ARBITRATION OF DISPUTES OVER ACCESS TO MONOPOLY INFRASTRUCTURE

PROCEDURES AND PRACTICE NOTES

Arbitration Registry of the

INDEPENDENT PRICING AND REGULATORY TRIBUNAL

OF NEW SOUTH WALES

Arbitration Registry of the

INDEPENDENT PRICING AND REGULATORY TRIBUNAL

OF NEW SOUTH WALES

ARBITRATION OF DISPUTES OVER ACCESS TO MONOPOLY INFRASTRUCTURE

Revised May 1997

Please note that procedures outlined in this document are subject to refinement as the Tribunal gains further experience in this area. Comments or inquiries regarding this document should be directed to:

Gary Drysdale ☎ (02)9290 8477

Comments may be sent by fax to ☎ (02)9290 8466

Arbitration Registry of the
Independent Pricing and Regulatory Tribunal
of New South Wales

PO Box Q290
QVB Post Office
Sydney NSW 1230

Level 2,
44 Market Street
Sydney

FOREWORD

In January 1996 an amendment was made to the Independent Pricing and Regulatory Tribunal Act 1992 that resulted in the extension of the Tribunal's responsibilities. One major new role for the Tribunal is the arbitration of disputes regarding access to utility infrastructure assets that are subject to state regulation. This currently includes electricity transmission, electricity distribution, natural gas distribution and rail infrastructure.

The arbitration of infrastructure access disputes under the national competition policy reforms is a recent development. The Tribunal is currently involved in its first arbitration. This arbitration is not only the first conducted by the Tribunal but also the first of this type in Australia.

This publication has been produced with the assistance of Blake Dawson Waldron Solicitors to outline the arbitration procedures that are currently used by the Tribunal. The Tribunal believes that these procedures will result in fair and expeditious outcomes. However, it is important to note that these procedures will be subject to refinement as the Tribunal gains further experience in this area.

The Tribunal welcomes public comment on these arbitration practice notes. Any comments should be referred to Mr Gary Drysdale, of the Tribunal's Arbitration Registry (phone 02 9290 8477, fax 02-9290 8466).

Thomas G Parry
Chairman

January 1997

TABLE OF CONTENTS

INTRODUCTION

In August 1993 an Independent Committee of Inquiry chaired by Professor Fred Hilmer recommended that a National Competition Policy should be established. In February 1994 the Heads of Government agreed in-principle to implementation of the report's recommendations. At its April 1995 meeting the Council of Australian Governments (CoAG) agreed to a national competition reform package and signed three intergovernmental agreements to implement the reforms. One of these was the Competition Principles Agreement in which all Australian governments agreed to implement a range of measures to promote competition. These included a right for third parties to obtain access to major infrastructure, such as rail tracks, electricity and gas distribution networks and similar infrastructure of national significance whose duplication cannot be economically justified.

The Competition Policy Agreement requires that, whenever possible, third party access should be on terms and conditions agreed between the owner of the facility and those seeking access. These need not be exactly the same for all users. Where negotiation fails, binding arbitration should be available as an alternative.

Amendments to the Independent Pricing and Regulatory Tribunal Act in January 1996 require the Tribunal to undertake tasks in relation to access regulation of monopoly infrastructure in NSW. The Tribunal's responsibilities in this area have been further defined in industry specific legislation subsequently enacted in 1996. Other NSW legislation that covers third party access includes:

- *NSW Electricity Supply Act 1996*
  This Act provides the legislative framework for the access regime in the electricity industry. The principal document defining access for wholesale market participants is the NSW electricity code. Chapter 8 of the code requires access disputes to be referred to the Tribunal for resolution in accordance with Part 4A of the IPART Act.

- *Gas Supply Act 1996*
  This Act adopts a NSW Third Party Access Code for Gas Distribution Networks. The Gas Supply Act refers to the Independent Pricing and Regulatory Tribunal Act 1992 in respect of arbitration of access disputes and investigations by the Tribunal. Additionally, the Gas Supply Act contains specific provisions which limit the application of the IPART Act. For example, subsection 24B (3) in Part 4A of the IPART Act has been replaced by a similar provision in the Access Code.

- *Transport Administration Amendment (Rail Corporatisation and Restructuring) Act* 1996
  This requires market participants to refer access disputes to the Tribunal for resolution in accordance with Part 4A of the IPART Act and the NSW Rail Access Regime established by the Minister for Transport.

The Tribunal, for purpose of completeness, has included in the Appendices C-H, extracts from relevant legislation and access codes dealing with arbitration.

The Tribunal's access regulation role varies from industry to industry. In respect to electricity and gas, the Tribunal has been closely involved in the development of the access regimes. In rail, there has been very little involvement by the Tribunal in the establishment of the regime. However, across these industries, the Tribunal has an important arbitration role for the resolution of access disputes.

When access disputes are referred to the Tribunal for resolution, it can decide to act as an arbitrator or alternatively appoint one or more persons from a Panel approved by the Premier. Where the Tribunal has been actively involved in an access regulatory role, the parties to the dispute will need to agree to the Tribunal acting as an arbitrator.

When conducting an access arbitration the Tribunal must apply and take account of a number of issues. Some of these matters are outlined in sections 24A(2) and 24B(3)(a) of the IPART Act.

> *24A(2)*
> *The Commercial Arbitration Act 1984 applies to such an arbitration, but subject to this Part (Part 4A of the Act) and the regulations*
>
> *24B(3)(a)*
> *the matters set out in clause 6(4)(i), (j) and (l) of the Competition Principles Agreement.*

These two provisions provide for commercial arbitrations of access disputes but also require the arbitrator to take account of broader public interest matters as outlined in the Competition Principles Agreement. For example 6(4)(i) of the Competition Principles agreement states in part:

> *6(4)(i)*
> *In deciding on the terms and conditions for access, the dispute resolution body should take into account:*
> *(iv) the interest of all persons holding contracts for use of the facility;*
> *(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
> *(vii) the benefits to the public from having competitive markets.*

Material used in the arbitration process will generally be of a commercially sensitive nature, and hearings should be held in private to protect confidentiality. However, as outlined, public interest issues must also be taken into account in the resolution of access disputes. This is further emphasised in some circumstances where the Tribunal is required to seek submissions from the public regarding an access dispute. Sub-section 24B(2) of the IPART Act includes provision for:

> *"In the case of a dispute between a third party wanting, but not having, access to a service and the provider of that service, the arbitrator must give public notice of the dispute. The notice must invite submissions to the arbitrator from the public regarding the dispute and specify when and how those submissions may be made."*

Persons whose interests must be taken into account by the Tribunal in any determination will be:

- notified of the dispute (together with some information as to the issues involved in the dispute); and
- given an opportunity to present a submission to the arbitrator, explaining their interests and views.

