QUEENSLAND COMPETITION AUTHORITY BILL 1997

EXPLANATORY NOTES

Short Title

The short title of the Bill is the *Queensland Competition Authority Bill 1997*.

Policy Objectives of the Bill and the reasons for them

The policy objective of the Bill is to create an independent statutory body, the Queensland Competition Authority (QCA), to perform several functions associated with National Competition Policy. In particular, the QCA will:

- undertake prices oversight of monopoly or near monopoly Government business activities;
- act as a competitive neutrality complaints mechanism;
- regulate third party access to infrastructure.

(a) Prices oversight

The role of the QCA in respect of prices oversight is to monitor and report on the prices charged by monopoly or near monopoly government business activities.

In competitive markets, prices for goods or services are set by the market. Suppliers have little or no discretion over the prices they charge for goods or services. Moreover, in order to stay in business, suppliers must produce efficiently.

However, these constraints do not apply to the same extent for monopoly or near monopoly Government business enterprises (GBEs). This is because monopoly or near monopoly GBEs possess considerable discretion over the prices they charge for their outputs, since competitive pressures do not operate to constrain an entity's pricing activities. In addition, these entities are not subject to the same intense pressures to produce efficiently that drive organisations in competitive environments.

The absence of competition may arise from:

- a legislated monopoly, where legislation precludes competitive activity in relation to the supply of a good or service;
- a natural monopoly, where the least cost means of meeting market demand is through production by a single entity; and
- poorly contestable markets, where competition does not operate effectively in markets despite the absence of legislated or natural monopoly, or where there is a transition towards competition.

The increasingly commercial focus of GBEs, especially with corporatisation and commercialisation reform, intensifies incentives for those GBEs possessed of market power to maximise profit through charging excessive prices. This, in turn, exposes the State to a possible conflict of interest in performing any price regulation role since it, as owner, stands to gain from high prices.

It is intended to address this difficulty by establishing an independent body to perform, amongst other things, a role in investigating the prices charged by monopoly or near monopoly GBEs. The creation of this body will ensure that the State remains at arms length to GBEs in the price setting process.

(b) Competitive neutrality complaints mechanism

Government business activities - be they undertaken by government departments, government owned corporations or other statutory authorities—compete with private sector businesses in a variety of markets. Competition of this nature will increase as governments continue to implement reforms such as corporatisation and commercialisation.

However, private sector firms often find that they are not competing with government businesses on equal terms. For a start, a disparity may exist

because a government business is exempt from all or some taxation. Further, there may be no requirement to pay dividends to the owner of the business (the State) and/or the business may have access to cheaper sources of finance (courtesy of the State's higher credit rating and hence lower interest rate for borrowings). In addition, exemption from various regulatory requirements can also result in benefits to the government business.

"Competitive Neutrality" is the term that is used to identify and, where possible, remove these sorts of disparities so that government businesses are competing on equal terms with their competitors.

While competitive neutrality is desirable on equity grounds alone, it has even more significance when considered in the context of the efficient use of the economy's limited resources. That is, if government businesses operate along lines similar to the private sector, the same sorts of competitive incentives should follow. This provides a better basis for the various markets which make up the economy to function in a more productive manner.

Against this background, the Queensland Government has implemented a set of reforms aimed at ensuring that government businesses compete on terms which are as equal as possible to those which apply to the private sector.

Competitors of such government businesses must, however, be able to seek redress if they believe that they are competing at a disadvantage. Accordingly, the Bill provides for an independent mechanism which allows competitors of government businesses to lodge a complaint where they believe that the business enjoys a competitive advantage by virtue of its government ownership.

To remove some of the uncertainty for government businesses as to whether they comply with the principle of competitive neutrality, there is provision in the Bill for accreditation (for a defined period) of government businesses that operate on competitively neutral basis.

(c) Third party access

The underlying rationale of creating third party access rights to significant infrastructure is to ensure that competitive forces are not unduly stifled in

industries which rely upon a natural monopoly at some stage in the production process, especially where ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations.

A key aspect of the market system is that an infrastructure owner is entitled to choose with whom it will deal. The threat of competitors providing substitutes constrains a seller's ability to charge excessive prices or otherwise restrict supply. However, in cases where these substitutes do not exist, a seller possesses significant market power. A seller may exercise its market power to increase its profit by restricting output because doing so enables the seller to increase its price.

In cases of natural monopoly, one facility meets all of a market's demand more efficiently than a number of smaller and more specialised facilities. Accordingly, it is not socially desirable that the infrastructure comprising a natural monopoly be duplicated. At the same time, the absence of competition enables a natural monopoly infrastructure owner to extract excessive profits through exercising market power.

This is especially the case where the business which operates the natural monopoly also has a commercial interest in upstream or downstream markets (for example a rail operator who also owns the track). Such a business may discriminate against its upstream or downstream competitors by offering access on more favourable terms and conditions than is offered to competitors. In this way, an owner of a natural monopoly is able to stifle competition in upstream or downstream markets.

The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.

The Bill provides for a streamlined approach to access, and incorporates mechanisms to increase certainty for infrastructure owners and prospective users alike.

The way these policy objectives will be achieved by the Bill and why this way of achieving is reasonable and appropriate

(a) Prices oversight

To ensure rigorous independent scrutiny of GBE pricing practices, an ndependent body, the QCA, will be established. The QCA will provide independent scrutiny of prices charged by those government businesses with monopoly, or near monopoly, power.

The creation of the QCA is a reasonable and appropriate response to the problem of the pricing practices of monopoly or near monopoly GBEs. There is a potential conflict of interest for the Government in current arrangements whereby it, as owner of these enterprises, becomes directly involved in the price setting process. This conflict is particularly acute under corporatisation and commercialisation reforms since departments will have responsibility for performance monitoring and setting rates of return.

The best way to overcome this conflict is to establish an independent body such as the QCA to depoliticise the price setting process. This body will investigate the pricing practices of monopoly GBEs and publicly report the outcomes of its investigations. This establishment of the QCA is also consistent with developments in other jurisdictions.

(b) Competitive neutrality complaints mechanism

The complaints mechanism role will entail the QCA receiving complaints from competitors of the government's significant business activities; investigating those complaints; and reporting to the Ministers as to whether the complaints are substantiated. This report will also make recommendations, where appropriate, as to possible remedial action to overcome any lack of compliance with the principle of competitive neutrality. The Ministers will then decide, in consultation with the Minister responsible for the business activity in question, on what action to take in response to the report. This decision, and the reasons supporting it, will be publicly available. The QCA will not have powers to make determinations or to enforce its recommendations with respect to competitive neutrality.

(c) Third party access

Currently, access to infrastructure in Queensland is regulated by Part IIIA of the *Trade Practices Act, 1974* (Commonwealth). However, the Competition Principles Agreement entered into by each of the State, Territory and Commonwealth Governments provides that the Commonwealth access regime will operate only where a State or Territory in which significant infrastructure is situated does not have in place an access regime that complies with the requirements of that Agreement.

The Bill achieves the policy objectives of third party access by establishing a two step process for third party access. The first step involves a declaration process. The purpose of the declaration process is to ensure third party access is only available for a limited class of infrastructure, which can broadly be described as natural monopoly infrastructure. The second step of the process is the compulsory dispute resolution process which can only be invoked once negotiations in good faith fail to produce an agreement between the parties. The regime provides for dispute resolution through recourse to the QCA as arbitrator (although parties are free to arrange for private arbitration of a dispute).

