory's water resource management strategy, its governance mechanisms focus overwhelmingly on its significance as a source of revenue to the Territory. This, understandably, leads the board and senior management of ACTEW to adopt the same focus. A better balance needs to be struck.

3 ACTEW'S LEGAL FORM AND GOVERNANCE

By virtue of inheriting assets from the Commonwealth at the commencement of self government and through subsequent investments since, the ACT community has become the collective owner of a group of utility assets. For the purposes of this submission, it is presumed that the ACT community wishes to maintain this ownership. There is a range of structures through which this collective ownership could be realised. For any form of ownership there will need to be an associated governance regime to ensure that the objectives of the ACT in retaining the ownership of these assets are achieved. For the energy related assets in distribution and retailing, possibilities were briefly discussed in 2.1. As noted earlier, further reflection on this matter would quickly go beyond the terms of reference for the Review. This section is, therefore, restricted to discussion of the water and sewerage services businesses of ACTEW.

3.1 LEGAL FORMS

The Government of the Territory could elect to own its water and sewerage services assets directly and manage them through the administrative structures of government, typically through a directorate. This is the way, for example, that the health infrastructure of the Canberra Hospital is owned and managed. Proceeding in this way embeds the provision of services from the assets within government itself and makes the Minister to whom the directorate is responsible directly

accountability for that provision of the service. This has advantages and disadvantages depending on the nature of the services being provided and the expectations of the community. Interestingly, the Health Directorate uses an alternative model for the provision of services from Canberra's other public hospital, Calvary. The facility is owned by Calvary Health Care Act Limited and operated by Little Company Of Mary Health Care Limited, both of which are Australian companies limited by guarantee. Public hospital services are provided to the ACT community from this facility under a contractual agreement with the Health Directorate.

The other possibility is to create an incorporated entity that the Territory either owns or controls and vest ownership of the assets in that entity. Incorporation can be achieved either by Territory statute or by use of the Commonwealth *Corporations Act*. Incorporation under Territory statute would make the Territory solely responsible for providing the legal context in which the entity would operate. Incorporation under the *Corporations Act* would make the entity subject to the extensive framework of corporations law embodied in that Act. The former option was employed, for example, in the creation of the Sydney Water Corporation, Australia's largest water utility, which is constituted by the *Sydney Water Act 1994* and governed by the *State Owned Corporations Act 1989*.¹⁸ As noted earlier, ACTEW Corporation Limited was registered with ASIC in 1995.

Although there are alternate forms of incorporation, incorporation under the *Corporations Act* does not preclude such a corporation also being subject to Territory law.¹⁹ ACTEW is subject to the *Territory-owned Corporations Act (TOC)*. This Act applies to those companies that are listed in Schedule 1 to the TOC Act. At the time of writing, there are only two: ACTEW and ACTTAB Limited. Simultaneous application of the Commonwealth *Corporations Act* and State or Territory law need not, of itself, give rise to difficulties. Indeed the Part 1.1A of the *Corporations Act* contains provisions relating to the interaction of the Act with State and Territory law. Difficulties can arise, however, if applicable State or Territory law is not broadly consistent with the corporations law framework embodied in the *Corporations Act* and the principles upon which it is grounded.

The broad objective of the *Corporations Act* is to construct a framework of law that allows the creation of entities, companies or corporations, that can pursue the objectives of a group of individuals, the shareholders, through the agency of a, usually smaller, group of persons, the board of directors. In order to do this the *Corporations Act* gives the company certain powers, for example to own property and enter into contracts. The relationship between the shareholders and the board is, in economic terms, an instance of a principal-agent relationship. One that is subject to the major difficulty of such relationships, information asymmetry, in which the board naturally knows far more about how its decisions will affect the shareholders of the company than the shareholders do. Much of corporations law is concerned with dealing with this problem and safeguarding the shareholders

¹⁸ This form of incorporation is used for some 16 state-owned entities in NSW, including the Hunter Water Corporation and some seven electricity utilities.

¹⁹ In NSW, the *State Owned Corporations Act* applies to both entities incorporated under state statute and the *Corporations Act*, although separate provisions apply to each.

interests while allowing the directors freedom of action consonant with the responsibilities that they carry.

