Rail Corporation New South Wales
ABN: 59 325 778 353
Chief Executive
PO Box K349, Haymarket NSW 1238
Level 20, 477 Pitt Street, Sydney NSW 2000
Telephone (02) 9219 1201
www.railcorp.info

Your Reference: 11/592
Our Reference: D2012/37043

Mr James Cox PSM
Chief Executive Officer and Full Time Member
Independent Pricing and Regulatory Tribunal
P O Box Q290
QVB Post Office NSW 1230

Dear Mr Cox

PROPOSED REGULATION UNDER THE INDEPENDENT PRICING AND REGULATORY TRIBUNAL ACT

Thank you for your letter dated 2 May 2012 giving RailCorp the opportunity to provide comments on the invitation for submissions on the proposed Independent Pricing and Regulatory Tribunal Regulation 2012 (**Proposed Regulation**) and the accompanying Regulatory Impact Statement.

Please find enclosed our submission for your consideration.

Yours sincerely

04 June 2012

Rob Mason
Chief Executive

Submission by Rail Corporation New South Wales
to the Independent Pricing and Regulatory Tribunal of New South Wales

Introduction

Rail Corporation New South Wales (**RailCorp**) welcomes the opportunity to respond to the invitation for submissions on the proposed Independent Pricing and Regulatory Tribunal Regulation 2012 (**Proposed Regulation**) and accompanying Regulatory Impact Statement.

The Proposed Regulation modifies the application of the *Commercial Arbitration Act 2010 (NSW)* (**CA Act**) to the arbitration of public infrastructure access disputes under Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992* (**IPART Act**) and the *Water Industry Competition Act 2006* (**WIC Act**).

It modifies the application in respect of:

- legal or other representation (clause 5 of the Proposed Regulation);
- disputes being heard in private (clause 6 of the Proposed Regulation);
- the recovery of the fees and expenses of the Independent Pricing and Regulatory Tribunal of New South Wales (**IPART**) (clause 7 of the Proposed Regulation).

RailCorp respectfully submits that the proposed changes to the application of the CA Act to access disputes contained in clause 5 and 6 of the Proposed Regulation are not needed and should not be adopted.

Background

The types of dispute which are subject to the CA Act under the IPART Act and WIC Act are those between access seekers who want to use designated types of infrastructure and access providers who own and/or operate that infrastructure. The types of infrastructure which are the subject of these disputes invariably have natural monopoly characteristics such as railway lines, sewerage pipelines and pipeline networks for transporting drinking water. Because of the nature of the services which are the subject of access disputes, they rarely if ever involve individuals seeking access for personal use. They invariably involve commercial organisations which want to supply or enhance the provision of a service for commercial purposes.

Access disputes often raise issues of a technical, economic or commercial nature as well as legal issues. The determination of the disputes will often require the arbitrator to take into account the interdependence of all those factors. The economic regulatory aspects of some disputes, especially those relating to the price at which access to services should be granted, often require expert evidence. The potential complexity of these disputes and the need for the arbitrator and the parties to be able to resolve them in a structured way that provides both parties with an opportunity to present the issues for resolution is reflected in the Practice Directions issued by IPART entitled "*Arbitration under Part 4 of the Independent Pricing and Regulatory Tribunal Act 1992 (NSW) May 2012*".

While IPART has had little need to conduct access disputes as to the best of RailCorp's knowledge there has only been one under the IPART Act and none under the WIC Act, the Practice Directions anticipate the steps that may be involved in determining an access dispute under those acts. This includes the

scope of the dispute, who should be a party to the arbitration, whether there should be a hearing, the presentation of written evidence, the use of expert witnesses, the preparation of written submissions and the use of documentary evidence, including the need to issue subpoenas to third parties and confidentiality issues.

