

Regulatory Impact Statement

Independent Pricing and Regulatory Tribunal Regulation 2002

June 2002

**INDEPENDENT PRICING AND REGULATORY TRIBUNAL
OF NEW SOUTH WALES**

Regulatory Impact Statement

Independent Pricing and Regulatory Tribunal Regulation 2002

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Submissions

This Regulatory Impact Statement for the Independent Pricing and Regulatory Tribunal Regulation 2002 has been issued for public comment in accordance with the requirements of the Subordinate Legislation Act 1989.

Copies of this regulatory impact statement can be found on the Tribunal's web site at www.ipart.nsw.gov.au.

The closing times for written submissions concerning this matter is **5pm on Friday, 12 July, 2002**.

Unless confidentiality is sought, the submissions will be available for public inspection at the tribunal's office and will be placed on our website in PDF format and remain there until the making of the regulation.

All submissions should be sent to:

Inquiry on IPART Regulation
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

Or by facsimile: (02) 9290 2061.

Confidentiality

Special reference must be made to any issues in submissions for which confidential treatment is sought and all confidential parts of submissions must be clearly marked. *However, it is important to note that confidentiality cannot be guaranteed as the Freedom of Information Act and section 22A of the Independent Pricing and Regulatory Tribunal Act provide measures for possible public access to certain documents.*

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CONTENTS

1	INTRODUCTION	1
1.1	Background to the Regulatory Framework	1
2	OBJECTIVE OF THE PROPOSED REGULATION	2
3	ASSESSMENT OF THE PROVISIONS	3
3.1	Appearance of Legal Practitioners (Clause 5)	3
3.1.1	Objective	3
3.1.2	Proposal	3
3.1.3	Benefits	4
3.1.4	Costs	4
3.2	Private Hearing of Disputes (Clause 6)	4
3.2.1	Objective	4
3.2.2	Proposal	4
3.2.3	Benefits	4
3.2.4	Costs	5
3.3	Costs of Arbitration (Clause 7)	5
3.3.1	Objective	5
3.3.2	Proposal	5
3.3.3	Benefits	5
3.3.4	Costs	5
4	OTHER OPTIONS	6
5	CONCLUSIONS	6
6	CONSULTATION PROGRAM	7
	APPENDIX 1 REFERENCES	8

1 INTRODUCTION

Title of Regulation: Independent Pricing and Regulatory Tribunal Regulation 2002

Parent Act: Independent Pricing and Regulatory Tribunal Act 1992

Responsible Minister: The Honourable Kim Yeadon, Minister for Energy

This regulatory impact statement has been prepared for the proposed *Independent Pricing and Regulatory Tribunal Regulation 2002* (proposed Regulation). Consistent with the requirements of the *Subordinate Legislation Act 1989*, this regulatory impact statement:

- identifies the objectives sought to be achieved by the regulation
- assesses the costs and benefits of the proposed regulation
- identifies alternative options to achieve those objectives
- includes a consultation program with groups likely to be affected.

The proposed Regulation concerns the remaking of the *Independent Pricing and Regulatory Tribunal Regulation 1996* (the 1996 Regulation), without substantial alteration.¹ The only proposed drafting amendment to the 1996 Regulation is for clause 6(1) of the proposed Regulation to make provision to include a reference to an umpire. The purpose of this amendment is to more adequately reflect the Tribunal's power to appoint 'one or more persons' who may act as arbitrator to hear and determine a dispute referred to arbitration under Part 4A of the IPART Act.

Like the 1996 Regulation, the proposed Regulation modifies the application of the *Commercial Arbitration Act 1984* (CA Act) to the arbitration of disputes (relating to a public infrastructure access regime) under Part 4A of the IPART Act. Accordingly the proposed Regulation concerns:

- the right to legal representation
- the private hearing of disputes
- the recovery of the fees and expenses of the Tribunal.