The regime contained in the Bill applies predominantly to the services provided by publicly owned infrastructure, although provision exists for private infrastructure to be brought under the regime. A State based access regime provides a number of benefits including providing a certain and streamlined process for infrastructure owners and users alike. Mechanisms to streamline the process include regulation based declarations, which effectively declare infrastructure to be subject to compulsory dispute resolution without it first being forced through the threshold test declaration process (refer to discussion of access criteria in clause 76 and clause 80) (however, existing private infrastructure cannot be declared in this way). In addition, the QCA has the power to require the owners of declared services (ie. those services which are declared by the Ministers either by regulation or after receiving advice from the Authority in response to an application) to provide it with an undertaking, which would set out the broad terms and conditions upon which access is to be provided to third parties.

It is proposed that the QCA will play a major role in the administration of a third party access regime, including the independent assessment of whether services provided by infrastructure should become subject to the regime, accepting undertakings from infrastructure owners, and acting as a

dispute resolution body. The QCA will maintain registers in relation to third party access which will be available for public inspection.

Alternative ways of achieving the policy objectives

(a) Prices oversight

Mechanisms exist to facilitate competition in markets where inherently competitive elements are absent, including structural reform and third party access. Structural reform occurs where regulatory functions are separated from commercial activities or where natural monopoly activities are isolated from contestable functions in the production chain. Third party access requires third parties be given the opportunity to use another's natural monopoly infrastructure to allow competition to emerge in contestable functional steps in the production process.

Yet, even with these reforms, there are certain activities where competition may take some time to develop, or where industry characteristics are not amenable to the introduction of competition. Consequently, the need for prices oversight of GBEs arises from the reality that reforms cannot always be relied upon to provide the necessary pressure for monopoly or near monopoly GBEs to produce efficiently and price at levels that would prevail in competitive markets. Alternatively, the necessary competitive pressure may only emerge over a period of time.

The Competition Principles Agreement provides that prices oversight of State and Territory Government business enterprises is primarily the responsibility of the State or Territory that owns the enterprise and that State and Territory parties will consider establishing independent sources of price oversight advice where such advice does not exist.

(b) Competitive neutrality complaints mechanism

To a large degree, there is little scope for exploring alternatives for ensuring that government businesses are complying with the principle of competitive neutrality, given the specific requirement in the Competition Principles Agreement for the establishment of a dedicated complaints mechanism. Such alternatives, however, include reporting requirements and inspections. These mechanisms, while useful, do not carry the pressure of

external scrutiny and, to some degree, lack the credibility and transparency of an investigation by an independent body.

(c) Third party access

Third party access to the services provided by infrastructure subject to the proposed State regime could alternatively be left to be regulated under the Commonwealth regime. However, this would preclude the State from establishing an access regime which, for example, could jeopardise the continued delivery of community service obligations in the manner the Government deems appropriate.

Administrative costs for government implementation of the Bill

Funding of $1.65 million to establish the authority has been approved by the Cabinet Budget Committee. This funding will be sourced in part from the special competition payments from the Commonwealth—to total $750 million over the period 1997/98 to 2005/06.

Other competition policy reforms should eventually alleviate the need for prices oversight in the future as the monopoly power of GBEs is reduced. Accordingly, it is proposed that funding for the QCA be reviewed after it has been operating for three years.

It is estimated that the authority will eventually require ongoing funding of approximately $2.3 million per annum.

Consistency with fundamental legislative principles

The Bill has adequate regard to fundamental legislative principles.

The Bill raises a number of issues with regard to fundamental legislative principles. In considering these, it is to be noted that the Bill is substantially uniform or complementary with legislation of the Commonwealth and that, in the absence of the Bill, the Commonwealth regimes for prices oversight and third party access (as provided for respectively in the *Prices Surveillance Act 1983* and *Trade Practices Act 1974)* apply.

The Bill provides for the authority to have deterministic powers in the arbitration of third party access dispute processes under Part 5. These deterministic powers are required under the Competition Principles

Agreement. The Bill also confers deterministic powers upon the authority for the acceptance of undertakings. This is broadly consistent with the Commonwealth legislation that applies in the absence of effective State or Territory legislation. The Bill also provides for the authority to grant and cancel competitive neutrality accreditations. The Competition Principles Agreement provides that existing appeal mechanisms apply with respect to dispute resolution decisions and this is ensured through the application of judicial review. In view of the nature of the powers being exercised, it is considered inappropriate for there to be a merits review of the exercise of these powers particularly having regard to the detailed economic analysis required.

The Bill, in its application of third party access under Part 5, affects certain rights and imposes certain obligations on services once declared. This is because third party access provides a legislative right for parties to negotiate third party access with a natural monopoly infrastructure owner (both public and private) upon declaration of the service provided by that infrastructure. This is fundamental to the underlying tenets and rationale of the third party access policy. Further, declaration of existing private infrastructure can only occur by way of Ministerial declaration and not through regulation based declaration. This ensures that declaration is limited in the application of third party access to existing private infrastructure.

Certain elements of the third party access regime revolve around economic terms which cannot be precisely defined. This occurs, for example, in the application of a threshold test (refer to discussion of access criteria in clause 76 and to clause 80 and clause 86) before a service becomes declared and made subject to the access regime. For example, paragraph (a) of subclause 80(3) provides that the authority may recommend that a service not be declared if it is not satisfied that access to the service would be likely to have a "substantial effect on a market". Such a test draws on existing provisions of the *Trade Practices Act 1974*. Although the concepts remain difficult, the courts have been able to deal with the issues.

The Bill also provides for its application to various bodies by way of Ministerial declaration and by way of regulation. In terms of Ministerial declaration, responsible Ministers are able to declare a government business activity to be a government monopoly business activity for the purposes of

prices oversight (clause 19), declare a service to be a service subject to the State based third party access regime (Division 2 of Part 5), and declare a business activity carried on by a government agency to be a significant business activity for the purposes of competitive neutrality complaints (clause 39). In relation to third party access, declaration can only occur should a service satisfy all aspects of a prescribed threshold test (clause 86 and clause 76). With respect to competitive neutrality declarations, the policy framework and considerations taken into account are set out in the Queensland Government's NCP Competitive Neutrality Policy Statement (ie. *Competitive Neutrality and Queensland Government Business Activities: A Queensland Government Policy Statement*, July 1996).

Regulation based declarations apply in relation to prices oversight (clause 20) and third party access (Division 3 of Part 5). The rationale behind having two declaration avenues for prices oversight and third party access is to increase certainty, streamline the third party access declaration process and provide an appropriate balance of legislative and administrative powers in the declaration process. In this regard it is recognised that delegated legislative power is necessary to ensure effective outcomes with respect to all components of the Bill. That is, the very nature of prices oversight, third party access and competitive neutrality complaints fundamentally affects the operations of business activities in this State and decisions made in this regard require a considered and streamlined process to resolve such economic issues. It is considered the delegation of legislative power in this respect is appropriate given the role of the authority as an independent recommendatory body on these issues and the requirements for Ministerial decisions to be made public.

Consultation

Extensive consultation has been undertaken with all stakeholder groups, including major customers and consumer groups, unions and GBEs.

PART 1—PRELIMINARY

Division 1—Introduction

Clause 1 specifies the short title of the Act.

Clause 2 provides for commencement of the Act.

Clause 3 provides that the Act binds the State.

Clause 4 provides for the extraterritorial operation of the Act.

Division 2—Interpretation

Clause 5 refers to the dictionary contained in the Schedule which sets out the definitions for a number of the expressions used in the Bill.

Clause 6 provides that the legislation will be jointly administered by the Premier and the Treasurer and requires that wherever something is to be done by, or given to, the Ministers, the thing must be done by, or given to, both Ministers.

PART 2—QUEENSLAND COMPETITION AUTHORITY

Division 1—Establishment of authority

Clause 7 establishes the authority.

Clause 8 grants the authority a legal status as a body corporate, with a seal and the capacity to sue and be sued.