The proposed Regulation in respect of legal representation

Clause 5 of the Proposed Regulation reads as follows:

> *5 Legal representation*
>
> *(1) a party to a dispute may be represented in proceedings before an arbitrator by an Australian legal practitioner only by leave granted by the arbitrator.*
>
> *(2) An arbitrator may grant leave only if he or she is of the opinion:*
> *(a) that representation of the party by an Australian 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 an Australian legal practitioner.*
>
> *(3) This clause has the effect instead of section 24A of the Commercial Arbitration act 2010.*

The Proposed Regulation modifies the current position under the CA Act where parties are able to choose whether to appear themselves, or to be represented by another person of their choice. Instead, the arbitrator makes the decision for them but may only do so in very limited circumstances if he or she is of the opinion that representation will:

- shorten the dispute;
- reduce the costs of the dispute; or
- prevent one party being unfairly disadvantaged if they were not so represented.

The ostensible purpose of the proposed change is to enable the arbitrator to take control of the arbitration. There are no examples in the Regulatory Impact Statement as to how the current position under the CA Act has hampered arbitrators' ability to conduct an arbitration let alone an access dispute. Unlike some other types of dispute there is no possibility of the arbitrator of an access dispute being faced with the situation of resolving a dispute between two individuals one of whom is legally represented and the other is not. Instead, the parties are likely to have sufficient resources to make an informed decision themselves as to whether being represented by lawyers (as opposed to merely advised) would be of assistance to them in resolving the dispute expeditiously and cost effectively.

The Regulatory Impact Statement notes that in some instances lawyers will help to shorten proceedings and reduce costs as lawyers are familiar with handling disputes. It notes that the use of lawyers may be less useful where there are only commercial or non-legal technical matters at issue.[1]

[1] Page 6 of IPART's Regulatory Impact Statement.

Both IPART as the regulator, and parties to a dispute, routinely use lawyers for advice in respect of structuring and compiling arguments and submissions. It is RailCorp's submission that even under the current Independent Pricing and Regulatory Tribunal Regulation 2007 (**Current Regulation**) parties would choose to take on the cost of legal representation only in circumstances where there were complex, technical or legal matters at issue, or where the outcome of the decision was significant. Consequently, there is no need for the proposed regulation.

In any event, even if there was a demonstrated need for the parties to have to seek leave to have legal representation (which RailCorp submits there is not), it is suggested that there is no basis for limiting the arbitrator's discretion to grant leave to the narrow grounds itemised in the proposed regulation.

The Proposed Regulation in respect of private hearings

Clause 6 of the Proposed Regulation provides as follows:

> 6 *Private hearing of disputes*
>
> *Despite sections 27E – 27I of the Commercial Arbitration Act 2010, a dispute is to be heard in private, unless the arbitrator otherwise directs.*

Under the Current Regulation, the parties are able to reach their own agreement about the confidentiality of the arbitration. Where there is no agreement, the default position under the CA Act is that confidential information cannot be disclosed unless all parties consent. By allowing the arbitrator to decide that the dispute can be heard in public, the Proposed Regulation makes a hearing in public the default position and gives the arbitrator, rather than the parties as is currently the case, the choice as to whether the hearing is in public or private.

Private dispute

IPART's reasoning as stated in its Regulatory Impact Statement, is that whilst parties' confidentiality should be protected by a private hearing in disputes between normal commercial arbitrations, because disputes under the IPART Act and WIC Act relate to the balancing of private and public considerations, the arbitrator may need to consider public interests.[2] The arbitrator should therefore be able to invite and consider submissions, and disclose what may be confidential information to the public.

In distinction to the regulatory functions IPART exercises under the WIC Act and as the economic regulator for a number of access regimes such as the NSW Rail Access Undertaking, in an access dispute its potential as arbitrator is to resolve an inter partes dispute. Ordinarily, disputes about the terms and conditions of access are of little other than general interest to the public at large. It is not the same as regulatory process which may be determining whether or not a particular facility or service is subject to regulation at all.