In the interests of procedural fairness, once a submission of this type has been received, it will be provided to the parties of the dispute to allow response to any issues raised.

The Tribunal has also taken a number of additional steps to ensure procedural fairness. These include the following:

- The Tribunal's Arbitration Registry is 'ring-fenced' from the Tribunal's Secretariat. Once an access dispute is referred to the Tribunal the matter is dealt with by the Registry. The Registry's primary functions are to support the arbitrator on access arbitration, provide procedural advice to the parties and maintain public registers of access agreements. With only one exception outlined below, any involvement of the Secretariat with the parties in matters pertaining to the dispute will cease once a referral has been made.
- Tribunal members involved in a hearing will not discuss details of the arbitration with officers of the Secretariat. However, if during the course of a hearing, the arbitrator requests advice from the Secretariat, it will be provided in writing and supplied to the parties to the dispute. This advice will be subject to normal review and examination by the parties.
- Parties to an arbitration will be given the opportunity to object to the Tribunal's choice of an arbitrator. This includes circumstances where the Tribunal intends to arbitrate. If a reasonable objection is raised, the Tribunal will have no hesitation in appointing an alternative arbitrator chosen from a panel approved by the Premier[1].

[1] with the exception of arbitration of access to gas distribution networks where the Tribunal appoints the Panel.

PRACTICE NOTES

1. Introduction

These Practice Notes have effect from 1 September 1996.
The procedures set out in these Practice Notes may be followed in arbitrations undertaken by the Tribunal.

2. Explanatory Notes

In these Practice Notes, where the context permits:
"**the Act**" means the Independent Pricing and Regulatory Tribunal Act 1992;
"**the applicant**" means the person who has referred a dispute to the Tribunal:
"**Arbitrator**" means the Tribunal, or the person or persons appointed by the Tribunal, acting as an Arbitrator or Arbitrators to hear and determine a dispute referred to arbitration;
"**Arbitrator's Costs**" are all of the fees and expenses of the Arbitrator incurred in the course of hearing and determining a dispute, and, without limitation, include:
a) the Arbitrator's fees;
b) incidental costs such as room hire, transcription, administrative support; and
c) other costs which may be incurred by the Arbitrator in hearing and determining the dispute, such as the costs of any industry or expert assistance retained by the Arbitrator, or the costs of any assistance requested by the Arbitrator from any member of or consultant to the Secretariat of the Tribunal;
"**CA Act**" means the Commercial Arbitration Act 1984;
"**Costs of the Arbitration**" includes both the Costs of the Parties and the Arbitrator's Costs;
"**Costs of the Parties**" means the proper legal costs and disbursements of the parties incurred in the course of preparing for and at a hearing of a dispute;
"**dispute**" means a dispute referred to the Tribunal for arbitration;
"**party**" means a party to a dispute; and
"**Potentially Impeded Third Party**" has the meaning set out in paragraph 22 of these Practice Notes.

In these Practice Notes there are various procedural steps set out in relation to preparing for a hearing of a dispute, involving, among other things:
- the preparation and presentation of evidence, which will generally be in the form of written statements of witnesses and expert witnesses;
- making documents available to the other parties to the dispute; and
- the preparation and presentation to the Arbitrator of submissions by the parties.

By way of general explanation:
a) "**evidence**" of a party includes all of the facts on which a party relies, and the opinions of expert witnesses that a party puts forward, and presents (generally in written statements) to an Arbitrator at a hearing;

b) "**documents**" of a party includes all of the general business documents and records in the possession of a party or any of its agents or consultants; and
c) "**submissions**" of a party are the arguments put forward by a party, based on the facts established by the evidence presented and the documents referred to at a hearing.

3. Nature of Arbitration

Notwithstanding these Practice Notes, an Arbitrator may conduct any preliminary meeting, hearing or the arbitration process generally in any manner that he or she thinks appropriate. The Arbitrator will endeavour to hear and determine the dispute with as little formality as possible.

An Arbitrator is not bound by the rules of evidence. An Arbitrator will determine a dispute according to law and will have regard to the rules of natural justice in hearing and determining a dispute.

The parties to a dispute must at all times comply with the directions of the Arbitrator and must not do anything to delay or prevent the dispute being heard and determined by the Arbitrator.

4. Reference of a Dispute

A dispute may be referred to the Tribunal for arbitration by any party to the dispute. A dispute must be referred to the Tribunal in writing. The party referring a dispute to the Tribunal will be known as 'the applicant'. Once the dispute has been referred to the Tribunal, the applicant should provide a Notice of Dispute to the Tribunal, and to each of the parties to the dispute, as soon as possible after the dispute is referred to the Tribunal.

A Notice of Dispute should be in the form set out in Form 1 (see Appendix A).

The parties should be aware that, once filed with the Tribunal, the Tribunal may refer to and use the Notice of Dispute as a convenient summary of the nature of the dispute, and that the Notice of Dispute may be:
a) copied to any person whom the Arbitrator may require to be notified of the dispute; or
b) made publicly available if the Arbitrator requires.

5. Appointment of Arbitrator

As soon as practicable after referral of a dispute to the Tribunal, the Tribunal will either:

- determine that it will act as Arbitrator; or
- appoint a person or persons to act as Arbitrator, to hear and determine the dispute.

Each party to an arbitration will be given the opportunity to object to the Tribunal's choice of an Arbitrator. If a party raises an objection, the Tribunal will, following consultation with the parties:

a) appoint an alternative Arbitrator chosen from a panel approved by the Premier[2]. where it was originally proposed that the Tribunal act as Arbitrator; or

b) where possible, appoint an alternative Arbitrator from the panel where appointment from the panel is proposed.

The Arbitration Registry will write to the parties informing them of the name(s) of the person(s) acting as Arbitrator and the time, date and place of the first preliminary meeting.