1.1 Background to the Regulatory Framework

As part of the implementation of the Competition Principles Agreement, in New South Wales, amendments to the IPART Act in January 1996 provided the Tribunal with the power to act as arbitrator to hear and determine third party access disputes under Part 4A of the IPART Act.

¹ The *Independent Pricing and Regulatory Regulation 1996* (the 1996 Regulation) will be repealed on 1 September 2002 in accordance with the requirements of section 10(2) of the *Subordinate Legislation Act 1989*.

The operation of Part 4A of the IPART Act requires that commercial arbitration principles be followed. It also requires the arbitrator to take account of broader public interest matters. For example, sections 24B(3)(a) of Part 4A of the IPART Act provide that:

- 24B(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 (1) 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.*

The types of third party access disputes the Tribunal or an appointed umpire may arbitrate is conferred by the following regulatory provisions:

- Electricity - the *National Electricity Code* provides the framework for the access regime in the electricity industry. Chapter 9 of the Code requires access disputes in relation to distribution network services to be referred to the Tribunal as jurisdictional regulator for resolution.
- Gas - the *National Third Party Access Code for Natural Gas Pipelines System* provides the framework for access in the gas industry. *Gas Pipelines Access (New South Wales) Act 1998*, implements the national access code in New South Wales and extends third party access rights to distribution and transmission pipelines. Under the national access code, IPART is the relevant regulator in relation to natural gas distribution networks in New South Wales and may arbitrate a third party access disputes concerning reticulation of natural gas within a market.
- Rail Access – section 19B of *Transport Administration Act 1988*, requires a dispute concerning third party access to NSW rail NSW rail network to be resolved in accordance with Part 4A of the IPART Act and the NSW Rail Access Regime established by the Minister for Transport.

The proposed Regulation seeks to clarify matters in relation to the operation of arbitration hearings for third party access disputes.

2 OBJECTIVE OF THE PROPOSED REGULATION

The principal objective of the proposed Regulation is to modify and clarify the application of the CA Act to the arbitration of a dispute under Part 4A of the IPART Act.

In normal commercial arbitrations, a determination is made following consideration of the evidence presented by the parties to the dispute. In any disputes involving access under the IPART Act, the Tribunal or umpire must also consider the broader public interest and if required, have regard to public submissions. Public interest issues may not necessarily align with the parties' commercial interests. For this reason the arbitrator must be able to ensure that there is procedural flexibility to allow for public interest matters and the costs associated with such a matter to be appropriately taken into account.

The proposed Regulation deals with the operation and costs of arbitration hearings. In summary:

- *Clause 5* - specifies when qualified legal representation may be available.
- *Clause 6* - allows the Tribunal to decide when to conduct arbitration hearings in private.
- *Clause 7* - clarifies which costs are to be included in the costs incurred by the arbitrator.

3 ASSESSMENT OF THE PROVISIONS

3.1 Appearance of Legal Practitioners (Clause 5)

3.1.1 Objective

To provide for the circumstances when parties to a dispute may be represented by legal practitioners.

In the absence of the proposed Regulation, the following provision from the *Commercial Arbitration Act 1984* would apply to the arbitration of access disputes:

- 20(1) A party to an arbitration agreement may be represented in proceedings before the arbitrator or umpire by a legal practitioner, but only in the following cases:
- (a) where a party to the proceedings is, or is represented by, a legally qualified person;
 - (b) where all parties agree;
 - (c) where the amount or value of the claim subject to the proceedings exceeds \$20,000 or such other amount as is prescribed instead by regulation; or
 - (d) where the arbitration or umpire gives leave for such representation.

The vast majority of access disputes are expected to involve claims of more than \$20,000. If legal representation is sought for disputes of this type, the Tribunal as arbitrator or appointed umpire would be compelled to grant leave under the provisions of the CA Act.

3.1.2 Proposal

The proposed Regulation provides that the arbitrator or umpire must not grant leave, unless they are satisfied that:

- a) representation of the party by a legal practitioner is likely to shorten the hearing of the dispute or to reduce the costs of the dispute, or
- b) the party would be unfairly disadvantaged if the party was not represented by a legal practitioner.