The mere fact the outcome of an access dispute may be of public interest is not in RailCorp's view a sufficient reason to invite and consider public submissions. Australian courts regularly adjudicate

[2] Page 7 of IPART's Regulatory Impact Statement

disputes between businesses or individuals which are of general interest to the business or wider community. Yet that fact alone is not sufficient to potentially increase the length, cost and complexity of proceedings by inviting submissions from the public.

IPART's Regulatory Impact Statement states that currently arbitrators are limited in their ability to weigh up public interest in favour of disclosure against confidentiality concerns.[3] It goes on to say that the Proposed Regulation addresses this limitation by providing the arbitrator with discretion over the conduct of the arbitration. However, this is in contrast to clause 19 of the *Commercial Arbitration Act 2010*, which is not overridden by the Proposed Regulation.

Clause 19 provides that the parties to a dispute are able to determine the rules of procedures, and only failing agreement will the arbitrator decide these rules. Clause 6 of the Proposed Regulation does more than allow the arbitrator to take into consideration public concerns – it shifts the format of an arbitration from one that is agreed between the parties, to that of an inquisitorial system that is more akin to a regulatory process than an adjudicative process which is what the access dispute regime is.

A party to a dispute will be much better placed to be able to know whether particular information is commercially or otherwise sensitive and should be considered confidential. The Proposed Regulation leaves this decision entirely in the hands of the arbitrator. An obvious consequence of this lack of certainty will be the unwillingness of or difficulty for, parties or witnesses to put forward all information which may be relevant to their case.

No reason for change

As noted in the Regulatory Impact Statement, the only access regime conferring Part 4A arbitration on IPART is the NSW Rail Access Undertaking, pursuant to Schedule 6AA of the *Transport Administration Act 1988* (NSW) which applies to Rail Infrastructure Corporation, RailCorp and Australian Rail Track Corporation (**ARTC**) as access providers.

RailCorp submits that the Proposed Regulation attempts to modify the conduct of arbitrations of disputes where currently there is no apparent need. IPART notes that only one third party dispute has been referred to IPART under the previous *Independent Pricing and Regulatory Tribunal Regulation 2002*.[4] IPART has provided no evidence to suggest that under the NSW Rail Access Undertaking access providers have made it difficult for access seekers by making disputes overly legalistic, costly or lengthy as a result of legal representation. Nor is RailCorp aware of experiences of hearings being held in private being a problem. It is therefore unclear why the Current Regulation should be modified as suggested by the Proposed Regulation.

The Federal legislation relevant to access disputes, the *Competition and Consumer Act 2010*, provides for arbitration procedures which are more akin to those of the Current Regulations and the CA Act. Part IIIA of the *Competition and Consumer Act 2010* provides that:

---

[3] Ibid.

[4] Page 5 of IPART's Regulatory Impact Statement.

a) in arbitrations before the Australian Competition and Consumer Commission (**Commission**) a party may appear in person or be represented by someone else;[5]

b) arbitration hearings for an access dispute is to be in private, or in public if agreed by the parties, and that the member of the Commission presiding over an arbitration must have regard to the wishes of the parties and the need for commercial confidentiality;[6] and

c) a party to an arbitration hearing may request that the Commission treat particular material as confidential.[7] After considering a request, any objection and any further submission from any of the parties, the Commission may then decide not to give the material to the other party or parties.[8]

It is unclear why the procedures provided for access disputes under the IPART Act or WIC Act should be any different to those provided for in the *Competition and Consumer Act 2010*, which have been tried and tested and in place for many years.

Conclusion

RailCorp respectively requests that IPART reconsider its proposed modification to the Current Regulation in respect of legal representation and private hearings. As outlined above, RailCorp submits that there are no compelling reasons for the proposed changes and that they may in fact have unintended consequences that outweigh any perceived benefits.

[5] Section 44ZE of the *Competition and Consumer Act 2010* (Cth).
[6] Section 44ZD of the *Competition and Consumer Act 2010* (Cth).
[7] Section 44ZL of the *Competition and Consumer Act 2010* (Cth).
[8] Section 44ZL of the *Competition and Consumer Act 2010* (Cth).