

ECONOMIC REGULATOR BILL 2009

NOTES ON CLAUSES

PART 1 – PRELIMINARY

- Clause 1** Short title.
- Clause 2** Provides for all provisions in the Act to commence on a day to be proclaimed.
- Clause 3** Provides definitions for the purposes of the Act.
- Clause 4** This clause provides that the maximum prices, which are either recommended or determined by the Regulator, may be expressed in a number of different ways.
- Clause 5** Allows the Minister to declare, by notice published in the *Gazette*, the supply of a good or service by a publicly-owned entity to be a service for the purposes of the Act.
- Clause 6** Allows the Minister to declare, by notice published in the *Gazette*, a service supplied by a prescribed body to be a monopoly service.
- The clause provides that a service may be declared a 'prescribed monopoly service' or a 'non-prescribed monopoly service'.
- In the case of a prescribed monopoly service, the relevant monopoly provider must be listed in Schedule 1 and this establishes regular pricing investigations. The maximum period of the pricing order for each entity is also in Schedule 1. Currently, Metro Tasmania and the Motor Accidents Insurance Board are listed in Schedule 1, with maximum orders of five years and four years respectively.
- In the case of a non-prescribed monopoly service, following an investigation a pricing order (or determination in some cases) is made for up to five years. However, there is no requirement for a subsequent investigation and pricing order or determination.
- The pricing investigation process is set out in Part 3.
- Clause 7** Provides that the Act binds the Crown, such that the Act will apply to Crown entities, including Government agencies.
- Clause 8** Provides that this Act prevails over inconsistent provisions in other Acts, unless that other Act expressly provides otherwise.

PART 2 – TASMANIAN ECONOMIC REGULATOR

Division 1 – Tasmanian Economic Regulator

- Clause 9** Establishes the Office of the Tasmanian Economic Regulator as a body corporate.
- Clause 10** Sets out the functions of the Regulator.
- Clause 11** Defines the powers of the Regulator.
- Clause 12** Allows the Regulator to publish guidelines relating to the performance of its functions and exercise of its powers.
- Clause 13** Allows the Regulator to delegate its functions and powers to a member of the Regulator or a person who works to the Regulator.
- Clause 14** Establishes the independence of the Regulator by providing that the Regulator is not subject to Ministerial control or direction, except as provided by this or any other Act.

Division 2 – Membership of Regulator

- Clause 15** Provides that the Regulator consists of three members, appointed by the Minister, with one appointed as chairperson. The clause also requires the appointees to meet specified knowledge or experience requirements.
- Clause 16** Allows the Minister to appoint an acting member, and provides that if a person is appointed as an acting member for the chairperson, that person is not appointed as chairperson.
- The clause also sets out the circumstances where an action of the Regulator is not necessarily invalid.

Division 3 – Staff, assistance and facilities

- Clause 17** Allows the Regulator to obtain staff from either the Secretary of the relevant agency (currently the Department of Treasury and Finance) or another State Government agency. The clause requires the Regulator to meet all expenses associated with the use of the services of these staff.
- Clause 18** Allows the Regulator to obtain assistance or facilities from specified persons and public bodies to perform and exercise its functions and powers.

Division 4 – Finances of Regulator

- Clause 19** Defines the funds of the Regulator and requires all funds to be paid into an account in the Special Deposits and Trust Fund. The clause also sets out how these funds may be expended.
- Clause 20** Requires a monopoly service provider to pay all or some of the Regulator's expenses in conducting a pricing policy investigation. If the investigated service is provided by two or more local government bodies, the clause requires that the costs are apportioned on the basis of population the share of the respective councils.
- Clause 21** Sets out the requirements of the Regulator's financial statements.
- Clause 22** Sets out the requirements of the Regulator's annual report.
- Clause 23** Sets out the procedure for tabling the Regulator's annual report in Parliament.