Clause 9 provides that the authority represents the State and confers upon the authority all the rights, privileges and immunities of the State and makes it an exempt public authority under the Corporations Law.

Division 2—Functions and powers of authority

Clause 10 sets out the authority's functions. Some of the major functions are to provide advice to the Ministers on the criteria to be used for deciding whether a business activity carried on by a government agency is to be declared a government monopoly business activity, to investigate and report to the Ministers about the pricing practices of government monopoly business activities, to investigate alleged breaches of competitive neutrality and to administer the third party access regime contained in the Bill.

Clause 11 provides that the authority has all the powers of an individual and any other powers conferred under this or another Act.

Clause 12 provides that the Ministers are not able to direct the authority in relation to the conduct of any investigation (except that the Ministers may direct the authority to consult with a stated person) nor in relation to the contents of any of its reports, nor in performing its functions under Part 5 of the Act. Ministerial directions must be written.

Clause 13 provides for the authority to make copies of directions received from the Ministers available for public inspection, within 14 days of receipt, at the authority's office during office hours

PART 3—PRICING PRACTICES RELATING TO GOVERNMENT MONOPOLY BUSINESS ACTIVITIES

Division 1—Criteria for declarations of government monopoly business activities

Clause 14 requires the authority to develop criteria for use by the Ministers for deciding whether a government agency is a government monopoly business activity and for it to give written notice of those criteria to the Ministers within 6 months of its creation. "Monopoly" in this context is not restricted to a situation where there is only a single supplier in

a particular market, and is intended to extend to "near monopolies", ie where a government agency conducting a business activity has substantial market power.

Clause 15 enables the authority to revise the criteria and for it to give written notice of the revised criteria to the Ministers.

Clause 16 provides that the authority may consult on the criteria whilst they are being developed.

Clause 17 requires the authority to publish the criteria developed under this Division.

Division 2—Declaration of government monopoly business activities

Clause 18 provides that the authority may request the Ministers to declare a government business activity to be a government monopoly business activity (the activity) and that the Ministers refer the activity to the authority for the appropriate investigations in accordance with the provisions of clause 23. Such a request may be made, for example, in response to complaints the authority receives from a government agency's customers if the authority considers that the government agency's business activity meets its criteria developed under Division 1.

Clause 19 indicates that the Ministers may make a declaration with or without a request for a declaration from the authority. Any such declaration must be made by gazette notice. The Ministers must have regard to any advice given to them by the authority about the criteria to be used by them in the circumstances where they decide to make a declaration. The appropriate investigations by the authority in this instance are provided for in clause 23.

Clause 20 applies to government monopoly business activities declared by regulation. The appropriate investigations by the authority in this instance are provided for in clause 22.

Clause 21 provides that the authority must keep a list of requests made by it under clause 18 during the preceding 2 years and make a copy available for inspection at its office during office hours.

Division 3—Investigations about government monopoly business activities

Clause 22 provides for the authority to conduct an initial investigation involving an assessment of the pricing practices of a government monopoly business activity and then further investigations relating to the ongoing monitoring of the government monopoly business activity's pricing practices. This type of reference is intended to be utilised where the authority's ongoing monitoring of a government monopoly business activity's pricing practices forms an integral part of the initial investigation.

Clause 23 applies to those government monopoly business activities that are declared by gazette notice. In contrast to standing references (provided for in clause 22), a Ministerial reference may require the authority conduct an investigation about a government monopoly business activity's pricing practices or just monitor a government monopoly business activity's pricing practices (or both). The Ministers may, by written notice, withdraw or amend a reference to the authority to investigate a particular GBE before receiving the authority's report. The notice must provide reasons.

Clause 24 provides that the Ministers, in referring a government monopoly business activity to the authority, may require the authority to perform certain tasks or meet deadlines.

Clause 25 provides that the authority must give reasonable notice of an intended investigation under this division in a newspaper circulating throughout the State and provides the requirements that must be included in the notice of an investigation. A notice must be given to the government agency carrying on the government monopoly business activity.

Clause 26 requires that the authority, when conducting an investigation, must have regard to the following matters (although it may consider any other issues it considers relevant):

(a) *the need for efficient resource allocation*—monopoly or near monopoly business activities can interfere with efficient resource allocation in two ways. First, by charging excessive prices, monopolists can cause resources to be allocated to less highly valued uses in the economy (alternatively, setting a GBE's prices too low will ultimate result in shortages). Second, the absence of competitive pressures can create an environment where monopolists or near monopolists produce outputs inefficiently;

(b) *the need to promote competition*—competitive forces encourage pricing to reflect the true cost of production and supply. The authority could stifle the emergence of competition if it recommended prices that were too low. Accordingly, the authority's focus when conducting prices oversight will be on maximum, rather than minimum prices. This consideration also requires the authority to administer prices oversight in harmony with its other competition functions, so that, for example, recommendations concerning prices oversight should be consistent with the implementation of third party access;

(c) *the protection of consumers from abuses of monopoly power*—prices oversight should protect consumers by curtailing the abuse of monopoly power by government monopoly business activities. In this regard, the term "consumers" should not be narrowly interpreted. The term is intended to extend to all users of a good or service produced by a government monopoly business activity;

(d) (i) *the cost of providing the services concerned in an efficient way having regard to relevant interstate and international benchmarks*—the very nature of the markets and activities subject to prices oversight suggests that there exists little, if any, competition. In order to gauge the appropriateness of pricing policies, it becomes useful, therefore, to consider the cost of providing the services relative to similar firms in other jurisdictions (although care must be taken to ensure that appropriate comparisons are made);

(ii) *the actual cost of providing the goods and services*—the actual production costs of a good or service must be considered by the authority when making pricing recommendations;

(iii) *standards of the goods and services, including quality, reliability and safety*—efficient pricing should not be at the expense of appropriate standards of quality, reliability or safety. The authority, as part of an investigation, should take account of relevant regulation, including safety, which applies to a government monopoly business activity's goods

or services. In addition, the authority should take account of the terms and conditions of any contracts;

(e) *the appropriate rate of return on government agency assets*—the cost of providing a good or service includes a return commensurate with the risk of the government monopoly business activity's business (but excludes any monopoly profits);

(f) *the effect of inflation*—where recommendations pertain to a government monopoly business activity's pricing practices over a period of time, it is necessary to allow for the impact of inflation;

(g) *the impact on the environment of prices charged by government agencies for government monopoly business activities*—the authority's pricing recommendations should take account of their environmental impact;

(h) *considerations of demand management*—the authority should have regard to the impact on demand of its pricing recommendations. For example, the authority may recommend higher prices be charged at peak periods relative to non-peak periods, as failure to take account of such considerations could cause the premature expansion of capacity;

(i) *the social impact of decisions*—when considering this matter, it is expected that the authority will take account of the impact of its recommendations on lower income groups and in different regions;

(j) *the need for pricing practices not to discourage socially desirable investment or innovation by government agencies*—just as overpricing represents an inefficiency in pricing, underpricing may stifle innovation and discourage investment, ultimately leading to shortages and rationing;

(k) *the Government's directions to the government agency*—Government may, in the public interest, issue certain directions to a government monopoly business activity which must be considered by the authority when making recommendations on that entity's pricing practices.

Clause 27 indicates that the provisions of Part 6 of the Bill apply to an investigation under this division.

Clause 28 provides the authority may report to Ministers the results of its investigations up to the time when the authority's investigation ceases due to the business activity ceasing to be a government monopoly business activity or the Ministers withdrawing the reference of the particular activity to the authority.

Division 4—Reports of authority about investigations

Clause 29 provides for the application of the division.

Clause 30 indicates that the authority must report the results of an investigation to the Ministers.

