IPART
New South Wales

Independent Pricing and Regulatory Tribunal

# Regulatory Impact Statement

*Independent Pricing and Regulatory Tribunal Regulation 2012*

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# Invitation for submissions

IPART invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

**Submissions are due by Thursday, 31 May 2012.**

We would prefer to receive them electronically via our online submission form <www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission>

You can also send comments by fax to (02) 9290 2061, or by mail to:

Inquiry on IPART Regulation 2012
Independent Pricing and Regulatory Tribunal
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Our normal practice is to make submissions publicly available on our website <www.ipart.nsw.gov.au>. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed on the previous page.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. IPART will then make every effort to protect that information, but it could be disclosed under the *Government Information (Public Access) Act* 2009 (NSW) or the *Independent Pricing and Regulatory Tribunal Act* 1992 (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's submission policy is available on our website.

# Contents

# 1 Introduction

## 1.1 Overview of proposed Regulation

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|---|---|
| Title of regulation: | *Independent Pricing and Regulatory Tribunal Regulation 2012* |
| Parent Act: | *Independent Pricing and Regulatory Tribunal Act 1992* |
| Responsible Minister: | The Honourable Barry O'Farrell, Premier and Minister for Western Sydney |

This Regulatory Impact Statement has been prepared for the proposed *Independent Pricing and Regulatory Tribunal Regulation 2012* (**proposed Regulation**). Consistent with the requirements of the *Subordinate Legislation Act 1989*, this Regulatory Impact Statement:

- identifies the objectives that the proposed Regulation seeks to achieve
- identifies alternative options to achieve those objectives
- assesses the costs and benefits of the proposed Regulation and any alternative options, and
- includes a statement of the consultation program to be undertaken with groups likely to be affected.

This Regulatory Impact Statement fulfills the requirements of the *Subordinate Legislation Act 1989* for the making of statutory rules and is consistent with the NSW Better Regulation Office's *Guide to Better Regulation*.

The proposed Regulation concerns the remaking of the *Independent Pricing and Regulatory Tribunal Regulation 2007* (**2007 Regulation**)[1] without substantial alteration. The only proposed drafting amendment to the 2007 Regulation is to clarify the arbitrator's discretion regarding the private hearing of disputes.

1 The 2007 Regulation will be repealed on 1 September 2012 under section 10(2) of the *Subordinate Legislation Act 1989*.

The proposed Regulation has the same main objective as the regulations before it. It modifies and clarifies certain provisions of the *Commercial Arbitration Act 2010* (**Commercial Arbitration Act**) that concern the conduct and cost of arbitrations of disputes regarding access regimes under the *Independent Pricing and Regulatory Tribunal Act 1992* (**IPART Act**) and *Water Industry Competition Act 2006* (**WIC Act**). In summary, the proposed Regulation concerns:

- the right to legal representation in those arbitrations (**clause 5**)
- the private hearing of disputes (**clause 6**), and
- the recovery of the arbitrator's fees and expenses (**clause 7**).

## 1.2 Background to regulatory framework

As part of implementing the NSW Competition Principles Agreement, the Independent Pricing and Regulatory Tribunal (**IPART**) was given power to arbitrate third party access disputes. These disputes are referred for arbitration under the IPART Act (**IPART Act Arbitrations**). This role was later extended to arbitrating access disputes under the WIC Act (**WIC Act Arbitrations**). Further details of these arbitrations are outlined below.

Arbitrations in New South Wales are regulated by the Commercial Arbitration Act, which sets out the procedural framework for the conduct of arbitrations. This framework applies to IPART Act Arbitrations and WIC Act Arbitrations, but its application is subject to regulations made under the IPART Act and WIC Act.[2]

### 1.2.1 IPART Act Arbitrations – rail access

A government agency that owns, controls or operates public infrastructure may establish an access regime. Third parties will approach the government agency to obtain access to the infrastructure. If a third party and the government agency cannot agree on access under an access regime, either party may refer the dispute for arbitration by IPART (or another person appointed by IPART). The dispute can be referred for arbitration only where the access regime provides that the arbitration provisions in Part 4A of the IPART Act apply.[3]

The only access regime conferring Part 4A arbitration jurisdiction on IPART is the NSW Rail Access Undertaking, which was created under the *Transport Administration Act 1988*. The Undertaking provides that Part 4A of the IPART Act applies to disputes over third party access to the NSW rail network by the national rail track corporation, rail operators, or access purchasers.[4]

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2 IPART Act, section 24A(2); WIC Act, section 40(4), and *Water Industry Competition (Access to Infrastructure) Regulation 2007* (**WIC Regulation**), clause 11.