The Arbitrator will then:

a) require the parties to prepare a document (or documents) which sets out a clear statement of:

   i) the nature of the dispute;

   ii) the issues which the parties consider are likely to arise; and

   iii) where parties have a difference in view, the contentions of each party.

b) determine whether any other persons are parties to the dispute, and make provision for them to become parties in the arbitration;

c) determine whether any particular persons, or the public generally, should be informed of the dispute, and make any consequential directions in relation to them;

d) provide the parties with an estimate of the Arbitrator's costs for the arbitration;

e) consider any request for leave for legal representation;

f) set a timetable for the completion of the preparatory steps prior to the hearing of the dispute;

g) seek information from the parties as to the expert witnesses on whom they propose to rely at the hearing of the dispute;

h) fix a date for a further preliminary meeting to be held;

i) in urgent matters, fix a date for the hearing of the dispute; and

j) deal with any other matters which will promote the efficient and proper conduct of the arbitration.

k) fix a date for a further preliminary hearing to be held;

l) in urgent matters, fix a date for the hearing of the dispute; and

m) deal with any other matters which will promote the efficient and proper conduct of the arbitration.

---

2 with the exception of arbitration of access to gas distribution networks where the Tribunal appoints the Panel.

6. Preliminary Meeting

As soon as is convenient to the Arbitrator, the Arbitrator will hold a preliminary meeting of the parties to the dispute.

At the first or any subsequent preliminary meeting, the Arbitrator may:

a) deal with the matters set out in the pro forma draft minutes of the preliminary meeting (which will generally be in the form set out in Form 2 -see Appendix 2);

b) deal with other preliminary matters arising in the dispute, such as:

(i) discussing with all of the parties, and determining, the extent of the dispute;

(ii) determining whether any other persons are parties to the dispute and making provision for them to be joined as parties in the arbitration;

(iii) determining whether any particular persons, or the public generally, should be informed of the dispute and making any consequential directions in relation to them; and

c) deal with any other matters which will promote the efficient and proper conduct of the arbitration.

The Arbitrator may convene further preliminary meetings, either at the request of one of the parties, or of his or her own motion. In many cases at least a second preliminary meeting will be required by the Arbitrator, at a time when most of the pre-hearing steps will have been carried out by the parties, to deal with any consequential issues arising and to set a hearing date at that time.

The Arbitrator may refuse to set a hearing date until all of the matters dealt with at the preliminary meetings have been completed by the parties.

A full transcript may be taken of all proceedings at a preliminary meeting.

7. Failure to Comply with Arbitrator's Directions

If any party fails or refuses:

a) to attend a preliminary meeting;

b) to attend a hearing of a dispute; or

c) to comply with any requirement of the Arbitrator, including any matter dealt with at a preliminary meeting,

the Arbitrator may, in his or her discretion, nevertheless continue with the preliminary meeting or hearing or determine the dispute.

8. Evidence to be presented by the Parties

To promote the expeditious hearing of a dispute, an Arbitrator will generally require that all of the evidence of the parties must be in the form of written statements. Written statements of witnesses should be sworn or affirmed by the witness giving the statement.

All written statements should be filed in the Arbitration Registry and served on the other parties. The Arbitrator will generally set a time for the filing and service of written statements. The applicant will generally be required to provide its written statements shortly before the other party(s). The parties may also be given an opportunity to provide further written statements in reply before the hearing. In all cases however, all written statements should be filed and served not less than 7 days before the hearing.

Any evidence which does not comply with the requirements set out in this Practice Note, or the directions of the Arbitrator, may not be accepted by the Arbitrator at the hearing of the dispute.

If the parties are able to agree certain facts at any time, the preparation of an agreed statement of facts by the parties will generally assist the Arbitrator and expedite the hearing of the dispute. Particularly, the parties are encouraged to discuss the preparation of an agreed statement of facts prior to preparing written statements of witnesses, so as to minimise the amount of written material required.

Each party should give notice to the Arbitrator and to the other parties as soon as possible if any evidence set out in a written statement is in dispute.

Dispute as to Qualification

A party will not be permitted to dispute the capacity or qualification of a person to give an expert opinion, unless that party has given written notice of its intention to do so, to the other party(s) and to the Arbitrator at least 7 days before the hearing of the dispute.

9. Expert Evidence

Any person who proposes to give an opinion on any matter as part of the evidence at a hearing, rather than to give only an account of facts, may be an "expert witness" for the purposes of these Practice Notes.

Expert witnesses who may be called at a hearing of a dispute include economists, accountants, persons experienced in an industry or trade, academics and, in some cases where legal issues are in dispute, lawyers.

Generally, in the interests of expediting the hearing and minimising costs, the parties will be limited to relying upon a maximum of two expert witnesses, with only one expert witness permitted in any one area of expertise in issue in the dispute.

The evidence of an expert witness should be set out in a written statement, which should be filed and served in the normal way.

Any evidence of an expert witness which does not comply with the requirements set out in this Practice Note, or the directions of the Arbitrator, may not be accepted by the Arbitrator at the hearing of the dispute.

10. Documents of the Parties

In the interests of fairness, the Arbitrator will generally require that the parties disclose to one another all of the documents on which they may rely in the hearing of the dispute, well prior to the hearing date. For this purpose, unless otherwise directed by the Arbitrator, all documents:

a) which a party refers to, or generates, in preparing the evidence on which it proposes to rely, and the submissions which it proposes to make to the Arbitrator, at the hearing of a dispute, and
b) which the parties referred to, or generated, in the course of negotiating the issues which form part of the dispute,

should be made available to all other parties. In many cases it will be convenient for copies of such documents to be provided by the parties to one another.

The Arbitrator will usually set a time for such documents to be made available by the parties. Generally, in the absence of a direction from the Arbitrator, documents must be made available not less than 14 days before the hearing.

Any document which has not been made available by a party as required in this Practice Note, or as required by an Arbitrator at any time, may, in the discretion of the Arbitrator, not be relied upon by that party at the hearing of the dispute.

11. Confidentiality of Documents

Any person who is required under any of these Practice Notes, or any direction of the Arbitrator, to produce or make available a document or statement or any other material to the Arbitrator or any other person, may request the Arbitrator, at any time, to direct that the contents or any part of that document, statement or material not be disclosed, or be disclosed only on certain conditions, if it contains genuinely confidential material which would significantly prejudice that person if it were disclosed.