The aim is not to deny advice from qualified legal practitioners to the parties to the dispute, but rather to avoid the protracted legal debates that might occur. The proposed Regulation provides for legal representation in cases where this is expected to lead to specific benefits of a shorter hearing time or where a party would be unfairly disadvantaged by not having legal representation. For instance, leave may be granted to legal practitioners when matters of law are being discussed and to assist with the cross examination of witnesses.

In effect the proposed Regulation allows the Tribunal, to decide the course of action that best meets the objectives of the particular arbitration.

3.1.3 Benefits

The benefits of the proposed Regulation are:

- to reduce costs of dispute
- to allow procedural flexibility in conducting an arbitration so that ‘public interest’ concerns are presented
- to prevent protracted legal debate on commercial and technical issues.

3.1.4 Costs

There are no costs to the public associated with this clause. However in some circumstances, parties may consider that the hearing of dispute may take longer without the assistance of lawyers to narrow down issues and facts in dispute.

3.2 Private Hearing of Disputes (Clause 6)

3.2.1 Objective

To provide for disputes to be held in private where material is of a commercially sensitive nature.

3.2.2 Proposal

A dispute is to be held in private unless the arbitrator otherwise directs.

The presumption is for arbitration hearings to be held in private. The reason for this presumption is that material used in the arbitration process of access disputes will generally be of a commercially sensitive nature. However, the Tribunal must take into account public interest, and in some circumstances seek submissions from the general public. Sub-section 24B(2) of the IPART Act includes provision for:

The notice must invite submissions to the arbitrator from the public regarding the dispute and specify when and how those submissions may be made.

The proposed Regulation allows the arbitrator to decide when the public interest considerations may outweigh any confidentiality considerations or when it is not necessary for aspects of the dispute to not be held in private.

The Tribunal’s *Arbitration of Disputes over Access to Monopoly Infrastructure, Procedures and Practice Notes*, informs the process for notifying, seeking and considering submissions from the public.

The aim of this provision is to provide procedural flexibility of how the arbitration is conducted while at the same time providing necessary confidentiality for commercially sensitive material.

3.2.3 Benefits

The proposal will ensure that arbitrations involving commercially sensitive information are held in private.

3.2.4 Costs

Nil.

3.3 Costs of Arbitration (Clause 7)

3.3.1 Objective

To clarify which costs incurred by the arbitrator are to be included in the application of section 34 (1) of the CA Act.

3.3.2 Proposal

The proposed Regulation provides that without limiting the fees and expenses of the arbitrator or umpire referred to in section 34 of the CA ACT, the fees of the arbitrator or umpire are taken to include:

- all costs incurred by the arbitrator or umpire; and
- all costs incurred by the Tribunal,

in relation to the arbitration of a dispute, including administrative costs, costs incurred in engaging consultants and expert witnesses, and witnesses' expenses.

The direction as to the payment of costs incurred by arbitration of a dispute remains at the discretion of the arbitrator or umpire (section 34(1) of the CA ACT).

This provision seeks to clarify what are reasonable costs incurred by the arbitrator or umpire in the resolution of a dispute referred to arbitration under Part 4A of the IPART Act.

In normal commercial arbitration, determinations are made on the basis of evidence submitted by the parties and it is unusual for the arbitrator to engage his/her own experts. As previously outlined, the Tribunal must take into consideration the public interest in any determination of an access dispute.

The Tribunal cannot necessarily rely on the parties to present evidence in support of the public interest. The Tribunal may therefore engage independent consultants (including if necessary the Tribunal's Secretariat) to assist in this process. The Tribunal considers that costs incurred for this purpose are a legitimate expense of the arbitration.

3.3.3 Benefits

The benefits are greater certainty and transparency in the application of section 34(1) of CAA. This can be expected to reduce possible arguments as to what costs associated with the resolution of a dispute should be included, resulting in consequent savings in overall costs.

