IPART
New South Wales

Independent Pricing and Regulatory Tribunal

Proposed Independent Pricing and Regulatory Tribunal Regulation 2012

Legislation — Report and Recommendations
July 2012

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Contents

1 Introduction

1.1 Recommendations on proposed Regulation

Our recommendations on the proposed *Independent Pricing and Regulatory Tribunal Regulation 2012* (**proposed Regulation**), and the pages on which they are listed in this report, are as follows:

1.2 Overview

The *Independent Pricing and Regulatory Tribunal Regulation 2007* (NSW) (**2007 Regulation**) will be repealed on 1 September 2012[1] unless it is replaced. The 2007 Regulation was made by the Governor under the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**).[2]

1 The 2007 Regulation will be repealed on 1 September 2012 under section 10(2) of the *Subordinate Legislation Act 1989* (NSW).

2 IPART Act, section 29.

Parliamentary Counsel has drafted the proposed Regulation, which is contained in Appendix A. If the proposed Regulation is made, it will replace the 2007 Regulation without substantial alteration.

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* (NSW) (**Commercial Arbitration Act**) that concern the conduct and cost of arbitrations of disputes regarding access regimes under the IPART Act and *Water Industry Competition Act 2006* (NSW) (**WIC Act**). In summary, the proposed Regulation concerns:

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

1.3 What this report contains

This report sets out:

- the background to, and content of, the proposed Regulation (sections 2 and 3 respectively)
- the relevant legislative and regulatory requirements for the making of the proposed Regulation (section 4), and
- our recommendations to the Premier[3] on the proposed Regulation (section 5).

3 The Premier is the responsible minister for the IPART Act.

2 Background to the proposed Regulation

2.1 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**) (see section 2.2 below). This role was later extended to arbitrating access disputes under the WIC Act (**WIC Act Arbitrations**) (see section 2.3 below).

The practice and procedure of arbitrations in New South Wales is governed by the Commercial Arbitration Act. This Act applies to IPART Act Arbitrations and WIC Act Arbitrations, but its application is currently subject to regulations made under the IPART Act and WIC Act respectively.[4]

2.2 IPART Act Arbitrations – rail access

A government agency that owns, controls or operates public infrastructure may establish an access regime. Third parties may approach the government agency to obtain access to the infrastructure. If a third party approaches the government agency and that 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.[5]

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

5 IPART Act, section 24A.

The only access regime conferring Part 4A arbitration jurisdiction on IPART is the NSW Rail Access Undertaking (**Undertaking**).[6] The Undertaking provides that the arbitration provisions in Part 4A of the IPART Act apply to disputes over third party access to the NSW rail network.[7] Thus, the arbitration provisions in Part 4A of the IPART Act and the 2007 Regulation currently apply to such rail access disputes.

IPART arbitrated a rail access dispute between Rail Access Corporation and National Rail Corporation in 1996/1997. Pacific National and Freight Victoria Limited also referred a rail access dispute to IPART in 2004, but the parties settled the dispute before arbitration proceedings commenced.

2.3 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.[8] Currently, the 2007 Regulation applies to these WIC Act Arbitrations, along with a number of the arbitration provisions in Part 4A of the IPART Act and the *Water Industry Competition (Access to Infrastructure) Regulation 2007* (NSW).[9]

IPART has not conducted any WIC Act Arbitrations.

2.4 Objective of the proposed Regulation

As mentioned above, 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. This is the same objective of the current and previous Regulations. 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.

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6 The NSW Rail Access Undertaking created under the *Transport Administration Act 1988* (NSW) (see section 99C and Schedule 6AA).

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

8 WIC Act, section 40(1).

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

In commercial arbitrations, parties to the dispute present evidence and submissions to the arbitrator. The arbitrator then determines the dispute after considering the parties' evidence and submissions and their private interests. However, in determining disputes regarding access to monopoly services in IPART Act Arbitrations and WIC Act Arbitrations, the arbitrator may need to balance private interests with the public interest and consider public submissions.[10] In addition, the arbitration avenue is provided for in legislation, rather than a result of the parties' commercial agreement.

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.

[10] 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 (see IPART Act, section 24B(3)(d), WIC Act, section 40(5)). This may include public interest considerations. Further, in IPART Act Arbitrations, the arbitrator must notify, and invite submissions from, the public where the dispute concerns a third party wanting, but not having access to, a service: IPART Act, s24B(2).