Clause 31 indicates that the authority must also give a copy of its report to the government agency carrying on the government monopoly business activity.

Clause 32 provides that the authority make more than 1 report for the purpose of reporting the result of an investigation.

Clause 33 requires the authority to include in a report its recommendations, and its reasons for those recommendations, about pricing practices relating to the activity and confirms the authority's ability to report on anything it considers relevant arising from an investigation (eg. comparisons with similar entities, options to improve competitive outcomes in the industry or actions which could improve transparency). The clause also requires the authority to include in its report any direction given to it by the Ministers in relation to the investigation.

Clause 34 requires Ministers make publicly available a copy of any report produced by the authority within 2 days after the Ministers receive the report. The clause envisages that the Ministers will make the authority's reports available for public inspection at the authority's office. The clause also empowers the authority to publish a report that is publicly available.

Clause 35 provides that the authority may recommend that the release of the report, or of part of the report, be delayed for a specified period. In such a case, the authority must give reasons for such a recommendation.

Clause 36 requires the Ministers to accept, or reject, or accept with qualification the recommendations contained in the report from the authority

within one month of receiving it. The Ministers must publish their decision and reasons for their decision by gazette notice as soon as practicable.

Clause 37 provides that upon acceptance of recommendations, the Ministers must refer the matter to the Minister responsible for the Government agency concerned to implement their decision.

PART 4—COMPETITIVE NEUTRALITY AND SIGNIFICANT BUSINESS ACTIVITIES

Division 1—Preliminary

Clause 38 defines the principle of competitive neutrality.

Clause 39 defines a significant business activity.

Clause 40 provides where the authority is required to do a thing under this Part, but no time is stated within which that thing is to be done, then the thing must be done within a reasonable time.

Clause 41 explains what is meant by a government agency not complying with competitive neutrality.

Division 2—Complaints about competitive neutrality

Clause 42 describes the ground upon which a complaint may be made to the authority. Complaints may be made on the ground that an agency insofar as it conducts a significant business activity does not comply with the principle of competitive neutrality.

Clause 43 sets out who may have standing to lodge a complaint with the authority. A complainant must be adversely affected by the competitive advantage alleged by the person to be enjoyed by the government agency and must either compete with the significant business activity or seek to compete with the activity.

Clause 44 sets out the form with which a complaint must comply. A complaint must be in writing and contain sufficient details of the alleged non-compliance and how the complainant is adversely affected by that non-compliance as well as details showing that there is competition between the complainant and the significant business activity, and that an attempt has been made to resolve the matter.

Clause 45 gives the authority power to ask for further information from the complainant to enable it to decide whether to investigate a complaint.

Division 3—Investigation of complaints

Clause 46 requires the authority to investigate a complaint within a reasonable time unless the authority is of the opinion that the complaint should not be investigated, having regard to the effect of the various matters outlined in the clause. Provision is also made for matters which the authority must consider in forming its opinion that the complainant is not or could not be in competition in a particular market. The authority must give written reasons to the complainant within 14 days of a decision not to investigate a complaint.

Clause 47 allows the authority to defer an investigation until the completion of a tender process in which the businesses concerned are involved. However, the tender process may be continued and completed notwithstanding the making of a complaint or a decision by the authority to investigate or continue investigating the complaint. In addition, the outcome of the tender process is not affected by the results of the investigation or any decision by the Ministers about the results of the investigation.

Clause 48 sets out the procedure for the notification to certain parties of an investigation by the authority and provides the requirements that must be included in the notice of an investigation.

Clause 49 requires the authority, when conducting an investigation, to have regard to the matters listed therein (although it may consider any other issues it considers relevant). Examples are provided in relation to two of the matters specified (ie. legislation and government policies and guidelines about the application of competitive neutrality).

However, in deciding whether there is a competitive advantage, the authority is not to accept that any competitive advantage enjoyed by the government agency because of government ownership or control is justified because of a competitive disadvantage suffered by the agency because of that ownership or control.

Clause 50 indicates that the provisions of Part 6 of the Bill apply to an investigation under this division.

Division 4—Reports of authority about investigations

Clause 51 states that the division applies to reports given under division 3 of this Part.

Clause 52 states the authority must report the results of an investigation under division 3 to the Ministers.

Clause 53 provides that the authority may make more than 1 report for the purpose of reporting the result of an investigation.

Clause 54 provides for the contents of a report including, where a complaint is substantiated, any recommendations for how the government agency's failure to comply with the principle of competitive neutrality could be overcome. In the report, the authority may comment on any disadvantages suffered by the significant business activity because of government ownership or control of the agency, including its recommendations on how the disadvantage could be overcome.

Clause 55 provides that the Ministers must make available copies of the report, although, in special circumstances, the public release of the report may be delayed.

Clause 56 provides that the authority may recommend that the release of the report, or of part of the report, be delayed for a specified period. In such a case, the authority must give reasons for such a recommendation

Clause 57 provides that the Ministers must, in consultation with the Minister responsible for the significant business activity, accept (with or without qualification) or reject the report. The Ministers' decision and reasons supporting the decision are to be provided to the authority, the complainant and the government agency conducting the significant business activity.

Clause 58 provides that the authority must give a copy of the Ministers' decision notice to the relevant parties.

Clause 59 provides that the Ministers' decision notice must be available for public inspection and provides details of some arrangements which must be made by the authority to achieve this.

Division 5—Accreditation

Clause 60 sets out the purpose of the accreditation system. Accreditation is designed to provide certainty for government agencies carrying on a significant business activity by affirming that a particular activity is operating in accordance with the principle of competitive neutrality. Complaints against an accredited business activity will not be investigated.

Clause 61 provides that a government agency conducting a significant business activity may apply for accreditation.

Clause 62 provides that the authority may request further information in order to consider the application for accreditation.

Clause 63 sets out the procedure for granting an application for accreditation. The authority must accredit an applicant if it is satisfied that the applicant carries on the significant business activity in accordance with the principle of competitive neutrality.

Clause 64 provides that if an accreditation is granted, then such grant is subject to the various conditions stated in the provision, as well as any other conditions that the authority considers necessary and reasonable.

Clause 65 provides for the authority to give notice to the applicant in writing where an accreditation is granted and, if it is granted subject to conditions, the authority must notify the applicant of the conditions attached to the grant and the reasons therefor.

Clause 66 provides for the gazettal of the grant of an accreditation by the authority, including a list of all current accreditations.

Clause 67 provides for the period during which an accreditation remains in effect.

Clause 68 sets out the procedure for surrender of an accreditation, including when the surrender is to take effect.

Clause 69 provides that an accreditation may be cancelled if the government agency has contravened a condition of the accreditation. Before cancelling an accreditation, the authority must notify the agency concerned and invite the agency to show cause why the accreditation should not be cancelled. If the authority decides to cancel an accreditation, the authority must give reasons as to why it has cancelled an accreditation. Provision is also made for when the decision takes effect.

PART 5—ACCESS TO SERVICES

Division 1—Interpretation

Clause 70 defines the term "facility" and, in doing so, excludes licensed pipelines under the *Petroleum Act 1923*, since these pipelines are already the subject of an access regime contained in that Act as well as any other facility prescribed under a regulation as a facility to which this part does not apply.

Clause 71 defines the meaning of the term "market".

Clause 72 sets out the definition of "service" for Part 5 and also provides for the exclusion of certain things from the definition, eg. the supply of goods, the use of an intellectual property right, or the use of a production process except to the extent that such a service is an integral but subsidiary part of the service. In addition, a regulation can exclude specific services from the definition of services for the purposes of the Bill.

Clause 73 clarifies that where the term facility is used in association with a service, that term refers to the facility used, or to be used, to provide the service or part of a service.