In considering any request under this Practice Note, the Arbitrator may take into account:

a) the extent of the prejudice which may be suffered by the person making the request, if it is refused;
b) the prejudice which may be suffered by any other person (particularly any party to a dispute), if it is not refused;
c) any undertakings which may be offered by any other person in relation to the confidentiality of the contents of the document, statement or material; and
d) the importance of the contents of the document, statement or material to the issues in the dispute.

12. Copies of Documents for the Arbitrator

Unless an Arbitrator otherwise requires, not less than 7 days before the hearing, the parties should prepare and provide to the Arbitration Registry, a bundle of all of the documents on which all of the parties propose to rely at the hearing of the dispute. The

parties should discuss the contents of the bundle between them prior to its preparation so as to minimise the contents of the bundle and to ensure that it is conveniently tabulated and bound.

13. Written Submissions to the Arbitrator

Written submissions at a hearing of a dispute will be encouraged by an Arbitrator, and may be required from the parties, whenever they may promote the expeditious resolution of a dispute.

Generally, an Arbitrator will require the parties to present a brief written outline of their evidence and submissions at the beginning of a hearing. The Arbitrator may then require the parties to present more detailed written submissions on the evidence presented, any documents referred to and any other issues which may arise, at the hearing, after the evidence has been presented, or at any other convenient time during or after the hearing.

Detailed written submissions will be considered particularly appropriate in disputes which involve:

a) questions of law;
b) the analysis of large amounts of, or detailed, information which has been presented in evidence; or
c) conflicts in any of the evidence which has been presented to the Arbitrator.

All written submissions presented by a party to an Arbitrator at any time, should be provided to all other parties to a dispute.

14. Hearings

The hearing of a dispute will generally be held in private.

At the hearing of a dispute, the applicant will generally present its evidence to the Arbitrator first. The Arbitrator may however, make any directions as to the order in which parties to a dispute are heard.

If written statements of witnesses have been prepared by the parties, then at the hearing of a dispute:

a) witnesses will generally not be allowed to give oral evidence further to their written statements;
b) witnesses may be examined by any other party to the dispute, subject to any direction of the Arbitrator as to the conduct, subject matter or direction of that examination.

Transcript
The Arbitrator may require that a full transcript of the proceedings at a hearing be taken.

15. Determination by the Arbitrator

Usually an Arbitrator will, as soon as practicable after the completion of a hearing, provide to the parties a written determination of the dispute, signed by the Arbitrator, setting out reasons for the Arbitrator's decision.

In urgent cases, an Arbitrator may make a determination orally or in short written form shortly after the hearing of a dispute, but will then publish a full written determination within 7 days thereafter.

16. Costs of the Arbitration

The Costs of an Arbitration include both:
a) the Arbitrator's Costs; and
b) the Costs of the Parties.

The Arbitrator may make any direction as to the payment of the Costs of an Arbitration, or any of them, by the parties, or any one or more of the parties, as he or she considers appropriate.

After a determination of a dispute is made by an Arbitrator, the Arbitrator may request submissions from the parties to the dispute in relation to the payment of the Costs of the Arbitration.

In making a direction as to the payment of the Costs of the Arbitration, the Arbitrator may have regard to:
a) the conduct of the parties during the arbitration of the dispute;
b) the nature and timing of any offer of compromise of the dispute which may have been made by a party to the dispute; and
c) the nature of the determination made by the Arbitrator.

The Arbitrator must take into account factors set out in section 34 of the CA Act.

17. Settlement of the Dispute

If any of the parties to a dispute have settled any issues in the dispute between them, one of those parties should notify the Arbitrator as soon as possible. If only some of the issues between all of the parties in the dispute are settled, the Arbitrator will continue to hear and determine the dispute, in relation to the issues still on foot.

If all of the issues in a dispute are settled between all parties to the dispute, the Arbitrator should be notified immediately. Once notified, the Arbitrator may direct that the Arbitrator's Costs to that time be paid by the parties on such terms as he or she thinks

appropriate. Generally, in that situation, no direction as to the payment of the Costs of the Parties will be made by the Arbitrator.

18. Termination of the Arbitration

An Arbitrator may at any time after his or her appointment, of his or her own motion or on receipt of a written request of a party, terminate the arbitration of a dispute on any of the grounds set out in section 24E of the Act. The Arbitrator will generally seek the views of all parties to the dispute before terminating the arbitration of a dispute.

If the Arbitrator terminates the arbitration of a dispute, the Arbitrator may nevertheless make such directions as to the Costs of the Arbitration as he or she considers appropriate.

19. Notice of the Dispute to Other Persons

Where notice of a dispute is:
a) required, by the terms of a legislative provision or otherwise, or
b) considered appropriate by the Arbitrator, at the suggestion of a party or otherwise,
to be given to any person other than the parties to the dispute, or to the public, the Arbitrator will direct that the notice be given, and will settle the form of the notice and the mode of giving the notice, as soon as possible. The form of the notice may include a copy of, or an extract from, the Notice of Dispute.

20. Submissions from Persons not Parties to a Dispute

Where the Arbitrator is required to take the interests of a person who is not a party to the dispute into account in determining a dispute, the Arbitrator will generally require that the person be notified of the dispute in the manner set out in Practice Note 19. The Arbitrator may also direct that such a person be invited to provide to the Arbitrator, care of the Arbitration Registry, a written submission on the issues arising in the dispute, on or before a date set by the Arbitrator. Usually, a period of not less than fourteen days will be given by the Arbitrator for receipt of that submission.

21. Confidentiality of Submissions

In most cases, all of the parties to a dispute will be provided with copies of all submissions received by an Arbitrator under Practice Note 20. A person making a submission to an Arbitrator may request the Arbitrator, in writing, to direct that the contents of the submission, or part of it, not be provided to one or more of the parties to a dispute, on the basis that:
a) the submission contains genuinely confidential material (and the confidential material is clearly identified); and
b) the disclosure of that material would significantly prejudice or damage that person.

If the Arbitrator does not make the direction sought, the person making the submission may withdraw his or her submission before access or copies of it are provided to the parties.

