

Arbitration of sewer mining disputes

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1 Certain disputes about sewer mining can be referred to IPART for arbitration

A sewer miner, or a service provider from whose sewers a sewer miner wants to draw the contents, may apply to IPART for the arbitration of a dispute.

The types of dispute that IPART can deal with are:

1. disputes as to the terms of any agreement under which the sewer miner is to be permitted to draw from the contents of a service provider's sewerage infrastructure, or
2. disputes about any matter arising under such an agreement, if the agreement allows for disputes to be arbitrated by IPART, or
3. disputes about any matter arising under a determination of a previous sewer mining arbitration by IPART, or IPART's nominated arbitrator.^a

The *Water Industry Competition Act 2006* (**WIC Act**) defines a sewer miner to be "a person who draws from the contents of a service provider's sewers or who wants to do so".

Disputes about sewer mining can be referred to IPART only if the relevant service provider has formally notified IPART of its sewer mining policy, and that it is willing to allow disputes as to its granting or refusal of permission to draw from the contents of its sewers to be referred to IPART for arbitration.^b A service provider can withdraw its willingness to have such disputes referred to IPART.^c

2 How to apply for arbitration of a sewer mining dispute

To refer a sewer mining dispute to IPART for arbitration, send an email to ipart@ipart.nsw.gov.au which:

- has the subject line "Referral of a dispute for arbitration under the *Water Industry Competition Act 2006*"
- is copied to the other party to the dispute

^a *Water Industry Competition Act 2006*, section 46(1).

^b WIC Act, section 45(a).

^c WIC Act, section 45(b).

IPART acknowledges the Traditional Custodians of the lands where we work and live. We pay respect to Elders both past and present. We recognise the unique cultural and spiritual relationship and celebrate the contributions of First Nations peoples.

- clearly sets out:
 - the applicant's name (including Australian Company Number in the case of a company)
 - the name of the other party
 - your contact details for communicating about, and being served with documents for, the dispute
 - a description of the dispute, and
 - a description of any attempts made to resolve the dispute before seeking arbitration, and
- states that you consent to IPART providing details of the dispute to the public, or third parties whose interests are affected, if necessary.

3 Procedure for arbitrating a sewer mining dispute

3.1 IPART may be the arbitrator or nominate someone else as the arbitrator

Section 46(2) of the WIC Act gives IPART the choice of acting as the arbitrator itself, or nominating someone else as the arbitrator. For example, IPART may nominate an experienced commercial arbitrator.

Upon referral of a sewer mining dispute to it, IPART may at its discretion consult with the parties as to whether IPART or a commercial arbitrator should arbitrate the dispute, and may invite the parties to propose any suitable commercial arbitrators. IPART is not bound to nominate a commercial arbitrator who has been proposed by either party and may nominate another person or persons to perform the role of arbitrator.

3.2 Some requirements are set by statute

The WIC Act sets six compulsory rules for an arbitration of a sewer mining dispute. These are set out below.

1. The arbitrator may require the service provider to cause notice of the proceedings to be given to other persons who are permitted to draw from the contents of the service provider's sewerage infrastructure.^d
2. In considering the terms of a proposed determination, the arbitrator—
 - a. must give effect to the service provider's policy with respect to the granting of permission to draw from the contents of its sewerage infrastructure,^e and
 - b. subject to paragraph (a), must have regard to such matters as are prescribed by the regulations.^f

^d WIC Act, section 46(3).

^e WIC Act, section 46(5).

^f As at the date of publishing this fact sheet, no such matters were prescribed.

3. Before making a determination, the arbitrator—
 - a. must cause copies of the proposed determination to be given to each of the parties to the dispute, and
 - b. must give each of the parties an opportunity to make submissions to the arbitrator in relation to the proposed determination.^g
4. The arbitrator must use their best endeavours to determine the dispute within 6 months after the application for the dispute to be determined is made to IPART.^h
5. On making a final determination, the arbitrator must cause a notice of the determination to be given to IPART.ⁱ
6. On receiving such a notice, IPART must publish it on IPART's website.^j

Subject to the WIC Act and any applicable regulations made under it,^k the *Commercial Arbitration Act 2010 (CA Act)* applies to an arbitration under section 46 of the WIC Act.^l The CA Act provides for some compulsory procedural requirements in addition to those imposed by the WIC Act. These include, but are not limited to:

- The parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party's case.^m
- All statements, documents or other information supplied to the arbitrator by one party must be communicated to the other party.ⁿ
- The parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.^o

3.3 The parties are free to agree many procedural matters

Section 19 of the CA Act provides that:

- subject to that Act, "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings", and
- failing such agreement, the arbitral tribunal may, subject to the provisions of that Act, conduct the arbitration in such manner as it considers appropriate.