Clause 74 applies if the access provider of a service is a partnership or joint venture and outlines how the access regime applies to participants in the partnership or joint venture.

Clause 75 provides for the giving of notice by the authority where there is more than one owner of the service or facility.

Division 2—Ministerial declarations

Subdivision 1—Recommendation by authority for declaration

Clause 76 sets out the access criteria, all of which must be fulfilled to the satisfaction of the authority before the authority may recommend a service (or part of a service) be declared by the Ministers. The Ministers are also required to be satisfied a service meets the access criteria before they declare it.

Fulfilment of each limb is required to ensure that application of third party access is focused on natural monopoly infrastructure and that appropriate tests are incorporated to screen out insignificant infrastructure and to ensure public interest considerations are applied. Limb (a) requires access to the service to increase competition in a related market, as clearly there is limited benefit to providing for third party access if it does not allow for increased competition.

Limb (b) is intended to focus the application of the regime onto natural monopoly infrastructure by requiring that it would be uneconomic to duplicate the facility. A facility may be uneconomic to duplicate for a range of reasons, including for example, environmental constraints. In general, the application of the limb means that where more than one facility serves a market, the services provided by those facilities would not be subject to being declared. However, this may not be the case where, for example, one of two facilities has no spare capacity and cannot be expanded because of physical, safety, environmental or other constraints.

Limb (c) requires access only be granted if it can be provided safely. Limb (d) requires that access (or increased access) not be contrary to the public interest. Public interest considerations are not intended to take on a restricted scope, and may include, for example, concerns that access can be provided in an environmentally sound manner.

Clause 77 allows any person to ask the authority to recommend that a nominated candidate service be declared by the Ministers. The clause also enables the Ministers to ask the authority to consider whether a particular candidate service should be declared by the Ministers. Provision exists for the person requesting a declaration be made to withdraw the request before the authority makes a recommendation.

Clause 78 requires the authority notify the owner regarding the receipt of a request in relation to the service provided by the owner. The authority must also notify an owner of any withdrawal of a request.

Clause 79 requires the authority, upon receipt of a request, to recommend to the Ministers that the service either be declared or not be declared. In making its recommendation, the authority may consult with any party it considers appropriate, must make a recommendation within a reasonable time after receipt of an application, and must publish its recommendation and the reasons for the recommendation. Any recommendation that a service be declared must stipulate the period for which declaration should operate.

Clause 80 requires the authority to recommend declaration where a service meets all the access criteria. However, the authority may recommend the service not be declared if it considers the application was not made in good faith or is frivolous. Similarly, the authority may recommend a service not be declared if the authority is not satisfied that access to the service would be likely to have a substantial effect on a market. This consideration is based on the premise that third party access should not be allowed where it is unlikely to have some real, as opposed to trivial, impact on a market, or on a significant section of a market. The intrusion into traditional property rights that arises with third party access can only be justified if it is likely to produce some real, as opposed to trivial, impact on a market, or a significant section of a market. The authority may also recommend that part of the service be declared (although the authority is not obliged to recommend part of a service be declared where the service specified in the request does not meet the access criteria and may simply recommend that the service not be declared).

Subdivision 2—Investigations about candidate services

Clause 81 gives the authority the power to conduct an investigation about a candidate service.

Clause 82 requires the authority give notice regarding an investigation about a candidate service and sets out the requirements regarding the notice of an investigation about a candidate service.

Clause 83 provides that an investigation by the authority is subject to Part 6.

Subdivision 3—Declaration by Ministers

Clause 84 sets out the requirements of the Ministers upon receipt of a declaration recommendation from the authority. Ministers must either declare a service (or part of a service) or not declare the service. Any declaration of a service or part of a service must state an expiry date of the declaration.

Clause 85 requires the Ministers publish notice of their declaration decision and the reasons for that decision. This information must be given to the authority. In addition, this information, plus a copy of the authority's signed declaration recommendation must be given to the owner of the facility and the applicant. Should publication not occur within 60 days after receipt of a declaration recommendation, the Ministers are deemed to have decided to not declare the service.

Clause 86 requires the Ministers to declare a service (or part of a service) if they are satisfied of all of the access criteria, however, Ministers may decide not to declare a service satisfying all the access criteria if they are not satisfied that access (or increased access) would be likely to have a substantial effect on a market. These matters are discussed in relation to clauses 76 and 80. The Ministers may also declare part of a service where only part of the service meets the access criteria (although the Ministers are not obliged to declare any part of the service, where the service specified in the request does not meet the access criteria).

Clause 87 provides that if there is a decision in favour of declaration, the declaration begins to operate at the time specified in the declaration, however, this date must not be earlier than the day after the declaration is

published. A declaration continues in operation until its specified expiry date or until it is revoked.

Subdivision 4—Revocation of declaration

Clause 88 allows for the authority to recommend to the Ministers that a declaration be revoked if it believes that the Ministers would no longer be satisfied on one or more of the matters specified in section 86.

Clause 89 gives the authority the power to conduct an investigation about the declared service which is subject to a recommendation.

Clause 90 requires the authority give notice regarding an investigation about the declared service and sets out the requirements regarding the notice of an investigation about the declared service.

Clause 91 provides that an investigation by the authority under this subdivision is subject to Part 6.

Clause 92 requires the Ministers, on receiving a revocation recommendation from the authority, to either decide to revoke or not to revoke the declaration. There are two conditions that must be satisfied before a declaration is revoked. First, the Ministers must have received a recommendation from the authority that the declaration be revoked. Second, the Ministers must be satisfied that the services would not meet the necessary threshold test under clause 86 (refer also to access criteria under clause 76).

Clause 93 requires the Ministers to publish their decision whether or not to revoke a Ministerial declaration. In the case of a decision to revoke, the Ministers must also give written notice of the decision to the authority and the access provider.

Clause 94 provides for when a decision by the Ministers to revoke a Ministerial declaration takes effect.

Subdivision 5—Other matters

Clause 95 provides that the expiry or revocation of a declaration does not affect things done prior to the revocation.

Clause 96 requires the authority to keep a register of Ministerial declarations in operation.

Division 3—Regulation based declarations

Clause 97 applies to services, declared by regulation to be a declared service. Regulation based declarations are limited to those services provided by a public or new private facility.

Clause 98 provides that the ending of the operation of a regulation based declaration does not affect the validity of things done whilst the declaration was in force.

Division 4—Access agreements for declared services

Subdivision 1—Negotiations for access agreements

Clause 99 requires access providers of declared services to negotiate with third parties seeking to make an access agreement in relation to the service.

Clause 100 requires the parties to negotiate in good faith with respect to any access agreement relating to a declared service.

Clause 101 specifically requires access providers to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker in negotiations regarding access agreements.

Subdivision 2—Rights and obligations of parties to access agreements

Clause 102 provides that access agreements for the same declared service need not be identical. This provides some flexibility for access providers in their negotiations regarding access arrangements.

Clause 103 empowers the authority to require an access provider give it a copy of an access agreement.

Clause 104 provides that an access provider (or a related body corporate) must not engage in conduct for the purpose of preventing or hindering a third party's access to a service under an access agreement.

Clause 105 empowers the authority to require an access provider give it stated information about access arrangements for the purposes of determining the access provider's compliance with subclause 104(1).

Clause 106 facilitates the assignment of rights under an access agreement.

Subdivision 3—Approval of certain access agreements

Clause 107 provides for the application of the subdivision to access agreements containing limitations on a user's right to transfer the interest in the agreement.

Clause 108 provides for application to the authority for approval of such agreements.

Clause 109 provides for consideration of such an agreement by the authority and includes matters that the authority must have regard to in deciding whether to give approval to the agreement.