In considering any request by a person under this Practice Note, the Arbitrator may take into account:

a) the extent of the prejudice which may be suffered by the person making the request, if it is refused;
b) the prejudice which may be suffered by any other person (particularly to any party to a dispute), if it is not refused;
c) any undertakings which may be offered by any other person in relation to the confidentiality of the contents of a document; and
d) the importance of the contents of the submission to the issues in the dispute.

22. Potentially Impeded Third Parties

If an Arbitrator forms the view that he or she may make a determination in a dispute that may impede the existing right of a person who is not a party to the dispute (a "**Potentially Impeded Third Party**"), the Arbitrator may invite the Potentially Impeded Third Party to become a party to the dispute for the purpose only of hearing and determining the issues of:

a) whether the existing right of the Potentially Impeded Third Party should be impeded in the manner contemplated, or at all;
b) whether impeding the existing rights of the Potentially Impeded Third Party gives rise to a case for the compensation of the Potentially Impeded Third Party; and
c) if there is a case for compensation of the Potentially Impeded Third Party, the determination of that compensation.

Each of the issues set out in paragraphs a), b) and c) will be issues on which evidence and submissions may be heard by the Arbitrator from all parties to the dispute, and which should be determined by the Arbitrator in determining the dispute between the parties.

The Arbitrator may make whatever consequential directions as he or she considers necessary so as to put the Potentially Impeded Third Party in a position, so far as is convenient to the proper determination of the dispute, to present an informed case on the issues identified in paragraphs a), b) and c) above.

23. Arbitration Registry

The Tribunal maintains the office of the "Arbitration Registry of the Independent Pricing and Regulatory Tribunal". Once an access dispute is referred to the Tribunal the matter is usually dealt with by the Registry. However, where an external Arbitrator is appointed from the panel and a party objects to use of the Registry, the Arbitrator will need to make other arrangements for support services.

The Registry's primary functions are to:

a) support the Arbitrator on access arbitration;
b) provide appropriate assistance and procedural advice to the parties;
c) provide procedural information regarding the conduct of arbitrations to members of the
public ; and
d) maintain registers of access agreements.

To ensure procedural fairness the Arbitration Registry is 'ring-fenced' from the Tribunal's Secretariat. With only one exception outlined below, any involvement of the Tribunal's Secretariat with the parties in matters pertaining to the dispute will cease once a referral has been made.

Tribunal members involved in a hearing will not discuss details of the arbitration with officers of the Secretariat. However, if during the course of a hearing, the Arbitrator requests advice from the Secretariat, it will be provided in writing and supplied to the parties to the dispute. This advice will be subject to normal review and examination by the parties.

Any person wishing to write to or communicate with an Arbitrator, or the Tribunal in relation to its arbitration function, should initially contact the Arbitration Registry. All written correspondence and other documents passing between a party to a dispute and the Arbitrator to that dispute or the Tribunal will be copied to all parties to that dispute, except in extraordinary circumstances.

The Arbitration Registry is open from 9.30am to 1.00pm and 2.00pm to 4.30pm on every business day. The Arbitration Registry is situated at Level 2,44 Market Street, Sydney, New South Wales.

APPENDIX A

Form 1

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 199_.

NOTICE OF DISPUTE

Between:
1. [*Party 1*] of [*Address*], (Applicant);
2. [*Party 2*] of [*Address*], (Respondent).

Existence of a Dispute

A dispute exists with respect to a public infrastructure access regime between the parties set out above. The dispute has been referred in writing to the Independent Pricing and Regulatory Tribunal on 199 . The respondent has been informed that the dispute has been referred to the Tribunal.

Appointment of an Arbitrator

The Tribunal is requested to act as an arbitrator, or to appoint an arbitrator or arbitrators, (an "Arbitrator") to hear and determine the dispute.

Details of the Dispute

The dispute concerns the following issues between the parties:

1. [*Insert brief statement of the issues in dispute*]

2.

3.

Dispute Resolution Procedures

The dispute resolution procedures which the parties are required to follow to resolve the dispute are set out in the following documents:

[*Insert references to the relevant Access Agreement, Regime and/or Act*]

The dispute resolution procedures set out in those documents have/have not been followed by the parties.

Acknowledgment of Publication of this Notice of Dispute.

The applicant acknowledges that an Arbitrator hearing and determining this dispute may be required to give notice of this dispute to one or more persons, or to the public generally. If so, the applicant consents to the Arbitrator publishing a copy of the whole or any part of this Notice of Dispute to any such person or to the public.

Persons to whom notice of the Dispute may be required to be given.

The following persons or groups of persons, other than the parties, may be required to be given notice of the dispute:

[*Insert list of persons*]

(Delete if inapplicable) Sub-section 24B(2) of the Act may be applicable to the dispute. Public notice of the dispute may be required to be given.

DATED: 19 .

.....

Signed by, or for and on behalf of, the applicant.

If you have any query in relation to this Notice of Dispute, please contact the Arbitration Registry of the Independent Pricing and Regulatory Tribunal at Level 2, 44 Market Street, SYDNEY NSW 2000, or on (02) 9290 8400.

APPENDIX B

Form 2

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 1996.

PRELIMINARY MEETING MINUTES

Between:
1. [*Party 1*] of [*Address*], (Applicant);
2. [*Party 2*] of [*Address*], (Respondent).

Arbitrator: *(name of arbitrator(s))*

Date of Preliminary Meeting: 199 .

At the Preliminary Meeting, the following matters were discussed between the parties and directed by the Arbitrator:

1. The parties have no objection to the Arbitrator hearing and determining the dispute.

2. The parties acknowledge that the Arbitrator may direct one or more of them to pay some or all of the Costs of the Arbitration, which include both the Arbitrator's Costs and the Costs of the Parties.
   The parties agree that the Arbitrator's Costs may properly include the following items (estimates of which are set out in the table):

Item	Fee/expense
Arbitrators' fees	$ per day
Administration costs Room hire Administrative support Equipment	 $ $ $
Transcription service	$
Industry or Expert Assistance for the Arbitrator	$
Miscellaneous arbitration expenses	records to be retained.

3. The parties will / will not be represented by legal practitioners at the hearing of the dispute or at any preliminary meeting.

4 The applicant must file with the Arbitration Registry and deliver to the respondent, on or before , sworn statements setting out all of the evidence, including evidence of any expert witnesses, on which it will rely at the hearing of the dispute.