The body of corporations law employs two principal methods to deal with information asymmetry. The first is transparency whereby the directors are obliged to give timely and reliable information to the shareholders about their decisions and the impact on the company. The second is the clear specification of the responsibilities and accountabilities of directors. These two elements are fundamental to corporations law. If their effectiveness is compromised, the capacity of the corporations law to provide a robust and reliable framework for the sound operation of a company will be called into question. In its draft report on water and sewerage services, the Commission identified a number of instances where provisions of the TOC Act may interfere with the elements of corporations law.

An example is provided by the provisions of the TOC Act governing the audit of TOCs. Under section 324BA of the *Corporations Act* an audit of a company can only be carried out by a registered company auditor. In order to be registered an auditor must demonstrate that they have relevant qualifications and experience. The purpose of this provision is clear, to ensure that the information provided by the financial statements of the company is reliable. Those relying on these statements are thereby assured not only that the statements have been audited, but audited by a person that has met the requirements for registration under the *Corporations Act*.

Under section 18(3) of the TOC Act

“A territory-owned corporation or a subsidiary, or the directors of such a corporation or of a subsidiary, must not appoint a person other than the auditor-general as auditor of the company.”

While under section 13(1) of the *Auditor General Act*, “[t]he auditor-general must accept appointment under the *Corporations Act* as the auditor of a public sector company”.

The joint effect of these two provisions is that only the Auditor General may audit ACTEW and that the Auditor General must do so. The *Auditor General Act* does not, however, specify that the person appointed to the office should have any particular skills or experience.²⁰ Thus it is possible that a person lacking the skills and experience identified as necessary in the *Corporations Act* would audit ACTEW, a company registered under the *Corporations Act*. While the relevant sections of Part 1.1A may prevent the directors of ACTEW and the Auditor General of the Territory from committing an offence under the *Corporations Act* in following these provisions of territory law, a key objective of the corporations law that the information provided by the financial statements of the company is reliable may be compromised. It cannot be assumed that, because they are both subject to

²⁰ Contrast this with the ICRC Act which specifies that “The Executive may only appoint as commissioner a person who has knowledge or experience in 1 or more of the following fields: (a) commerce; (b) economics; (c) industry; (d) law; (e) public administration.”

corporations law, the financial statements of ACTEW are reliable as in those of, say, AGL Energy Ltd.²¹

3.2 GOVERNANCE

Good governance of ACTEW requires that a number of elements be assembled. First the legal form chosen must be clear and support the other elements. Second the functions and objectives of ACTEW must be clearly stated and incorporated into the governance regime of the entity in an appropriate way. For a company, this would be through the constitution and statement of intent. Finally effective mechanisms must exist for those charged with the management of the entity, the directors for a company, to be held accountable for the performance of the entity against its objectives.

While the corporations law is particularly well suited to provide the legal form, being specifically designed to do so, other structures such as statutory incorporation within an appropriate legal framework may also be capable of doing so. The legal form chosen should be suited to the environment in which it must operate and be capable of effective operation within that environment. The legal form should be clear about the responsibilities of those operating within it, avoiding ambiguity. Where the legal form is derived from statutes in a number of jurisdictions, the schemas embodied in the various pieces of legislation should be consistent and mutually reinforcing. The legal form should provide a framework in which the other elements of governance can operate effectively.

Section 2.1 above has dealt with the way in which the functions and objectives of ACTEW should be identified. These should be embodied in the mechanisms provided for that purpose by the legal form chosen. The final and critical piece of the governance puzzle is the accountability mechanism. Unless those responsible for the management of the entity are held accountable for the performance of the entity, governance will have failed.