PART 3 – MONOPOLY PROVIDER INVESTIGATIONS

This Part sets out the process for the investigation of a monopoly service provider and the setting of maximum prices, by order or by determination in the case of a local government entity or a monopoly provider that is not listed in Schedule 1.

Division 1 – Commencing monopoly provider investigations

Clause 24 Provides definitions relevant to Part 3 of the Act and, in particular, sets out the timeframes for the Minister to require the Regulator to commence its first investigation of a monopoly service provider which has been declared under clause 6.

The Minister must require the Regulator to commence a first pricing investigation by date specified in a declaration under clause 6 or, if no day is specified, within three months of a declaration.

For monopoly service providers listed in Schedule 1, Minister must require the Regulator to commence an investigation at least 11 months before the expiry of the relevant order or determination.

The clause also allows the Minister to require the Regulator to conduct an investigation at any other time.

This clause provides, in subclause (5), that if a pricing order or determination that applies to one or more Local Government Bodies is in place and the Minister intends to issue a requirement to commence an investigation that would affect that original order or determination, this requirement can only be made if at least half the affected Bodies agree to it.

The clause also allows the Minister to amend a written notice if the Regulator has not made its final report in respect of the investigation.

The clause also sets out whom the Minister must consult, and in some cases obtain agreement from, before issuing or amending a requirement to commence an investigation.

Clause 25 Specifies what must be included in the terms of reference for an investigation of a monopoly provider.

Clause 26 Sets out how the Regulator is to give notice of a requirement to conduct an investigation.

Division 2 – Conduct of monopoly provider investigation

Clause 27 Requires the Regulator to conduct an investigation in accordance with the Minister's requirement and the terms of reference and provides that the Regulator is not bound by the rules of evidence.

- Clause 28** Sets out the arrangements for hearings held as part of a pricing investigation, if the Regulator chooses to hold a hearing.
- This clause excludes evidence subject to a direction by the Regulator from the operation of the *Freedom of Information Act 1991* and the *Right to Information Act 2009*.
- Clause 29** Sets out the information gathering powers of the Regulator. They include requiring a person to answer questions and provide documents and other information as required by the Regulator.
- The clause provides that such a person may be reimbursed for certain costs incurred in providing this information.
- This clause does not apply to a Cabinet record.
- Clause 30** Governs the use of documents or other information required by the Regulator, including making certain information available to a person who would be entitled to inspect it, if the Regulator did not possess it.
- The clause allows the Regulator to give directions prohibiting or restricting the publication of information provided under clause 29, and creates an offence if the directions are contravened.
- Clause 31** Specifies the minimum range of matters that the Regulator must take into consideration when conducting a monopoly provider investigation.
- Clause 32** Prohibits the Regulator from investigating the terms of certain contracts if prohibited by the requirement to investigate under clause 24.
- This clause also prohibits the Regulator from releasing information that relates to exempt contracts or any information that could damage the commercial interests of a monopoly provider.
- Such information, which includes information obtained under the Regulator's information gathering powers, are excluded from the operation of the *Freedom of Information Act 1991* and the *Right to Information Act 2009*.
- Clause 33** Specifies a range of offences in relation to an investigation under this Part.

Division 3 – Action following monopoly provider investigation

Clause 34 Sets out the Regulator's obligations regarding a draft report of a pricing investigation.

The clause provides that the draft report must not contain any matter that is not supported by every member of the Regulator.

This clause requires the Regulator to allow persons or bodies who have received the draft report to make submissions and to take those submissions into consideration before making a final report.

Clause 35 Sets out the Regulator's obligations regarding a final report of a pricing investigation, including the requirement for the report to contain recommendations in relation to the maximum prices by the monopoly provider for the period of the pricing policy order or determination.

The clause sets out the arrangements for tabling in each House of Parliament and publicly releasing the final report.

Clause 36 Sets out the arrangements for a pricing policy order arising from a pricing investigation of a prescribed monopoly provider.