Clause 110 provides for the giving of notice of the approval or the refusal (together with reasons for the decision to refuse) by the authority to the relevant parties.

Division 5—Access disputes about declared services

Subdivision 1—Preliminary

Clause 111 clarifies that subdivision 3 in this division refers to arbitrations conducted by the authority of an access dispute referred to it under a dispute notice. Provision is also made for the parties to give such a notice only if there is no agreement between them providing for the dispute to be dealt with in any other manner.

Subdivision 2—Notices about access disputes

Clause 112 provides a mechanism for parties, either the access seeker or access provider, to notify the authority of a dispute in relation to access or the terms of access for a declared service. Where the dispute concerns a

service which is already covered by an access agreement, then the parties should rely upon the terms of their agreement. However, parties could enter an agreement relating to a particular service, and have reason to give a dispute notice if they cannot reach agreement for access to an additional (albeit identical) service.

Clause 113 specifies details that must be included as part of a dispute notice to the authority.

Clause 114 requires the authority to provide written notice of its receipt of a dispute notice to the other party to the dispute as well as any other person the authority considers is appropriate.

Clause 115 provides for the withdrawal of dispute notices and the effect of such a withdrawal.

Subdivision 3—Arbitration of access disputes and making of determinations

Clause 116 provides that the parties to an arbitration of an access dispute are the party who gives the dispute notice and the party stated in the notice to be the other party involved in the dispute, as well as any other party who applies and satisfies the authority that it has a sufficient interest to be a party to the access dispute.

Clause 117 provides that unless the authority terminates the arbitration of an access dispute for one of the reasons set out in clause 122, it must in writing make both a draft determination and a determination in relation to the dispute. The draft determination is provided to the parties to the dispute prior to the authority making a final determination. The determination does not have to require the provider to give access. A determination by the authority may deal with any matter relating to access by the third party to a declared service and not necessarily just the particular matter that was the subject of dispute. The authority must give the parties reasons for its determination.

Clause 118 sets out some specific examples of access determinations that can be issued by the authority, although the authority is not limited by these examples in making its determinations.

Clause 119 specifies a number of constraints on the authority in making an access determination relating to extensions to the facility and the existing rights of users. If an access determination by the authority breaches any of the constraints it is of no effect. An access determination must be consistent with an approved access undertaking or access code for the service.

Clause 120 provides that the authority, in making a determination, may take into account any other matters that it thinks are relevant in addition to those it must take into account. The matters that must be taken into account by the authority are necessary to the development of effective resolution of access disputes.

The requirement that the authority consider the access provider's legitimate business interests and investment in the facility will require the authority to recognise the access provider's past investment in the facility and to ensure its decisions do not discourage the access provider from undertaking socially desirable investment in the future. If the authority fails to take adequate account of an owner's legitimate business interest, future investment in this State may be jeopardised. However, the phrase is not intended to justify owners continuing to earn monopoly profits under the regime. The firm and binding contractual obligations of the owner, as well as its reasonably anticipated requirements, should also be recognised in the context of its legitimate business interests.

The consideration of legitimate business interests of persons who have, or may acquire, rights to use the service, requires the authority have regard to the interests of all persons holding contracts for use of the facility including the firm and binding contractual obligations of other persons already using the facility.

Together, the limbs (b) and (d) should prevent the authority from distorting competition in upstream or downstream markets through access pricing being applied in other than a uniform basis in a particular market. Furthermore, these provisions should not be interpreted in a manner which enables a new user to gain access at anything less than the total of the additional costs it imposes upon the access provider.

The other limbs require several other matters also be considered in this context including the public interest, service quality, safety and factors pertaining to any facility extensions.

Clause 121 provides that an arbitration under this subdivision is subject to Part 7.

Clause 122 provides for the authority to terminate an arbitration of an access dispute at any time if it thinks the dispute is lacking in substance, misconceived or vexatious. In addition, the authority may terminate the arbitration if it feels the party who notified the dispute has not engaged in negotiations in good faith.

Clause 123 provides that the effective date for an access determination is the later of the day the determination is made or the date of effect stated in the determination.

Clause 124 provides that a determination may be enforced as provided in division 8.

Clause 125 provides that an access provider (or a related body corporate) must not engage in conduct for the purpose of preventing or hindering a third party's access to a service under a determination.

Clause 126 empowers the authority to require an access provider give it stated information about access arrangements for the purposes of determining the access provider's compliance with clause 125.

Clause 127 requires the authority to keep a register of access determinations and specifies the details on each determination that must be recorded in the register.

Division 6—Access codes for declared services

Clause 128 provides for the Ministers to make codes for declared services. Before doing so, the Ministers must ask the authority to give them any information or advice that the authority considers appropriate, and consult with interest parties on the draft codes. In addition, the Ministers may ask the authority to provide information or advice about a stated matter relevant to a code.

Clause 129 stipulates that codes are subordinate legislation.

Clause 130 sets out the purpose of a code and provides that a code may provide for any issue about access to a declared service, including the matters detailed in the provision.

Clause 131 provides that a code must state a date of expiry, with the expiry being not later than 10 years after the day of its making.

Clause 132 stipulates that an access code operates until its expiry day, unless it is earlier revoked.

Division 7—Undertakings for declared and non-declared services

Subdivision 1—Preparation and approval of draft undertakings

Clause 133 empowers the authority to direct an owner of a declared service to give the authority a draft access undertaking within 90 days after receiving written notice from the authority (although the authority may extend this period).

Clause 134 stipulates that the authority must consider a draft access undertaking given to it under clause 133. The authority must either approve the draft undertaking, or request the owner amend and resubmit the draft undertaking within 60 days after writing to the owner giving reasons why the authority will not approve the draft undertaking (although the authority may extend this period).

Clause 135 empowers the authority to prepare a draft access undertaking for the declared service should an owner not comply with a notice given under clauses 133 or 134.

Clause 136 allows prospective or actual owners of services (whether declared or not) to give a draft access undertaking to the authority. This allows owners to provide certainty in relation to the application of the access regime for the services mentioned in the undertaking. The authority must consider such undertakings and should it refuse a draft undertaking, the authority must provide reasons and must state the way in which it considers the draft undertaking needs to be amended.

Clause 137 sets out matters which may be detailed in an access undertaking, however, this does not preclude other matters from being detailed in access undertakings for a service. An access undertaking must, however, state the expiry date of the undertaking.

Clause 138 sets out the approval processes to be followed by the authority in approving draft undertakings, including the matters it should have regard to in giving approval. The authority can only approve a draft undertaking after it has carried out consultation, considered the results of consultation, and if it is satisfied that the undertaking is consistent with any access code for the service.

Subdivision 2—Preparation and approval of draft amending undertakings

Clause 139 provides for the authority to require the responsible person to amend, within 30 days of receiving notice, an approved undertaking in order to make the undertaking consistent with either a provision of this Act or an access code for the service to which the undertaking relates.

Clause 140 requires the authority consider a draft undertaking given to it under clause 139 and either approve the draft, or require the responsible person amend and resubmit the draft.

Clause 141 empowers the authority to prepare a draft access undertaking amending the approved access undertaking should the responsible person not comply with the requirements.

Clause 142 provides that a responsible person for an approved access undertaking may voluntarily give the authority a draft access undertaking to amend the approved access undertaking. The authority must consider such draft undertakings and should it refuse a draft undertaking, the authority must provide reasons and must state the way in which it considers the draft undertaking may be amended.

Clause 143 requires the authority to have regard to certain matters before it can approve a draft access undertaking amending an approved access undertaking given to, or prepared by, it.

Subdivision 3—Investigation about draft undertakings

Clause 144 provides for the application of the subdivision to various draft undertakings.

Clause 145 provides for the authority to conduct an investigation in relation to the approval or refusal of a draft undertaking.