3.3.4 Costs

There are no costs to the public associated with this clause.

4 OTHER OPTIONS

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

Legislative and other requirements concerning third party access to infrastructure already exist. The proposed Regulation specifically deals only with the resolution of disputes relating to access. If the Regulation is not made, the provisions of the CA Act would apply to the exercise of Part 4A of the IPART Act. If the CA Act was to apply, arguably there would be insufficient procedural flexibility for public interest considerations to be taken into account, and there would remain a degree of uncertainty as to what Tribunal costs could be recovered, particularly in respect of consultancy fees. Accordingly, to not make the proposed Regulation would leave procedural matters and cost matters unspecified, which may impair the efficient operation of Part 4A of the IPART Act.

Another option to achieve the objectives of the proposed Regulation would be to change the CA Act to reflect the expanded role of arbitration in new area of access disputes. This seems inappropriate given the subject matter of the regulation is more procedural than substantive. The proposed Regulation will modify, and clarify, the operation of arbitration hearings that are not adequately dealt with in the CA Act.

In summary, other approaches would seem to be largely inappropriate, if not irrelevant.

5 CONCLUSIONS

This Regulatory Impact Statement has assessed the impacts of the proposed *Independent Pricing and Regulatory Tribunal Regulation 2002*.

The proposed Regulation is designed to facilitate and streamline the process of arbitration of disputes concerning third party access to infrastructure. The improvement in clarity of the arbitration process is likely to lead to savings in costs and the time taken to complete the arbitration process and provide certainty in relation to costs which may be recovered.

The proposed Regulation is not expected to generally impose additional direct costs on industry or the wider community. The proposed Regulation does impose some restrictions in the case of legal representation, but this is considered to be minimal and for the purpose of ensuring procedural informality and flexibility in arbitrating a dispute.

Given that only a single third party access dispute was referred to the Tribunal under the 1996 Regulation, it has not proved possible to quantify the associated costs and benefits. It is expected that the proposed Regulation will reduce the direct costs of dispute resolution through restricting opportunities for unnecessary legal debate (clause 5) and by clarifying which costs are to be defined as costs of the arbitration (clause 7).

It is further expected that these reductions in costs would be achieved without affecting the expected outcomes of dispute arbitration, or the interests of the parties to the dispute.

In summary, the proposed Regulation takes the need and results from arbitration as given and only seeks to modify the process so as to streamline it, to reduce direct costs and to facilitate 'public interest' concerns being taken into account.

6 CONSULTATION PROGRAM

A period of 21 days is required under the Subordinate Legislation Act for public consultation in respect of this regulatory impact statement and the proposed Regulation. In undertaking this consultation program, a notice under section 5(2)(a) of the Subordinate Legislation Act will be published in the Sydney Morning Herald and the Government Gazette specifically inviting comment on these documents.

During the public consultation phase, the following organisations will be forwarded copies of the draft Regulation and the Regulatory Impact Statement and requested to make written submissions:

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

The Tribunal will consult with these stakeholders during this period of review.

APPENDIX 1 REFERENCES

Competition Principles Agreement

Hilmer, F., Rayner, M., and Taperell, G., *National Competition Policy*, Report by the Independent Committee of Inquiry, AGPS: Canberra, 1993.

IPART, *Arbitration of Disputes over Access to Monopoly Infrastructure, Procedures and Practice Notes*, 1997.

Independent Pricing and Regulatory Tribunal Regulation 2002

under the

Independent Pricing and Regulatory Tribunal Act 1992

Explanatory note

The object of this Regulation is to remake, without substantial alteration, the *Independent Pricing and Regulatory Tribunal Regulation 1996*. That Regulation will be repealed on 1 September 2002 under section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation modifies the application of the *Commercial Arbitration Act 1984* to the arbitration of disputes (relating to a public infrastructure access regime) under Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992*. The modifications concern the right to legal representation, the private hearing of disputes and the recovery of the fees and expenses of the Independent Pricing and Regulatory Tribunal.