The Portfolio Minister is required, within 90 days of receiving a final report, to make a pricing policy order after taking into consideration the Regulator's recommendations, and any comments received from any Minister of the Crown, the monopoly provider and, if relevant, the Local Government Association of Tasmania.

This clause ensures that the pricing policy order overrules any other pricing order or any pricing arrangements set out in any other Act, and is to commence 61 days after it is gazetted.

This clause provides that a pricing policy order is disallowable by Parliament, but prevents the Treasurer from declaring a pricing policy order to be subordinate legislation for the purposes of the *Subordinate Legislation Act 1992*. This removes the possibility that a regulatory impact statement must be prepared, which would be unnecessary as the public benefits and costs are assessed by the Regulator during the investigation.

Clause 37 Defines what action must be taken by a monopoly provider following a pricing policy order. The monopoly provider must, within 45 days, determine the pricing policies and the prices to be charged when the order takes effect. The clause requires the monopoly provider to lodge these pricing policies and prices with the Regulator for approval.

The clause prohibits a monopoly provider from amending the pricing policies or prices as approved unless it has the Regulator's written approval.

Clause 38 This clause applies where the Portfolio Minister receives a final report in respect of a pricing policy investigation of a monopoly provider that is not a prescribed monopoly provider. The provisions are substantially the same as clause 36, except that the Portfolio Minister makes a determination of the maximum prices that may be charged by the monopoly provider during the period specified in the terms of reference.

PART 4 – PRESCRIBED BODY PRICING POLICY INQUIRIES

Clause 39 Allows the Minister to direct the Regulator to inquire into and report on a matter relating to or affecting the pricing policies of a prescribed body.

Inquiries differ from pricing policy investigations in that the Regulator does not have information gathering powers and is not required to make pricing recommendations.

The clause defines circumstances in which the Minister must not give such a direction, and specifies the nature and content of such a direction. The clause also allows the Minister and Portfolio Minister to jointly determine liability for the Regulator's costs in conducting the inquiry.

Clause 40 Sets out how the Regulator may conduct its inquiry.

Clause 41 Allows the Regulator to give directions prohibiting or restricting the publication of information provided under an inquiry and creates an offence if the directions are contravened.

Clause 42 Sets out the Regulator's reporting requirements relating to an inquiry.

Clause 43 Specifies a range of offences in relation to an inquiry.

PART 5 – TAXI FARE METHODOLOGY INQUIRIES

This Part allows the Regulator to provide advice to the Transport Commission on methodologies for setting, and indexing, taxi fares. This part does not create the function or power to conduct a pricing policy investigation and recommend maximum fares.

As with prescribed body inquiries in Part 4, in conducting an inquiry under this Part, the Regulator has no information gathering powers.

Clause 44 Allows the Minister, on the request of the Transport Commission, to direct the Regulator to inquire into and report on appropriate methodologies for setting maximum taxi fares.

This clause requires the Transport Commission to be liable for the Regulator's costs in conducting the inquiry.

Clause 45 Allows the Regulator to conduct a taxi fare methodology inquiry as it considers appropriate.

Clause 46 Specifies offences in respect of taxi fare methodology inquiries, similar to those for prescribed body inquiries in Part 4.

Clause 47 Sets out the Regulator's reporting requirements relating to an inquiry under this Part.

PART 6 – COMPETITIVE NEUTRALITY COMPLAINTS

Competitive neutrality principles are designed to ensure that competition between public and private businesses occurs on a fair basis. They are set out in the *Competition Principles Agreement* as part of National Competition Policy.

A competitive neutrality complaint occurs when a person complains to the Regulator that a State Government or Local Government body is acting in a way that breaches these principles.

This Part sets out the process following a competitive neutrality complaint.

Clause 48 Sets out who may make a competitive neutrality complaint to the Regulator and in what circumstances.

Clause 49 Sets out the form and content of a complaint made under clause 48.

The fee in the regulations to accompany the complaint is 110 fee units (\$146 in 2009-10).