Clause 146 requires the authority to give notice of an investigation under this subdivision and sets out the requirements for a notice of an investigation under this subdivision.

Clause 147 indicates that Part 6 of the Bill applies to an investigation under this subdivision.

Subdivision 4—Other matters

Clause 148 provides for the authority to agree to the withdrawal of an approved access undertaking at any time by the person who gave the relevant draft undertaking to the authority.

Clause 149 provides that an approved access undertaking comes into operation at the time of approval, and continues in operation until the earlier of the expiry date stated in the undertaking, or the withdrawal of the undertaking.

Clause 150 requires the authority to keep a register of approved access undertakings in operation. Any withdrawals of an approved access undertaking must be noted in this register.

Division 8—Enforcement

Clause 151 describes what the phrase "a person involved in a contravention" refers to in this division.

Clause 152 provides for the enforcement of determinations by parties. Enforcement is by way of application to the Supreme Court. If the Court is satisfied that a party's conduct or proposed conduct contravenes a determination the Court may make any order it thinks appropriate including, an order granting an injunction restraining the party from contravening the determination or requiring the party to do something, and an order directing the party to compensate the applicant for loss or damage suffered as a result of the contravention. Further, the Court is able to make any other order that

it thinks appropriate against a person who was involved in the contravention.

Clause 153 permits any person to take action against a person (referred to as the "obstructor") whose conduct or proposed conduct would contravene the hindering access prohibition in clauses 104 or 125. If the Court is satisfied that the obstructor's conduct or proposed conduct would contravene clauses 104 or 125, the Court may make any order (including making injunctions) it thinks appropriate. The Court may also make any other order that it thinks appropriate against a person who was involved in the contravention. The Court is able to decide that division 5 (ie. arbitration processes under this Part) provides more appropriate ways of dealing with an applicant's access to the service concerned.

Clause 154 confers power on the Supreme Court to accept a consent injunction whether or not the Court is satisfied of the contravention.

Clause 155 confers powers on the Supreme Court to grant an interim injunction. When the authority seeks an interim injunction, the Court must not require the authority or any other person, as a condition of granting the interim injunction, to give an undertaking as to damages.

Clause 156 provides the Court may grant an injunction restraining a person from engaging in conduct whether or not it appears likely that the person will engage in conduct of that kind in the future, or that there is imminent danger of substantial damage from the conduct.

Clause 157 provides the Court may grant an injunction requiring a person to do a thing whether or not it appears likely that the person will engage in conduct of that kind in the future, or that there is imminent danger of substantial damage from the conduct.

Clause 158 empowers the Court to discharge or vary an injunction order granted or made under this division.

Division 9—Accounting procedures for owners of declared services

Clause 159 allows the authority to develop, and revise, a cost allocation manual for use by the responsible operator of a declared service, subject to consultation with the responsible operator and any other persons considered

appropriate. The manual must take account of the responsible operator's existing accounting system. However, before making a recommendation under this clause, the authority must allow the responsible operator to develop its own cost allocation manual.

Clause 160 requires the authority to give a copy of a manual and any revised manual to the responsible operator of a declared service.

Clause 161 provides for a cost allocation manual to be binding on the responsible operator of a declared service to whom it relates from the later of the day after a manual copy is received by the responsible operator, or the date specified in the manual.

Clause 162 requires the responsible operator of a declared service keep its books of account and other records in accordance with the requirements of a cost allocation manual.

Clause 163 requires the responsible operator of a declared service to keep separate accounting records.

Division 10—Registers

Clause 164 allows the authority to keep a register in the way it considers appropriate.

Clause 165 requires the authority keep each register available for public inspection during office hours at the authority's head office or other places the authority considers appropriate.

Clause 166 requires the authority to allow for inspection of registers maintained by the authority upon payment of a prescribed fee.

Division 11—Other matters

Clause 167 clarifies that any a provision of this Bill or an access code prevails to the extent of any inconsistency with a term of an access agreement.

Clause 168 clarifies that a term of an access agreement relating to a service is not invalidated because it excludes, changes or restricts the

application or operation of a provision of an approved access undertaking for the service. This allows for flexibility in the negotiation processes for the striking of an access agreement.

Clause 169 provides for the conferring of functions on the authority for the law of another State, in accordance with an agreement between the States, where that law establishes an access regime.

Clause 170 provides for the conferring of functions upon another State's authority, in accordance with an agreement between the States, where that authority meets the requirements of the provision.

PART 6—INVESTIGATIONS BY AUTHORITY

Division 1—Preliminary

Clause 171 provides for the application of the Part to various investigations by the authority.

Division 2—General conduct of investigations

Clause 172 provides the varying methods by which the authority may conduct an investigation.

Clause 173 provides for general procedures to be used by the authority in conducting its investigations, including the requirement to comply with natural justice.

Clause 174 indicates that the authority must consider all submissions made to it, if received in writing within the time stated in relation to the investigation.

Division 3—Hearings

Clause 175 provides that the authority may hold hearings for an investigation.

Clause 176 provides that the authority must give reasonable notice of hearings in a newspaper circulating throughout the State and provides details of the persons to whom notice must be given in the particular circumstances.

Clause 177 provides that hearings must normally be held in public, but also makes provision for private hearings in certain circumstances including the persons who may be present and issues regarding publication of relevant material.

Clause 178 provides that a person may be represented by someone else at a hearing.

Clause 179 provides that the proceedings at hearings are to be conducted in accordance with the procedures for meetings of the authority insofar as these are applicable.

Clause 180 provides for the taking of evidence at a hearing by oath or affirmation.

Division 4—Witnesses at hearings

Clause 181 provides for the giving of notice to witnesses to attend a hearing at a stated time and place and to give evidence or produce documents.

Clause 182 provides for the payment of witness fees to persons other than officers of a government agency.

Clause 183 indicates that witnesses must not fail to attend a hearing without reasonable excuse.

Clause 184 provides for other offences by witnesses, with appropriate penalties. Provision is also made for a defence on the grounds of self incrimination.

Division 5—Other matters

Clause 185 provides for the giving of written notice by the chairperson to an officer of a government agency or another person requiring the giving of

a statement or the production of a stated document to a hearing. Once again, the defence of self incrimination is made available.

Clause 186 provides for the handling of documents produced to the authority for the purpose of an investigation, including reasonable access to the document by the person otherwise entitled to possession during the time the document is held by the authority.

Clause 187 deals with information believed to be confidential, where disclosure of the information is likely to damage a person's commercial activities.

PART 7—CONDUCT OF ARBITRATION HEARINGS BY AUTHORITY

Division 1—Preliminary

Clause 188 provides for the application of the Part to certain access disputes.

Clause 189 provides that in divisions 3 and 4 of the Part, a reference to a member of the authority for an arbitration is a reference to a member of the authority as constituted for the arbitration.

Division 2—Constitution of authority for arbitration hearings

Clause 190 requires an arbitration is to be heard before at least two authority members nominated in writing by the chairperson.

Clause 191 stipulates that, where the authority hearing the arbitration includes the chairperson, the chairperson presides at the arbitration. In other cases, the chairperson must nominate a member of the authority to preside at the arbitration.

Clause 192 sets out procedures to apply in cases where one of the authority members of an arbitration stops being a member or becomes

unavailable for the arbitration. In this case, the chairperson must direct that the arbitration continue in the absence of that member, or appoint another member.

Clause 193 provides that questions before the authority are to be decided by a majority of the members. Where they are evenly divided, the decision is to be in accordance with the opinion of the presiding member.

Division 3—General conduct of arbitration hearings

Clause 194 provides that arbitration hearings will be in private unless the parties otherwise agree. Where the hearing is in private, the authority may determine the persons who may be present and give directions regarding publication of relevant material.