5. The respondent must file with the Arbitration Registry and deliver to the respondent, on or before , sworn statements setting out all of the evidence, including evidence of any expert witnesses, on which it will rely at the hearing of the dispute.

6. The parties must each, on or before , make available to the other party, or if convenient provide copies of, all documents and all other materials:
   a) which that party refers to, or generates, in preparing the evidence on which it proposes to rely, and the submissions which it proposes to make to the Arbitrator, at the hearing of a dispute; and
   b) which that party referred to, or generated, in the course of negotiating any of the issues which form part of the dispute.

7. The parties propose to provide written statements from the following expert witnesses:

   Applicant:

   Respondent:

   No further expert witnesses may be relied upon by the parties at the hearing of the dispute without the permission of the Arbitrator.

8. The parties may each, on or before , file in the Arbitration Registry and deliver to the other party, any sworn statements setting out any evidence in reply on which they propose to rely at the hearing of the dispute.

9. **Notification of Dispute to Persons whose interests must be taken into Account.** [*delete if inapplicable*] The Arbitrator will cause the Arbitration Registry to give notice of the dispute, on or before , to the following persons. The notification will include an invitation to provide written submissions to the Arbitrator, care of the Arbitration Registry, to be received on or before .

   [insert details of persons, and form and manner of publication of the notice]

10. **Notification of Dispute pursuant to sub-section 24B of the Act.**

[*delete if inapplicable*] Sub-section 24B(2) of *the Independent Pricing and Regulatory Tribunal Act* 1992 applies to the dispute. Accordingly, the Arbitrator will cause the Arbitration Registry to give public notice of the dispute, on or before

.

The public notice will invite written submissions to the Arbitrator, care of the Arbitration Registry, to be received on or before .

11. A further preliminary meeting will be held on , at am / pm at Level 2, 44 Market Street, SYDNEY NSW 2000.

12. [*Any other matters*]

SIGNED by the Arbitrator.

.....

APPENDIX C

Extract from the Independent Pricing and Regulatory Tribunal Act 1992

PART 4A Arbitration of disputes

24A Arbitration of access disputes

(1) If a dispute exists with respect to a public infrastructure access regime that provides for the application of this Part, any party to the dispute may refer the dispute to arbitration.

(2) The Commercial Arbitration Act 1984 applies to such an arbitration, but subject to this Part and the regulations.

(3) A dispute is taken to exist with respect to such an access regime if a person (the third party) who wants access to a service, or wants a change to some aspect of the person's existing access to a service, under the access regime is unable to agree with the provider of the service on one or more aspects of access to the service.

(4) The parties of the dispute are the third party and the provider of the service. The provider of the service is the government agency that owns, controls or operates the infrastructure by means of which the service is provided.

24B Appointment and functions of arbitrator

(1) The Tribunal may act as arbitrator to hear and determine disputes referred to arbitration under this Part. Alternatively, the Tribunal may appoint one or more persons from a panel approved by the Minister (whether or not the persons are members of the Tribunal) who may act as arbitrators to hear and determine a dispute referred to arbitration under this Part.

(2) In the case of a dispute between a third party wanting, but not having, access to a service and the provider of the service, the arbitrator must give public notice of the dispute. The notice must invite submissions to the arbitrator from the public regarding the dispute and specify when and how those submissions may be made.

(3) In the arbitration of a dispute referred under this Part, the arbitrator must take into account the following:

(a) the matters set out in clause 6 (4) (I), (j) and (l) of the Competition Principles Agreement,
(b) any guidelines referred to in section 12A (2) for the access regime to which the dispute relates,
(c) any submissions made on the dispute by the public, in a case to which subsection (2) applies,

(d) any other matters that the arbitrator considers relevant.

(4) An arbitrator in an arbitration under this Part has the powers of the Tribunal under section 22 (Tendering information, documents and evidence). In the application of that section under this Part, a reference to the Tribunal is taken to be a reference to the arbitrator.

24C Determination of dispute by arbitrator

(1) The arbitrator is to determine the dispute by making a written determination on access to the service by the third party.

(2) The determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. For example, the determination may do one or more of the following:

(a) require the provider to provide access to the service by the third party,
(b) require the third party to accept, and pay for, access to the service,
(c) specify the terms and conditions of the third party's access to the service,
(d) require the provider to extend the infrastructure facility,
(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

(3) The determination does not have to require the provider to provide access to the service by the third party.

24D Parties required to give effect to determination

The parties to an arbitration are require to give effect to the arbitration determination and, is the determination is in favour of the third party's access to the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

24E Termination of arbitration

(1) An arbitrator may, without making a determination, terminate the arbitration at any time if the arbitrator thinks that any of the following grounds exist:

(a) the notification of the dispute was vexatious,
(b) the subject-matter of the dispute is trivial, misconceived or lacking in substance,
(c) the party who notified the dispute has not engaged in negotiations in good faith,
(d) access to the service should continue to be governed by an existing contract between the provider and the third party.

(2) In addition, if the dispute is about varying an existing determination, the arbitrator may terminate the arbitrator if the arbitrator thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

APPENDIX D

Extract NSW Electricity Market Code

8. ADMINISTRATION FUNCTIONS

Division 8A - Dispute Resolution

8.1 OVERVIEW OF DISPUTE RESOLUTION PROCEDURES

(a) This division 8A contains the procedures for resolving *disputes* between *market participants*.

(b) The dispute resolution procedures are illustrated in diagrammatic form in Schedule 8.1 and involve these key elements where a dispute (other than an access dispute) occurs:

(1) the parties in *dispute* are encouraged to resolve the *dispute* by negotiating a settlement;
(2) failing a negotiated settlement, whenever possible the next step should involve the parties resolving the dispute by mediation (see section 8.6);
(3) where mediation is not pursued, or if it is unsuccessful, the parties must refer the dispute to the dispute resolution panel for determination (see section 8.7);
(4) in some limited circumstances the parties may seek recourse to the Courts to deal with a dispute (see section 8.9).