- Clause 50** Allows the Regulator to make a preliminary assessment of a complaint made under clause 48 to determine whether an investigation of the complaint is necessary or appropriate.
- The clause provides the Regulator with information gathering powers for this preliminary assessment.
- The clause allows the Regulator to either resolve the complaint expeditiously if the parties agree, or determine that the complaint is to be investigated or refuse to investigate the complaint.
- Clause 51** Sets out the circumstances in which the Regulator may refuse to investigate a complaint.
- The clause sets out the notices the Regulator must provide if it refuse to investigate a complaint or ceases to investigate a complaint.
- Clause 52** Sets out the notices the Regulator must provide if it investigates a complaint.
- Clause 53** Sets out the requirements of a prescribed body that is the subject of a complaint that is being investigated.
- Clause 54** Sets out how the Regulator may conduct its investigation and provides that the Regulator is not bound by the rules of evidence.
- Clause 55** Sets out the information gathering powers of the Regulator in conducting a complaint investigation, and provides for the reimbursement of certain costs.
- These are identical to those for a pricing policy investigation.
- Clause 56** Governs the use of documents or other information required by the Regulator, including making certain information available to a person who would be entitled to inspect it, if the Regulator did not possess it.
- The clause allows the Regulator to give directions prohibiting or restricting the publication of information provided under clause 55, and creates an offence if the directions are contravened.

Clause 57 Requires that the Regulator, after conducting a complaint investigation, determine whether or not the complaint is justified.

The clause sets out the reporting requirements of the Regulator in the case where it determines that the complaint is justified. These are to include that the report must recommend that the way competitive neutrality principles are applied in Tasmania should change, or the behaviour of the body under investigation should change, or both.

The clause provides that a finding that the complaint is justified does not entitle the complainant to compensation.

Clause 58 Specifies the time period in which a complaint investigation must be completed (45 days), and permits the Minister to extend the period by up to 30 days and more than once.

Clause 59 Requires the Portfolio Minister to advise the Regulator and the complainant, within 30 days of receiving a report, of any action he or she has taken or intends to take in response to the Regulator recommendations under clause 57.

Clause 60 Requires the prescribed body, within 30 days of receiving a report on a complaint investigation, to advise the Regulator of any action it has taken or intends to take in response to a recommendation from the Regulator that its behaviour should change.

The clause allows the Regulator to require the body to supply further information at any time after this period.

This clause establishes a penalty if the body does not provide information as required in this clause.

Clause 61 Requires the Regulator to refund to the complainant any prescribed fee where a complaint is found to be justified.

Clause 62 Creates offences in relation to a complaint investigation.

PART 7 – MISCELLANEOUS

Clause 63 This clause excludes the operation of the *Freedom of Information Act 1991* and the *Right to Information Act 2009* with regard to information relating to all investigations and inquiries under this Act, if the Regulator has issued a direction restricting or prohibiting the publication of that information.

Clause 64 Governs the service of documents provided to and by the Regulator.

Clause 65 Specifies the circumstances in which Schedule 1 may be repealed, replaced or amended.

- Clause 66** Allows the Governor to make regulations for the purposes of the Act relating to the conduct of investigations and inquiries, the fees payable under the Act, offences for non-compliance with the regulations, and permitting the Minister to determine, apply or regulate any matter, as provided for in the Act.
- Clause 67** Sets out the administration of the Act.
- Clause 68** This clause deals with the transitional arrangements as the powers and functions of the Government Prices Oversight Commission are transferred to the Regulator.
- The clause prohibits certain actions being taken under the *Government Prices Oversight Act 1995* once the *Economic Regulator Act 2009* and gives effect to the savings and transitional provisions set out in Schedule 4.
- Clause 69** This clause repeals the *Government Prices Oversight Act 1995*, two amending Acts and the *Government Prices Oversight Regulations 2008* on a day to be proclaimed, which will be after the commencement of the *Economic Regulator Act 2009*.