The governance of ACTEW confronts two further challenges that governance of an entity like, say, AGL Energy Ltd does not face. The first is that the two shareholders of ACTEW hold their shares in trust for the Territory. In effect the beneficial owners of ACTEW are the people of the Territory. It is the community of the Territory that ultimately enjoys the benefits from the expenditure of the profits ACTEW earns and that must shoulder the burden of any losses that ACTEW's operations may generate. This is, in effect, a second principal and agent problem between the community of the Territory and the shareholders of ACTEW. This second principal and agent problem overlays the first of the relationship between the shareholders of ACTEW and those responsible for its management, currently the board of the company. This layering of principal and agent problems heightens information asymmetries. The governance regime chosen by the shareholder must not only ensure that they can be effective in their role but also that they are seen by the community to be so.

²¹ Decisions of the auditor of ACTEW can have significant implications for the welfare of the community of the Territory. This is illustrated by the recent concern that the Commission's price direction for water and sewerage services could cause an impairment of ACTEW's assets, reducing its profits and the revenue paid to government, perhaps substantially.

The second challenge is that ACTEW is providing an essential service and is owned by the community from which its customers are drawn, the groups of owners and customers are largely the same. In most regulated, privately-owned entities the owners of the entity, its shareholders, would form a group largely disjoint from the group made up of the entity's customers. The substantial identity of ACTEW's owners and customers has two consequences. For the regulator it means that, for many in the ACT community who are both customers and owners of ACTEW, the Commissioner's regulatory decisions determine, not whether they are affected, but whether they are affected as owners or as customers. For the government it generates a potential conflict of interest because the government has responsibilities to protect the interests of both ACTEW's customers and its owners. 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

A graphic example of how these consequences can impact is provided by the recent problem of how to deal with the revenue shortfall that arose as a result of the imposition of stage three water restrictions through three of the five years of the last year regulatory period.²² Recovering the revenue in the current regulatory period would have meant higher prices for customers but lower taxes and/or more government services for owners. In setting prices, this leaves the Commission trying to balance the interests of the ACT community as ACTEW's customers against its interests as ACTEW's owners. The government faces a similar dilemma in determine the position that it should support, but complicated by the allocation of responsibility for setting prices to the Commission and balancing the ACT budget to the government.

4 CONCLUDING COMMENTS

In reviewing the options canvassed here, it should be remembered that the overriding requirement is that whatever arrangements are put in place should operate efficiently and effectively to ensure that ACTEW delivers against the priorities that have been established for it. This requires that the role that ACTEW is to play is clearly defined and that the governance and accountability mechanisms that are established are capable of ensuring that it plays that role well.

It is vital that the cart not be put before the horse. There is no point in establishing the most effective structure and governance regime for ACTEW if the objectives it is asked to pursue and the accountabilities it is held to have not been defined within a framework that ensures the delivery of maximum benefit to the community. Defining the role involves stating clearly what ACTEW is responsible for and what it is not responsible for. For items in the latter group, it is desirable that the entity that is responsible should be identified. In many cases this will be government. ACTEW's role cannot be properly delineated without considering the broader question of how the Territory's water resources should be managed. In chapter 8 of its final report on secondary water use, the

²² For an explanation of how this arose, see the Commission's draft report into water and sewerage services.

Commission outlined how integrated and adaptive management of the Territory's water resources could be achieved.²³

As noted in the Commission's final report on water and sewerage services, following corporatisation, little thought seems to have been given to how to make the relationship between ACTEW and its shareholders operate within the framework provided by corporations law. Bureaucratic arrangements seem to have focussed entirely on the budget implications of ACTEW's operations. For example, the Minister responsible for water policy in the government does not have a direct relationship to the board of the single most important entity in that area of his portfolio responsibility. It has become very clear that if the corporations law model is to work, more and appropriately and experienced qualified bureaucratic resources need to be assigned to the task of assisting Ministers to carry out the role of shareholder.

Whether or not this is feasible is a key issue that must be resolved before determining the legal form that ACTEW should take. Moreover, in considering alternatives to the corporations law model, workability must be a key consideration. 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. The corporations law offers a well tested, robust and flexible model capable of meeting this objective if properly implemented. The Commission considers that failure to achieve proper implementation to date does not justify abandoning the model now.

²³ It is noteworthy that both the recent Taskforce into Lake Water Quality and the review of *Think water, act water* identified the need for a more cohesive, coordinated approach to ACT water management on a catchment wide basis.