3 Content of the proposed Regulation

The proposed Regulation concerns:

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

The following sections address each of these clauses.

3.1 Right to legal representation

Clause 5 of the proposed Regulation provides that a party may be represented by an Australian legal practitioner[11] in arbitration proceedings only where the arbitrator grants leave. The arbitrator may only grant leave if they are of the opinion that:

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

Clause 5 has effect instead of section 24A of the Commercial Arbitration Act, which provides as follows:

> **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.

For instance, under clause 5, the arbitrator may grant leave for legal representation if witnesses will be cross-examined, or where legal matters will be discussed. However, the arbitrator may decide not to grant leave if there are only commercial or non-legal technical matters at issue.

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

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.

3.2 Private hearing of disputes

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 regime in the Commercial Arbitration Act (sections 27E to 27I). Under that regime, 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 parties and arbitrator cannot disclose information that relates to the arbitral proceedings or an award (**confidential information**), other than in certain permitted circumstances. Relevantly, an arbitrator cannot disclose confidential information unless all the parties consent.

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, as IPART Act Arbitrations and WIC Act Arbitrations involve the balancing of both private and public considerations, the arbitrator may also need to invite and consider submissions from the public.[12] In doing so, the arbitrator may 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 regime does 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 agreement, limit when the arbitrator can disclose publicly any information relating to the arbitration, including any award ultimately made. These limitations may impair the efficient conduct of IPART Act Arbitrations and WIC Act Arbitrations. Clause 6 addresses these limitations by providing the arbitrator with discretion over 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.

We note that 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.

[12] 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.

3.3 Recovering the arbitrator's fees and expenses

Under s33B of the Commercial Arbitration Act, the arbitrator has discretion over the costs of an arbitration (including the arbitrator's fees and expenses), and 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. These costs 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 the arbitrator may need to take into account the public interest in IPART Act Arbitrations or WIC Act Arbitrations, the arbitrator cannot necessarily rely only on the parties to present evidence in support of the public interest. Therefore, the arbitrator may engage independent consultants (including IPART's Secretariat, if necessary) and expert witnesses to assist in ascertaining the public interest. The arbitrator may also incur administrative costs in conducting the arbitrations. The costs incurred in doing so should form part of arbitration costs.

4 Legislative and regulatory requirements

4.1 Subordinate Legislation Act

4.1.1 Regulatory Impact Statement

Consistent with the requirements of the *Subordinate Legislation Act 1989*, IPART prepared a Regulatory Impact Statement (**RIS**) for the proposed Regulation.[13] The RIS:

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

4.1.2 Public consultation

In accordance with the *Subordinate Legislation Act 1989*, we invited submissions from the public on the RIS and proposed Regulation.

Notices of the RIS and proposed Regulation were published in the Sydney Morning Herald and Daily Telegraph on 9 May 2012, and the NSW Government Gazette on 4 May 2012,[14] specifically inviting comment on these documents.

We also forwarded copies of the draft proposed Regulation and RIS to the following organisations, and invited comments and submissions from them:

- 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.

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13 IPART, *Regulatory Impact Statement – Independent Pricing and Regulatory Tribunal Regulation 2012 - Discussion Paper*, May 2012.

14 As required by section 5(2)(a) of the *Subordinate Legislation Act 1989* (NSW).

As required by the *Subordinate Legislation Act 1989* (NSW), we allowed at least 21 days for submissions to be provided.[15]

4.2 Guide to Better Regulation

We also considered whether any additional steps were required to comply with the *Guide to Better Regulation* (**Guide**).[16]

The Guide requires a "Better Regulation Statement" to be prepared for a significant regulatory proposal to demonstrate it has met the better regulation principles set out in the Guide. The Guide states that portfolio Ministers[17] (in this case, the Premier) are responsible for determining whether a regulatory proposal is significant. This is determined on a case by case basis, but a regulatory proposal is generally considered significant if it would:

- introduce a major new regulatory initiative
- have a significant impact on individuals, the community, or a sector of the community
- have a significant impact on business, including by imposing significant compliance costs
- impose a material restriction on competition, or
- impose a significant administrative cost to government.