SCHEDULE 1 – CERTAIN MONOPOLY PROVIDERS

Schedule 1 prescribes Metro Tasmania and the Motor Accidents Insurance Board as prescribed monopoly providers, within the meaning of the Act, and sets out the duration of applicable pricing orders.

SCHEDULE 2 – MEMBERSHIP OF THE REGULATOR

- Clause 1** Sets out the term of appointment of members of the Regulator.
- Clause 2** Provides that a member who has a full time office in another capacity is not disqualified from that office if he or she is a member of the Regulator and can accept remuneration as a member of the Regulator.
- Clause 3** Provides that the *State Service Act 2000* does not apply to members of the Regulator.
- Clause 4** Sets out the remuneration and conditions of appointment of members of the Regulator.
- Clause 5** Sets out the circumstances in which a member is deemed to have vacated office and when the Minister may remove a member from office.
- Clause 6** Permits the Minister to replace a member for the remainder of that member's term of office.
- Clause 7** Provides that the actions of the Regulator are not invalid by virtue of a vacancy in the office of a member or the subsequent discovery of a defect in the appointment of a member.
- Clause 8** Provides legal presumptions regarding the constitution of the Regulator and the appointment of any member for the purposes of legal proceedings.

SCHEDULE 3 – MEETINGS OF THE REGULATOR

- Clause 1** Sets out the arrangements for convening meetings of the Regulator.
- Clause 2** Sets out the presiding arrangements for meetings of the Regulator.
- Clause 3** Sets out the quorum and voting requirements at meetings of the Regulator.
- Clause 4** Sets out the arrangements for the conduct of meetings of the Regulator.

- Clause 5** Provides that resolutions agreed by two members are taken to be agreed at a meeting and that all members are to be informed of such a resolution.
- Clause 6** Sets out the requirements of members of the Regulator regarding disclosure of interests.
- Clause 7** Requires the Regulator to keep minutes of its proceedings.
- Clause 8** Permits the Regulator to regulate its own proceedings.
- Clause 9** Establishes legal presumptions regarding resolutions of the Regulator and the presence of a quorum at any meeting of the Regulator.

SCHEDULE 4 – SAVINGS AND TRANSITIONAL PROVISIONS

- Clause 1** Provides definitions for the purposes of this Schedule .
- Clause 2** Provides that the current Government Prices Oversight Commissioner, Mr Glenn Appleyard, is taken to be appointed as the chairperson of the Regulator on the day this Act commences, and for the same term and on the same conditions as Commissioner.
- Clause 3** This clause abolishes the Government Prices Oversight Commission, and terminates the appointment of the Commissioner and any Acting Commissioner once the relevant legislation is repealed.
- Clause 4** This clause provides that any guidelines made under section 12 of the *Government Prices Oversight Act 1995* continue to have effect.
- Guidelines have been issued in relation to the conduct of investigations of complaints of competitive neutrality inquiries.
- Clause 5** This clause continues any declarations made under sections 5 and 6 of the *Government Prices Oversight Act 1995*.
- Clause 6** This clause provides that if a requirement to conduct pricing policy investigation has been made, then that requirement is taken to be made under clause 24 of this Act.
- Clause 7** This clause provides that any pricing orders made under section 36 of the *Government Prices Oversight Act 1995* continue to have effect under this Act.
- Clause 8** This clause provides that a pricing policy determination made under section 38 of the *Government Prices Oversight Act 1995* continues to have effect under this Act.

- Clause 9** This clause permits the Government Prices Oversight Commission to refer any competitive neutrality complaint made before this Act commences to the Regulator and to refund the fee to the complainant if the complaint is justified.
- Clause 10** This clause transfers the funds and liabilities of the Commission to the Regulator.
- Clause 11** This clause allows the Regulator to prepare an annual report and financial statements including the activities of both the Commission and the Regulator in the relevant transitional year.
- Clause 12** This clause transfers the records of the Commission to the Regulator and continues any exemptions from the *Freedom of Information Act 1991* and any directions by the Commissioner restricting or prohibiting their publication.