3 IPART Act, section 24A.

4 This is required by *Transport Administration Act 1988*, section 99C and Schedule 6AA, clause 2(1).

The arbitration provisions in Part 4A of the IPART Act and the proposed Regulation apply to IPART Act Arbitrations.

### 1.2.2 WIC Act Arbitrations – water access

Part 3A of the WIC Act aims to promote competition and encourage innovation in the water industry. Consistent with this aim, the WIC Act establishes an access regime to enable persons to access certain monopoly infrastructure services used for supplying water and providing sewerage services. If providers of those infrastructure services and access seekers cannot agree on:

- the terms of access to services that are subject to a coverage declaration or an access undertaking, or
- any matter under an access agreement that provides for disputes to be arbitrated under the WIC Act

either party may apply to IPART to determine the dispute.[5]

The proposed Regulation (as well as a number of the arbitration provisions in Part 4A of the IPART Act) applies to WIC Act Arbitrations.[6]

## 1.3 Submissions invited

IPART invites submissions on the proposed Regulation from interested parties.

IPART also invites submissions on a further issue, which has not been addressed in the proposed Regulation. The issue is whether the proposed Regulation should modify how the Commercial Arbitration Act allows parties to appeal to the Court on questions of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations. This is explained in section 5 below.

5 WIC Act, section 40(1).
6 WIC Act, section 40(5), WIC Regulation, clause 11.

# 2 Objective of the proposed Regulation

The principal objective of the proposed Regulation is to modify and clarify how the Commercial Arbitration Act applies to IPART Act Arbitrations and WIC Act Arbitrations.

These modifications and clarifications are aimed primarily at addressing certain differences between commercial arbitrations (to which the Commercial Arbitration Act applies), and IPART Act Arbitrations and WIC Act Arbitrations. In arbitrations between commercial players, parties to the dispute present evidence and submissions to the arbitrator. The arbitrator then determines the dispute after considering the parties' evidence and submissions. In determining disputes, the arbitrator need only consider the private interests of the parties to the dispute.

In IPART Act Arbitrations and WIC Act Arbitrations, the arbitrator determines disputes regarding access to monopoly rail services and water infrastructure services. These disputes usually involve a government entity or quasi-government entity. The arbitration avenue is provided for in legislation, rather than a result of the parties' commercial dealings.

Given the nature of IPART Act Arbitrations and WIC Act Arbitrations, the arbitrator may need to consider the broader public interest, and invite and consider public submissions, to determine the dispute.[7] There may also be a public interest in disclosing certain aspects of the arbitration. The public interest and the parties' private commercial interests may not necessarily coincide; they need to be considered and balanced.

The proposed Regulation seeks to give the arbitrator appropriate discretion over the conduct of the arbitration to enable the arbitrator to adopt a course of action that best meets the objectives of the arbitration, including taking the public interest into account. The proposed Regulation also clarifies what costs form part of the arbitrator's fees and expenses. In doing so, the proposed Regulation seeks to provide certainty and transparency on the costs of an arbitration.

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7 In arbitrating a dispute in an IPART Act Arbitration or WIC Act Arbitration, the arbitrator must take into account any matter that it considers relevant, which may include public interest considerations (see IPART Act, section 24B(3)(d), WIC Act, section 40(5)). See also section 24B(2) of the IPART Act.

# 3 Assessment of the proposed Regulation

This section 3 sets out an assessment of the costs and benefits of the proposed Regulation.

Only one third party access dispute has been referred to IPART under the previous *Independent Pricing and Regulatory Tribunal Regulation 2002*, which is very similar to the proposed Regulation. Given this limited practical experience, it has not proved possible to quantify the associated costs and benefits of the proposed Regulation. Accordingly, this section sets out the *expected* costs and benefits of the proposed Regulation.

## 3.1 Legal representation (clause 5)

### 3.1.1 Objective

The objective of clause 5 of the proposed Regulation is to specify the circumstances in which parties may be legally represented in IPART Act Arbitrations and WIC Act Arbitrations.