In our view, the proposed Regulation is not significant because it does not meet any of these criteria. Therefore, we have not prepared a Better Regulation Statement. We note that the Guide still requires portfolio Ministers to demonstrate that the better regulation principles have been applied to non-significant regulatory proposals. This can be done by:

- addressing the application of those principles in the Cabinet Minute, if the regulatory proposal is being submitted to Cabinet for approval, or
- submitting documentation (eg, relevant information from a Regulatory Impact Statement) with the Executive Council Minute to demonstrate the application of those principles, if the regulatory proposal is being submitted to Executive Council for approval.

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15 *Subordinate Legislation Act 1989* (NSW), section 5(2). 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: IPART submission to the Better Regulation Office's Review of NSW Regulatory Gatekeeping and Impact Assessment Processes, October 2011, section 2.1.5.

16 Better Regulation Office of NSW, *Guide to Better Regulation,* November 2009.

17 The decision of the portfolio Minister is subject to the views of the Premier and Cabinet, informed by the Minister for Regulatory Reform: Guide, page 9.

5 Our recommendations on the proposed Regulation

This chapter sets out our recommendations to the Premier on the proposed Regulation in light of stakeholders' responses to the proposed Regulation.

Copies of the stakeholders' responses can be found on our website.[18]

5.1 Clause 5 (legal representation)

5.1.1 Stakeholders' responses

RailCorp submits that there is no need to limit the parties' right to legal representation as contemplated by clause 5 of the proposed Regulation because the parties would not lightly decide to have legal representation.[19] RailCorp considers that unlike other types of disputes, the parties would invariably be commercial organisations. Therefore they are likely to have sufficient internal resources to make an informed decision themselves as to whether representation by lawyers (as opposed to merely being advised by lawyers) would help to resolve the dispute quickly and cost-effectively. They would only choose to take on the cost of legal representation where there are complex, technical or legal matters at issue, or where the outcome of the decision was significant. RailCorp also notes that IPART has not given examples of how an unfettered right to legal representation has hampered an arbitrator's ability to conduct an arbitration.

The Law Society submits that the additional public interest element in IPART Act Arbitrations necessitates fairly broad legal representation, as much to assist the arbitrator as the parties.[20] It suggests that the arbitrator should be able to grant leave for legal representation where he or she is of the view that legal representation would assist him or her in conducting the arbitration. While this may not reduce the costs or length of the proceedings, it would benefit the arbitrator, the parties and the public through a more thorough examination of the issues, and support good decision-making by IPART.

18 See www.ipart.nsw.gov.au.
19 RailCorp's submission, pp 1-3.
20 Law Society's submission, pp 1-2.

Other stakeholders either do not have concerns with the provision[21] or do not express a view.[22]

5.1.2 Our recommendation

We note that RailCorp was the only stakeholder advocating an unfettered right to legal representation. We also note that an unfettered right to legal representation is currently allowed in other jurisdictions, other than in Western Australia.[23]

In our view, it is important that the arbitrator has some control or discretion over the conduct of an arbitration (including whether parties are legally represented). This discretion would enable the arbitrator to ensure that the parties to an arbitration are legally represented where appropriate. For instance, an access seeker may not be equipped to manage the arbitration and may need legal representation. In such a situation, the arbitrator may allow the access seeker to be legally represented under clause 5 of the proposed Regulation, eg, if it would be unfairly disadvantaged without such representation. In other circumstances the arbitrator may decide that, because of the nature of the proceedings, no party should be legally represented.

However, we consider that Law Society's suggestion to broaden the right to legal representation has merit and should be adopted. Allowing legal representation where it would assist the arbitrator would help to facilitate the proper presentation and argument of all relevant issues. This is important because the award made by the arbitrator would affect the parties' rights and obligations.

Recommendation

1 Clause 5 of the proposed Regulation should include an additional ground for the arbitrator to grant leave for legal representation where the arbitrator is of the view that it would assist him or her in conducting the arbitration.

21 Sydney Water Corporation's submission and Sydney Catchment Authority's submission.
22 Department of Finance and Services' submission and Simmonds & Bristow's submission.
23 The Western Australian position largely mirrors the grounds for leave in the current Regulation. However, there is a proposal to amend the legislation to provide an unfettered right to legal representation.