Clause 195 enables the parties to an arbitration to be represented.

Clause 196 provides for general procedures to be used by the authority in conducting an arbitration hearing for an access dispute, including the requirement to comply with natural justice.

Clause 197 confers powers on the authority for the purposes of an arbitration.

Clause 198 provides that a person who contravenes an order from the authority that stated information remain confidential commits an offence.

Clause 199 provides for the authority to take evidence on oath or affirmation.

Division 4—Witnesses at arbitration hearings

Clause 200 provides for the member of the authority presiding at an arbitration hearing to, by written notice, require the attendance of a person before the authority to give evidence or produce a stated document.

Clause 201 provides for the payment of witness fees in relation to an arbitration hearing.

Clause 202 requires that a witness must attend as required until excused or released by an authority member unless the witness has a reasonable excuse.

Clause 203 provides that a witness must not without a reasonable excuse, fail to take an oath or affirmation, fail to answer questions or produce a document as required by the authority. An individual can refuse to answer a question or produce a document on the ground that the answer or production of the document may tend to incriminate him or her.

Division 5—Other matters

Clause 204 provides that a person commits an offence if that person does any act or thing in relation to the arbitration which would constitute a contempt of court (if the authority were a court of record).

Clause 205 provides for the giving of written notice by the chairperson to an officer of a government agency or another person requiring the giving of a statement or the production of a stated document to an arbitration hearing. Once again, the defence of self incrimination is made available.

Clause 206 provides for the handling of documents produced to the authority for the purpose of an arbitration hearing, including reasonable access to the document by the person otherwise entitled to possession during the time the document is held by the authority.

Clause 207 provides that, where a party to an arbitration believes that a document contains confidential information, the party can request the authority to withhold the material from other parties. After considering the request and the views of other parties, the authority can withhold so much of the document as it thinks appropriate.

Clause 208 allows the authority to make orders relating to each party's costs in an arbitration and for those costs to be recovered as a debt, including costs where the dispute notice is withdrawn before the authority makes a determination.

PART 8—OTHER PROVISIONS ABOUT THE AUTHORITY

Division 1—Membership of authority

Clause 209 provides for the appointment of members of the authority by the Governor-in-Council. The Bill does not prescribe a maximum number of members, but at least 3 must be appointed, including a chairperson and deputy-chairperson. In appointing a member, regard must be had to whether the person possesses relevant expertise. The clause also provides that members are appointed under this Act and not the *Public Service Act 1996.*

Clause 210 provides that the Governor-in-Council must appoint a chairperson and a deputy chairperson of the authority.

Clause 211 provides that members may be appointed to the authority for up to 5 years. This clause also establishes the circumstances where the office of a member becomes vacant and where the Governor-in-Council may end a member's appointment.

Clause 212 provides for the Governor-in-Council to set each member's remuneration and conditions of office. Members may be appointed on a full-time or part-time basis.

Clause 213 enables the chairperson to recommend the appointment of an associate member for particular investigations carried out by the authority.

Clause 214 provides for the appointment of an associate member by, and at the pleasure of, the Governor-in-Council. An associate member is taken to be a member of the authority for the particular investigation for which that person is appointed. The Governor-in-Council sets the conditions of office for an associate member.

Division 2—Proceedings of authority

Clause 215 provides the authority may hold meetings when and where it decides. The chairperson may call a meeting at any time, but must call a meeting when requested by at least half the members appointed to the authority.

Clause 216 provides for the chairperson to preside at the authority's meetings. The deputy chairperson presides at the authority's meetings if the chairperson is absent. In the absence of both the chairperson and the deputy chairperson, a member chosen by the members present will chair the authority's meetings.

Clause 217 sets out the quorum and voting rights of members present at meetings. A quorum is at least half the members appointed. The member presiding may cast a vote and, if votes are equal, also has a deciding vote. Otherwise, questions are decided by a majority of votes.

Clause 218 provides for the authority to regulate its proceedings in the way it considers appropriate. Meetings can be held through any means of communication. A resolution is deemed to be valid if at least half the members give written agreement to the resolution after they have received a valid notice of the resolution from the authority.

Clause 219 requires each member disclose to the authority any direct or indirect interests of the member (or a person who under a regulation is related to the member) where the interest could conflict with the proper performance of the member's duties. Any disclosure must be recorded in the minutes and be notified in writing to the Ministers.

However, disclosure is not required for an interest consisting only of the receipt of goods or services that are available to the public on the same terms as apply to the members.

A member with an interest in an issue before the authority must not be present or take part in any decision on the issue unless otherwise directed by the Ministers. The clause also modifies the rules for satisfying a quorum for a meeting of the authority where members have disclosed an interest.

Clause 220 requires the authority to keep minutes of its proceedings.

Division 3—Staff of authority

Clause 221 empowers the authority to engage a chief executive officer, who will be responsible for ensuring that the authority is appropriately managed. A member is not permitted to be so engaged.

Clause 222 enables the authority to engage such other employees as it considers necessary to perform its functions.

Clause 223 permits the authority to decide its employees' conditions of appointment, subject to any award, industrial agreement etc. The provision stipulates that the *Public Service Act 1996* does not apply to the appointment of the authority's employees.

Clause 224 permits the authority to make arrangements for the services of staff or facilities of a government agency to be made available to the agency.

Clause 225 preserves the leave and other entitlements of the authority employees who were previously public service officers.

Clause 226 entitles the authority to establish, amend, join in establishing, or take part in superannuation schemes.

Clause 227 sets out the superannuation arrangements for employees who were officers of the public service before joining the authority.

Division 4—Other matters

Clause 228 provides that judicial notice must be taken of the authority's common seal.

Clause 229 provides for the authority to be subject to certain Acts.

PART 9—OFFENCES

Clause 230 prohibits persons from stating anything to the authority which the person knows is false or misleading.

Clause 231 prohibits persons from presenting documents which contain information the person knows is false, misleading or incomplete unless the person indicates how the document is false, misleading or incomplete and furnishes the correct information to the authority. This information must be given in written form, unless the authority agrees it may be given orally.

Clause 232 prohibits a person from obstructing a member or employee from exercising their functions under the Act, unless the person has a reasonable excuse.

Clause 233 prohibits a person from threatening, intimidating, coercing or causing damage or disadvantage to another person because the other person assists, or proposes to assist, the authority in an investigation.

PART 10—MISCELLANEOUS

Clause 234 provides that the authority cannot compel the disclosure of exempt matter to it.

Clause 235 defines "exempt matter" for the purposes of clause 234.

Clause 236 enables the conduct and state of mind of representatives to be imputed to persons.

Clause 237 protects members and employees of the authority from civil liability for acts done, or omissions made, honestly and without negligence.

Clause 238 prevents a person being civilly liable for any loss, damage or injury suffered by another person because of the first person giving information in good faith to the authority.

Clause 239 deals with information believed to be confidential, where disclosure of the information is likely to damage a person's commercial activities.

Clause 240 defines the circumstances in which the making of records or divulging of protected information is prohibited, including in relation to court proceedings.

Clause 241 empowers the authority to present drafts of any reports it prepares under the Act to any person it considers appropriate.

Clause 242 requires the authority to produce an annual report. The annual report must contain details of each request made by the authority to the Minister to declare a business activity to be a government monopoly business activity and comment on the implementation of, and any failure to

implement, the authority's recommendations in relation to a government monopoly business activity's pricing practices.

Clause 243 allows the chairperson to delegate his or her powers to a member of the authority or to the authority's chief executive officer.

Clause 244 provides for regulation making power by Governor-in-Council.

SCHEDULE 1

Dictionary

This schedule contains the dictionary which defines particular words used in the Act.