### 3.1.2 Proposal

Clause 5 of the proposed Regulation provides that a party may be represented by an Australian legal practitioner[8] in arbitration proceedings only where the arbitrator grants leave. The arbitrator may only grant leave if they are of the opinion that:

- legal representation is likely to shorten, or reduce costs of, the hearing, or
- the party would be unfairly disadvantaged if not legally represented.

8 The term "Australian legal practitioner" is defined in the *Interpretation Act* 1987, section 21(1), to have same the meaning as in the *Legal Profession Act 2004*.

Clause 5 replaces section 24A of the Commercial Arbitration Act, which provides:

> **24A Representation**
>
> (1) The parties may appear or act in person, or may be represented by another person of their choice, in any oral hearings under section 24.
>
> (2) A person who is not admitted to practise as a legal practitioner in New South Wales does not commit an offence under or breach the provisions of the *Legal Profession Act 2004* or any other Act merely by representing a party in arbitral proceedings in this State.

It is not the object of clause 5 to deny legal representation to parties. Its object is to enable the arbitrator to:

- decide whether allowing legal representation would avoid a party being unfairly disadvantaged, and
- allow legal representation where it is expected to lead to specific benefits of shorter proceedings or reduced costs.

For instance, the arbitrator may grant leave for legal representation if witnesses will be cross-examined, or where legal matters will be discussed. Lawyers should also be familiar with handling disputes, and should therefore be able to focus the arbitration on the real issues in dispute. This would help to shorten proceedings and reduce costs. However, legal representation may be less useful in other situations. For example, it may be less useful to involve lawyers where there are only commercial or non-legal technical matters at issue.

Clause 5 maintains the current position in the 2007 Regulation of limiting external representation to legal representation (where appropriate) and not preventing a party from appearing or acting in person. For instance, if a party is a corporation, it may be represented by its officers or employees.

### 3.1.3 Benefits

The expected benefits of clause 5 are:

- to reduce the costs and length of arbitrations by ensuring that legal representation will only be allowed in appropriate circumstances, and
- to give the arbitrator procedural flexibility in conducting an arbitration so that the arbitrator can decide on the best course of action for the arbitration in question.

### 3.1.4 Costs

There are no expected costs to the public arising from clause 5.

There may be a cost to a party who seeks legal representation but is not granted leave for legal representation under clause 5. Without legal representation, that party may not be able to conduct their case in the manner they intended. However, this cost is

mitigated by the requirement for the arbitrator to consider whether a party would be unfairly disadvantaged if not legally represented.

## 3.2 Private hearing of disputes (clause 6)

### 3.2.1 Objective

The objective of clause 6 of the proposed Regulation is to provide for disputes to be heard in private where material is commercially-sensitive, but to allow the arbitrator to direct otherwise.

### 3.2.2 Proposal

Clause 6 of the proposed Regulation provides that a dispute is to be heard in private unless the arbitrator directs otherwise. This presumption of privacy applies despite the confidentiality provisions in the Commercial Arbitration Act (sections 27E to 27I).

Under the Commercial Arbitration Act, parties can reach their own agreement about the confidentiality of the arbitration, including whether the arbitration will be heard privately. If no such agreement exists, the default position in the Commercial Arbitration Act applies. The default position is that the parties and arbitrator cannot disclose confidential information unless certain circumstances exist. Relevantly, an arbitrator cannot disclose confidential information unless all the parties consent. Therefore, the default position under the Commercial Arbitration Act does not allow the arbitrator to disclose confidential information if a party objects.

The confidentiality regime in the Commercial Arbitration Act reflects the private nature of commercial arbitrations, which concern the resolution of the parties' private interests. However, IPART Act Arbitrations and WIC Act Arbitrations involve the balancing of both private and public considerations. On one hand, the information that is disclosed will ordinarily be commercially-sensitive. Therefore, the parties' confidentiality should be protected by a private hearing of the dispute. On the other hand, the arbitrator may also need to take the public interest into account. The arbitrator may therefore invite and consider submissions from the public,[9] and in doing so, disclose information about the arbitration. The arbitrator may also decide that there is a public interest in publishing the arbitral award.