This Regulation also contains savings and transitional provisions.

This Regulation is made under the *Independent Pricing and Regulatory Tribunal Act 1992* and, in particular, under sections 24A (Arbitration of access disputes) and 29 (the general regulation-making power).

draft

Independent Pricing and Regulatory Tribunal Regulation 2002

Contents

Contents

	Page
Part 1 Preliminary	
1 Name of Regulation	3
2 Commencement	3
3 Definitions	3
4 Notes	3
Part 2 Application of Commercial Arbitration Act 1984	
5 Object of Part	4
6 Appearance of legal practitioners	4
7 Private hearing of disputes	4
8 Costs of arbitration	4
Part 3 Savings and transitional	
9 References to Licence Compliance Advisory Board	6
10 Saving	6

Page 2

Independent Pricing and Regulatory Tribunal Regulation 2002

Independent Pricing and Regulatory Tribunal Regulation 2002

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Independent Pricing and Regulatory Tribunal Regulation 2002*.

2 Commencement

This Regulation commences on 1 September 2002.

Note. This Regulation replaces the *Independent Pricing and Regulatory Tribunal Regulation 1996* which is repealed on 1 September 2002 under section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

In this Regulation:

dispute means a dispute referred to in section 24A of the Act.

the Act means the *Independent Pricing and Regulatory Tribunal Act 1992*.

4 Notes

Notes included in this Regulation do not form part of this Regulation.

Part 2 Application of Commercial Arbitration Act 1984

5 Object of Part

The object of this Part is, in accordance with section 24A (2) of the Act, to modify the application of the *Commercial Arbitration Act 1984* to the arbitration of a dispute.

6 Appearance of legal practitioners

- (1) A party to a dispute may be represented in proceedings before an arbitrator or umpire by a legal practitioner only by leave granted by the arbitrator or umpire.
- (2) The arbitrator or umpire is not obliged to grant leave, and must not grant it unless satisfied:
 - (a) that representation of the party by a legal practitioner is likely to shorten the hearing of the dispute or to reduce the costs of the dispute, or
 - (b) that the party would be unfairly disadvantaged if the party were not represented by a legal practitioner.
- (3) In relation to the arbitration of a dispute, this clause has effect instead of:
 - (a) section 20 (1), and
 - (b) section 20 (3),of the *Commercial Arbitration Act 1984*.
- (4) However, this clause has effect instead of section 20 (3) of the *Commercial Arbitration Act 1984* only to the extent that section 20 (3) relates to leave permitting representation by a legal practitioner.
- (5) A reference in section 20 (4) of the *Commercial Arbitration Act 1984* to leave "granted under subsection (3)" is, to the extent that it refers to leave permitting representation by a legal practitioner in the arbitration of a dispute, taken to be a reference to leave granted under this clause.

7 Private hearing of disputes

A dispute is to be heard in private, unless the arbitrator or umpire otherwise directs.

8 Costs of arbitration

Independent Pricing and Regulatory Tribunal Regulation 2002

For the purposes of section 34 (1) and (2) of the *Commercial Arbitration Act 1984*, and without limiting the fees and expenses of the arbitrator or umpire as referred to in section 34, the fees and expenses of the arbitrator or umpire are taken to include:

- (a) all costs incurred by the arbitrator or umpire, and
- (b) all costs incurred by the Tribunal,

in relation to the arbitration of a dispute, including administrative costs, costs incurred in engaging consultants and expert witnesses, and witnesses' expenses.

Independent Pricing and Regulatory Tribunal Regulation 2002

Part 3 Savings and transitional

9 References to Licence Compliance Advisory Board

A reference in any Act, in any instrument made under any Act or in any other instrument of any kind to the Licence Compliance Advisory Board is taken to be a reference to the Tribunal.

10 Saving

Any act, matter or thing that had effect under the *Independent Pricing and Regulatory Tribunal Regulation 1996* immediately before the repeal of that Regulation by the *Subordinate Legislation Act 1989* is taken to have effect under this Regulation.