(c) If a dispute arises between or involving two or more market participants, one or more market participants and a third party (such as the Market and System Operator or a party applying for access to the network) including in relation to:

(1) a *market participant's* involvement in the *market*;
(2) the interpretation of the Code;
(3) the calculation or payment of an amount under the Code;
(4) the rights or obligations of a *market participant* under the Code;
(5) the rights or obligations of a market participant under any contract between two or more market participants where the contract provides that the dispute resolution procedures under the Code are to apply to any disputes under or in relation to the contract,

the matter in dispute must be dealt with in accordance with the dispute resolution procedures provided for in this section of the Code, unless:

(6) the matter involves an access dispute, in which case the matter must be referred by the parties in dispute to the Independent Pricing and Regulatory

Tribunal of New South Wales for arbitration and Part 4A of the IPART Act 1992 will apply to the access dispute; or

(7) the matter is resolved by agreement of the parties in dispute within 5 business days (or such other reasonable period as the parties agree to be an acceptable period) after the dispute first arises, in which case these dispute resolution procedures will not apply.

(d) The *dispute resolution procedures* are to be implemented so as to:

(1) be simple, quick and inexpensive;
(2) preserve and enhance the relationships between parties to the *dispute*;
(3) observe the rules of Natural Justice;
(4) place emphasis on conflict avoidance; and
(5) encourage resolution of disputes without formal representation or reliance on legal procedures.

8.2 DISPUTE RESOLUTION ADMINISTRATOR

(a) The *Market and System Operator* will be the initial *dispute administrator*.

(b) If *TransGrid* or the *Market and System Operator* is a party to a *dispute* and there is a conflict of interest the *dispute adviser* will take over the role of the *dispute administrator* for the purposes of that *dispute*.

(c) The market participants may, with the consent of the Market and System Operator (which consent is not to be unreasonably withheld), appoint a dispute administrator in place of the Market and System Operator. The market participants in appointing any new dispute administrator will procure that the appointed person or body is bound by these dispute resolution procedures.

(d) The dispute administrator will be responsible for the day-to-day administration of the dispute resolution procedures and will have the following functions:

(1) receiving all *dispute notices*;
(2) selecting mediators in accordance with section 8.6.3 and *dispute resolution panel* members in accordance with section 8.8.3;
(3) receiving and exchanging any documents sent to it during the *dispute resolution procedures*;
(4) organising for and keeping any forms including the *mediation agreement*, and copies of any minutes of orders made by the *dispute resolution panel*;
(5) organising logistics such as room and food requirements for the *dispute resolution procedures*; and
(6) any other matters that may be required for the administration and smooth running of the *dispute resolution procedures*.

(e) The dispute administrator's fees and expenses for carrying out its functions will be paid out of the market operations fund by the Market and System Operator.

APPENDIX E

Extract from the Gas Supply Act 1996

Section 23 Arbitration of disputes as to the terms of access

(1) If a dispute exists between an authorised reticulator and a system user:

(a) as to the terms on which the system user is to be granted access to a declared distribution system, or
(b) as to any matter arising under an access determination under this section,

either party to the dispute may refer the dispute to arbitration.

(2) The Commercial Arbitration Act 1984 applies to an arbitration under this section, but subject to this section and the regulations.

(3) Sections 24B-24E of the Independent Pricing and Regulatory Act 1992 apply to an arbitration under this section in the same way as they apply to an arbitration under section 24A of that Act, and apply as if:

(a) a reference in those sections to a government agency were a reference to an authorised reticulator, and
(b) a reference in those sections to a service were a reference to a distribution system, and
(c) the words "from a panel approved by the Minister" were omitted from section 24B (1) of that Act, and
(d) sections 24B (2) and (3) and 24C (2) of that Act were omitted.

(4) The arbitrator must determine the dispute:

(a) in accordance with, and so as to give effect to, the requirements of the Access Code, and
(b) in accordance with the access undertaking or access order for the distribution system to which the dispute relates,

but, if the access undertaking or access order is to become the subject of an application for review under section 26, must defer making a determination until the decision on the review takes effect.

(5) The arbitrator's determination of the dispute (an access determination) has effect according to its terms.

(6) An access determination that concerns a distribution system situated party in New South Wales and partly in some other State or Territory may, if the parties of the

dispute agree, be expressed to apply to any part of the system situated in the other State or Territory.

(7) A determination under a law of another State or Territory, being a determination:

(a) that is recognised by the regulations as being the equivalent of an access determination under this section, and

(b) that concerns a distribution system situated partly in New South Wales and partly in some other State or Territory, and

(c) that, with the agreement of the parties, is expressed to apply to a part of the system situated in New South Wales,

has effect in relation to the part of the system situated in New south Wales as if it were an access determination under this section.

APPENDIX F

Extract from Third Party Access Code for Natural Gas Distribution Networks in NSW

6. DISPUTE RESOLUTION

Arbitration of Access Disputes

6.1 The arbitration is to be conducted pursuant to section 23 of the Gas Supply Act 1996.

Guidance for the Arbitrator

6.2 In arbitrating a dispute, the Arbitrator must take account of the provisions of the Access Undertaking. In addition, the Arbitrator must take into account:

(i) whether access would promote competitive market conduct, prevent the misuse of market power, and facilitate entry into the gas industry by Users which are not Affiliates of the Service Provider;

(ii) the differences between Pipelines which are complex integrated networks and Pipelines which have simpler configurations;

(iii) the Service Provider's legitimate business interests;

(iv) the costs to the Service Provider of providing access, including any costs of expanding the Pipeline, but not costs associated with losses arising from increased competition in upstream or downstream markets;

(v) the economic value to the Service Provider of any additional investment that the Prospective User or the Service Provider may be required to incur;

(vi) the legitimate business interests of all Users and Prospective Users;

(vii) contractual or other binding obligations of the Service Provider and/or other persons already using Services provided by means of the Pipeline;

(viii) the operational and technical requirements necessary for the safe and reliable operation of the Pipeline;

(ix) the allocation of resources within the natural gas industry, the effect on investment, the impact on innovation and the operational efficiency of the Pipeline;

(x) existing or proposed ring fencing arrangements; and

(xi) the benefit to the public from having competitive markets.

6.3 A decision made by the Arbitrator in arbitrating a dispute is a Determination under this Code. This Determination may deal with any matter relating to the provision of a Service to a Prospective User and any other matter identified in this Code that is to be enforced through section 6. By way of example, the Determination may:

(i) require the Service Provider to enter into a contract to provide a Service to the Prospective User at a specified Tariff and on certain terms and conditions; or

(ii) require the Service Provider to increase the Capacity of the Pipeline; or

(iii) require the Service Provider to allow a User to alter the delivery point specified in a contract for a Service, applying the provisions of the Access Undertaking.