The Commercial Arbitration Act's confidentiality provisions do not adequately deal with these competing considerations. Rather, those provisions allow parties to agree to a privately-heard arbitration (a likely outcome), or in the absence of such

[9] Eg, Section 24B(2) of the IPART Act requires the arbitrator to give public notice of disputes between a third party wanting, but not having, access to a service and the provider of the service; the notice must invite submissions from the public on the dispute. IPART's practice directions for IPART Act Arbitrations inform the process for notifying, seeking and considering submissions from the public.

agreement, limit when the arbitrator can disclose confidential information. This removes the arbitrator's discretion and limits the arbitrator's ability to weigh up the public interest in favour of disclosure against confidentiality concerns. In particular, this limits the arbitrator's ability to make public any information relating to the arbitration, including any award ultimately made. These limitations may impair the efficient operation of the IPART Act and WIC Act.

Clause 6 addresses these limitations by providing the arbitrator with discretion over the conduct of the arbitration. The arbitrator can decide whether public interest considerations outweigh any confidentiality considerations or when it is not necessary to keep aspects of the dispute private, and invite submissions from the public where required.

IPART's practice directions for IPART Act Arbitrations and WIC Act Arbitrations set out a confidentiality regime for documents and information produced in the arbitration and the circumstances in which disclosure may be made, including when an arbitral award may be published.

#### 3.2.3 Benefits

The expected benefits of clause 6 are ensuring that:

- arbitrations that involve commercially-sensitive information will be heard privately, while facilitating the arbitrator's ability to invite submissions from the public where required, and
- information in relation to the arbitration that have public relevance, including arbitral awards, can be made publicly available.

#### 3.2.4 Costs

There are no expected costs to the public arising from clause 6.

If the arbitrator exercises their discretion to direct that the whole or part of an arbitration be heard publicly, there may be a cost to parties if confidential information is made public.

### 3.3 Costs of arbitration (clause 7)

#### 3.3.1 Objective

The objective of clause 7 of the proposed Regulation is to clarify which costs incurred by the arbitrator are to be included in the costs of an arbitration under section 33B of the Commercial Arbitration Act.

### 3.3.2 Proposal

Section 33B of the Commercial Arbitration Act provides that the costs of an arbitration, including the arbitrator's fees and expenses, are in the arbitrator's discretion, unless otherwise agreed by the parties. This means that the arbitrator can direct to whom, by whom, and in what manner the whole or part of those costs should be paid (subject to the parties' agreement).

Clause 7 of the proposed Regulation clarifies what costs are included as the arbitrator's fees and expenses for the purposes of section 33B. Without limiting the arbitrator's fees or expenses, clause 7 provides that the arbitrator's fees and expenses include all costs incurred by the arbitrator or IPART in relation to the arbitration, including administrative costs, costs incurred in engaging consultants and expert witnesses, and witnesses' expenses.

In commercial arbitrations, the arbitrator determines disputes based on evidence submitted by the parties; the arbitrator may or may not engage its own experts for its determinations. However, as already mentioned, the arbitrator may need to take into account the public interest in IPART Act Arbitrations or WIC Act Arbitrations. This means that the arbitrator cannot necessarily rely on the parties to present evidence in support of the public interest. Therefore it is likely that the arbitrator would engage independent consultants (including IPART's Secretariat, if necessary) and expert witnesses to assist in ascertaining the public interest. The costs incurred in doing so should form part of arbitration costs.

The arbitrator would also incur administrative costs in conducting IPART Act Arbitrations and WIC Act Arbitrations. Those costs should also form part of arbitration costs.

### 3.3.3 Benefits

The expected benefits of clause 7 are greater certainty and transparency in the application of section 33B of the Commercial Arbitration Act. This is expected to minimise the potential scope for argument about what is included in the costs of arbitration, resulting in consequent savings in overall costs.

### 3.3.4 Costs

There are no expected costs to the public or the parties arising from clause 7.

# 4 Alternative options

An important task in undertaking a regulatory impact assessment is to identify alternative options to achieve the objectives of the proposed Regulation.

As explained above, the proposed Regulation seeks to:

- modify certain provisions in the Commercial Arbitration Act to give the arbitrator sufficient procedural flexibility in IPART Act Arbitrations and WIC Act Arbitrations, and
- reduce uncertainty as to what costs the arbitrator can recover, particularly the costs of engaging independent consultants and expert witnesses.

The only alternative option for achieving the objectives of the proposed Regulation is to amend the Commercial Arbitration Act to incorporate the matters dealt with in the proposed Regulation.