^g WIC Act, section 46(6).

^h WIC Act, section 46(7).

ⁱ WIC Act, section 46(8). This requirement would not apply where IPART itself is the arbitrator.

^j WIC Act, section 46(9).

^k As at the date of publishing this fact sheet, no relevant regulations had been made.

^l WIC Act, section 46(4).

^m CA Act, section 18.

ⁿ CA Act, section 24(4).

^o CA Act, section 24B(1).

In practice, **IPART, or its nominated arbitrator, would expect the parties to agree on as many procedural matters as possible**, leaving only those on which they cannot reach agreement to the arbitrator. The parties, and the arbitrator, may wish to adopt or adapt parts of the recommended procedural framework set out in IPART's Practice Direction for Part 4A access arbitrations,^p so far as they are suitable for arbitration of the sewer mining dispute.

The arbitrator may decide to hold one or more preliminary hearings to resolve any procedural matters about which the parties cannot agree. Agreeing on as many matters as possible will reduce the duration and costs of any preliminary hearing.

The procedural matters which the parties should consider include:

1. A timeline to facilitate the determination of the proceeding within the 6-month time limit indicated by section 46(7) of the WIC Act, including:
 - a. by when each party should file a brief initial position statement;
 - b. by when each party should file its evidence and written submissions;
 - c. should there be an oral hearing and, if so, by when?
2. How will the parties attempt to narrow the facts and issues in dispute in the arbitration?
3. Whether either party considers it necessary to adduce expert evidence? If so, in what field and addressing what question(s)?
4. Whether any oral evidence or cross-examination of witnesses will be required?
5. If there is to be an oral hearing of the determination, where will it take place, and what arrangements will there be for transcription?
6. Whether any interim measures are required, such as an interim determination of the terms of any agreement that will apply pending the making of a final determination?
7. Whether either party requires provision of information or documents from the other party, or from third parties? If so, time limits and procedure to facilitate the efficient requesting and/or provision of such information or documents?
8. Whether any measures are necessary, beyond the confidentiality provisions of sections 27E to 27I of the CA Act, to prevent disclosure of confidential information?

4 Costs

Ordinarily, the arbitrator will determine how the costs of an arbitration, including the arbitrator's fees and expenses, are to be borne between the parties.

It is open to the parties to agree between themselves how to share costs.^q In the absence of such an agreement, costs are at the discretion of the arbitrator.^r

^p IPART, Practice Directions: Arbitration under Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), May 2012.

^q CA Act, section 33B(1).

^r CA Act, section 33B(1).

Because costs start running from the time an application is made, **the parties to a dispute may wish to agree how to share costs between them before a party applies for arbitration.**

5 The end of arbitral proceedings

An arbitration can end in two different ways.

Firstly, it can end when IPART or its nominated arbitrator makes a final determination.^s Once made, the determination becomes legally binding on the parties in accordance with its terms. If a court order enforcing the determination is required, a party may apply to the Supreme Court for enforcement under section 35 of the CA Act.

Secondly, the arbitrator may issue an order terminating the arbitration. This can occur if:

1. the claimant withdraws his or her claim, unless the respondent objects and the arbitral tribunal recognises a legitimate interest on the respondent's part in obtaining a final settlement of the dispute, or
2. the parties agree on the termination of the arbitration, or
3. the arbitral tribunal finds that the continuation of the arbitration has for any other reason become unnecessary or impossible, or
4. the arbitral tribunal dismisses a claim because there has been inordinate and inexcusable delay on the part of the claimant in pursuing the claim.^t

^s CA Act, section 32(1).

^t CA Act, section 32(2).