The Determination does not have to require the Service Provider to enter into a contract to provide a Service to the Prospective User, nor does it have to require a Prospective User to enter into a contract with a Service Provider.

6.4 The Arbitrator may refuse to make a Determination that requires the Service Provider to provide a particular Service to the Prospective User if the Arbitrator considers there is substantial competition in the market for the provision of the Service in question.

6.5 Notwithstanding section 6.2, the Arbitrator will have regard to any Reference Tariffs in the Access Undertaking but is not bound by them in making a Determination.

Restrictions on Determinations

6.6 Unless required by section 6.7 and subject to the Queuing Policy contained in the Access Undertaking, the Arbitrator must not make a Determination that:

(i) is inconsistent with the Access Undertaking;

(ii) would prevent a User from obtaining a sufficient amount of the Service to be able to meet its requirements as provided for by a contract for a Service;

(iii) impedes the existing right of a person to use a facility unless the Arbitrator has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation; or

(iv) affects the priority right of another person in a Queue, except where the dispute relates to the application of the Queuing Policy.

Disputes About the Capacity of a Pipeline

6.7 Subject to the Queuing Policy contained in the Access Undertaking, where the Arbitrator is satisfied that the Service Provider believes that there is insufficient Capacity within safe operating limits and prudent pipeline practice to accommodate a Prospective User's requirements for a Service:

(i) the Arbitrator must not make a Determination that grants access to the Service;

(ii) the Arbitrator may require the Service Provider to offer a similar Service on an interruptible basis and for the corresponding interruptible price where possible; and

(iii) the Service Provider must disclose to the Prospective User the assumptions it has used to calculate the Capacity of the Pipeline, and provide the Prospective User (at the cost of the Prospective User) with the option of having an independent expert provide a (non-binding) opinion regarding the Capacity of the Pipeline.

Obligation to Develop Capacity

6.8 The Arbitrator may require the Service Provider to install a New Facility in order to expand the Capacity of a Pipeline to meet the requirements of a Prospective User, provided that:

(i) the Service Provider must not be required to extend the geographical range of a Service;

(ii) the expansion is technically and economically feasible and consistent with the safe and reliable provision of the Service;

(iii) the Service Provider's legitimate business interests are protected;

(iv) the Prospective User must not become owner of a Pipeline or part of a Pipeline without the agreement of the Service Provider;

(v) the terms of access for the third party taking into account the costs borne by parties for the extension and the economic benefits to the parties resulting from the extension; and

(vi) the Service Provider must not be required to fund part or all of the New Facility, except where the Service Provider has agreed to the expenditure on the New Facility and its timing being assumed in the calculation of the Reference Tariff, in which case the terms of the Access Undertaking shall determine the funding arrangements.

Prospective User may Decide not to Take a Service

6.9 Where a Determination pursuant to section 6.3 requires the Service Provider to provide a Service under terms and conditions specified in the Determination, the Prospective User must, within 14 days following the date at which the Determination is made, notify the Arbitrator and the Service Provider, in writing, if it intends to enter into a binding contract with the Service Provider in accordance with the terms and conditions specified in the Determination.

Obligation to Reflect the Determination in a Contract

6.10 Subject to section 6.9, the Arbitrator, in making a Determination, shall require the Service Provider and Prospective User to represent that Determination in the form of a binding contract within 28 days, with the Arbitrator resolving the form of any contract terms and conditions that have not been resolved within that time. Thereafter, the contract governs their relationship.

6.11 If the Service Provider or the User or Prospective User lodges an appeal against the Arbitrator's Determination, the Arbitrator may require that the Arbitrator's Determination is put into effect until the appeal is concluded, unless the parties agree not to put the Determination into effect until the appeal is heard. Any change to the Arbitrator's Determination pursuant to the appeal must not have a retrospective effect.

Reservation of Capacity During an Access Dispute

6.12 No priority rights of a User or Prospective User party to an access dispute shall be altered during the period of that dispute until the Arbitrator's Determination has been made pursuant to section 6.3, or during the period of an Appeal pursuant to section 7.8.

Awarding of the Costs of Arbitration

6.13 Subject to the Commercial Arbitration Act 1984, the Arbitrator has the discretion to order a party or parties to pay some or all of the Arbitrator's costs.

6.14 Subject to the Commercial Arbitration Act 1984, the Arbitrator has the discretion to order a party or parties to pay some or all of the other party's or any third party's costs.

Time Limits for the Dispute Resolution Process

6.15 The Arbitrator must use reasonable endeavours to make a decision in arbitrating the dispute within 42 days following the date of the notification of the dispute.

A decision made by the Arbitrator in arbitrating a dispute is a Determination.

6.16 The Arbitrator may extend the time limits for any stage of the dispute resolution process where the circumstances warrant it, but may not extend the time limit to beyond double the stated limit without the agreement of the parties to the dispute.

APPENDIX G

Extract from Transport Administration Amendment (Rail Corporation and Restructuring) Act 1996

Section 19B (4)

An access regime established in accordance with this section must make provision with respect to the application of Part 4A of the Independent Pricing and Regulatory Tribunal Act 1992 to a dispute with respect to third parties access to the NSW rail network by persons as rail operators. In any arbitration of such a dispute, the arbitrator must:

(a) give effect to the access regime, and
(b) take into account (in addition to the matters referred in section 24B(3) of that Act) the desirability of ensuring priority and certainty of access for passenger services.

APPENDIX H

Extract from NSW Rail Access Regime

7. ARBITRATION

7.1 Part 4A of the Independent Pricing and Regulatory Tribunal Act applies to the Regime.

7.2 Before the Corporation will negotiate Access arrangements with an existing or prospective Rail Operator:

(a) the existing or prospective Rail Operator must agree that if a dispute exist with respect to the Regime, only the Independent Pricing and Regulatory Tribunal (or an alternative arbitrator appointed by the Tribunal in accordance with Part 4A of the IPART Act) will act as an arbitrator and that Part 4A of the IPART Act will apply to govern the Arbitration; and

(b) the existing or prospective Rail Operator must provide an undertaking to the Corporation to refer any such dispute to the Independent Pricing and Regulatory Tribunal.