However, it is preferable to make the proposed Regulation rather than to amend the Commercial Arbitration Act. This is because the Commercial Arbitration Act is a broad piece of legislation that applies generally to all arbitrations in New South Wales. In contrast, IPART Act Arbitrations and WIC Arbitrations are a narrow and specific type of arbitration conducted under the IPART Act and WIC Act. Further, the proposed Regulation only deals with three discrete aspects of the conduct of those arbitrations. Therefore, it is simpler and more logical to address those matters in a discrete statutory instrument instead of amending the Commercial Arbitration Act.

# 5 Submissions invited – parties' right to appeal questions of law

IPART also invites submissions on whether the proposed Regulation should modify how the Commercial Arbitration Act allows parties to appeal to the Court on questions of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations.

Section 34A of the Commercial Arbitration Act provides that parties can appeal to the Court on a question of law if two conditions are met:

1. all parties to the arbitration must agree to the appeal, **and**
2. the Court grants leave to appeal (if certain criteria are met).[10]

This is narrower than the position under the former *Commercial Arbitration Act 1984* (**1984 CAA**), which previously applied to IPART's arbitrations. Under the 1984 CAA, only one of the two conditions had to be met, that is, either the parties agreed to the appeal, **or** the Court granted leave where certain criteria were met (section 38). Unlike section 34A of the Commercial Arbitration Act, the parties' agreement was not a necessary pre-requisite to appeal questions of law.

Stakeholders may wish to comment on whether the proposed Regulation should remove the requirement in section 34A of the Commercial Arbitration Act for parties to agree to appeal to the Court on a question of law arising from an arbitration award (paragraph (1) above).

At this stage of consultation, it is difficult to quantify precisely the benefits and costs of removing the requirement for parties to agree on appealing a question of law. However, removing this requirement in IPART Act Arbitrations and WIC Act Arbitrations may facilitate an appeal of a question of law. This may be appropriate for the nature of IPART Act Arbitrations and WIC Act Arbitrations, which is different from arbitrations between ordinary commercial players.

[10] Under section 34 of the Commercial Arbitration Act, the Court must not grant leave unless it is satisfied that: (1) determining the question will substantially affect the rights of one or more of the parties; and (2) the question is one which the arbitral tribunal was asked to determine; and (3) on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong, or the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and (4) despite the parties' agreement to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

In commercial arrangements, the parties can reach an agreement before any dispute arises as to whether they should arbitrate their disputes, and what the elements of the arbitration agreement should be. The scope of such an agreement may include whether they will agree to appeal to the Court on a question of law.

However, the IPART Act and WIC Act enable aggrieved parties to refer access disputes to arbitration. This means that the arbitration avenue under the legislation is, in effect, already put in place for the parties. The parties to IPART Act Arbitrations and WICA Arbitrations do not have the same opportunity to agree on the scope of their arbitrations before a dispute arises. Further, it may be unlikely that the parties would agree to appeal on a question of law once their dispute has been referred to arbitration.

It also seems unlikely that parties would agree to appeal a question of law once IPART has made an arbitral award. In practice, the parties may agree to an appeal if IPART's arbitration award disadvantages all parties. However, that type of outcome would be unlikely.

IPART invites all interested parties to make written submissions on whether the proposed Regulation should modify the Commercial Arbitration Act in the manner described in this section 5.

# 6 Consultation program

The *Subordinate Legislation Act 1989* requires at least 21 days for public consultation on this Regulatory Impact Statement and the proposed Regulation.[11] Given that the matters raised in the proposed Regulation are not of significance or complexity, we consider that the 21 day period is appropriate and need not be extended.[12]

In undertaking this consultation program, IPART will publish a notice under section 5(2)(a) of the *Subordinate Legislation Act 1989* in the Sydney Morning Herald, the Daily Telegraph, and the NSW Government Gazette, specifically inviting comment on these documents.

During this period of public consultation, IPART will also consult with:

- all owners of relevant public infrastructure in NSW
- the central agencies in the NSW Government
- a selection of potential third party users of relevant infrastructure, and
- the NSW Law Society as the representative body of the legal profession,

by forwarding copies of the draft proposed Regulation and the Regulatory Impact Statement and inviting comments and submissions.

IPART will also publish this Regulatory Impact Statement and the proposed Regulation on its website at www.ipart.nsw.gov.au.

11 *Subordinate Legislation Act 1989*, section 5(2).

12 IPART submission to the Better Regulation Office's Review of NSW Regulatory Gatekeeping and Impact Assessment Processes, October 2011, section 2.1.5.