5.2 Clause 6 (private/public hearing of disputes)

5.2.1 Stakeholders' responses

Other than RailCorp, stakeholders either generally support the approach proposed in clause 6 of the proposed Regulation or do not express a view.[24] RailCorp submits that IPART Act Arbitrations should be held in private unless the parties otherwise agree.[25] We note that this position is generally consistent with the position in other jurisdictions, other than in Western Australia.[26]

Railcorp considers that a party would be much better placed than the arbitrator to know whether particular information is commercially sensitive and should be considered confidential. However, if it is left to the arbitrator to decide whether the arbitration should be held in public, the parties may be unwilling to put forward all relevant information to support their case. RailCorp also considers that the mere fact that the outcome of an access dispute may be of public interest is not a sufficient reason to invite and consider public submissions. Australian courts regularly adjudicate disputes that are of general interest to the business or wider community, but do not invite public submissions.

5.2.2 Our recommendation

In our view, RailCorp's submission does not take into account the legislative requirement for the arbitrator to give public notice of rail access disputes where a third party wants access to a service, and to invite public submissions.[27] The arbitrator would need to disclose information about the arbitration to meet this requirement. RailCorp's submission also does not acknowledge that the subject matter of IPART Act Arbitrations and WIC Act Arbitrations necessarily entails considering the broader public interest; in contrast, Court proceedings or commercial arbitrations focus on resolving the private rights and liabilities of the parties.

Further, in practice, IPART does not willingly disclose information that IPART considers may be confidential or commercially sensitive without first consulting with the party who provided the information. IPART recognises the commercial harm that may result from disclosure.

On balance, we do not consider that clause 6 needs amendment.

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24 The Law Society, Sydney Water Corporation and Sydney Catchment Authority generally support the provision. The Department of Finance and Services and Simmonds & Bristow do not express a view.

25 RailCorp's submission, pp 3-4.

26 In Western Australia, parties can currently agree on the procedure for an arbitration (which presumably includes confidentiality). There is a proposal to amend the legislation to expressly allow the parties to agree on the confidentiality of the arbitration.

27 IPART Act, s24B(2).

Recommendation

2 Clause 6 of the proposed Regulation should be maintained as it is currently drafted.

5.3 Clause 7 (arbitrator's fees and expenses)

Stakeholders either support clause 7 of the proposed Regulation or do not express a view.[28] Therefore, we consider that the clause should be maintained as it is currently drafted.

Recommendation

3 Clause 7 of the proposed Regulation should be maintained as it is currently drafted.

5.4 Agreeing to appeal to Court on a question of law

In consulting on the proposed Regulation, we asked whether the parties should have a broader right to appeal to a Court on a question of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations. Currently, under section 34A of the Commercial Arbitration Act, 2 conditions must be met before such an appeal can be heard:

- all parties to the arbitration must agree to the appeal (section 34A(1)(a)), **and**
- the Court must grant leave to appeal if certain narrow criteria are met (section 34A(1)(b)).

We invited submissions on whether the requirement for agreement in paragraph (1) should be removed because it arguably narrowed the parties' right to appeal.

5.4.1 Stakeholders' responses

The Law Society does not support removing the requirement for the parties to agree to appeal on a question of law in IPART Act Arbitrations and WIC Act Arbitrations. Sydney Catchment Authority supports removing the requirement and Sydney Water do not have concerns about removing requirement, but they do not provide detailed reasons for their respective positions. The Department of Finance and Services supports removing the requirement because it may be seen by access seekers as a potential barrier to competition. Other stakeholders do not express a view.[29]

[28] The Law Society, Sydney Water Corporation and Sydney Catchment Authority support the provision or state that they have no objection to it. No comment was made by RailCorp, the Department of Finance and Services, and Simmonds & Bristow.

[29] Simmonds & Bristow and RailCorp do not express a view.

5.4.2 Our recommendation

In our view, there are 2 competing considerations on the question of whether to broaden the parties' right to appeal to a Court on a question of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations.

On one hand, arbitrations should generally result in a final and binding determination of the parties' rights and interests. This would arguably be diminished by broadening the parties' right to appeal to a Court on a question of law.

However, we consider that the foregoing is outweighed by key differences between commercial arbitrations on one hand, and IPART Act Arbitrations and WIC Act Arbitrations on the other hand.

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 arising out of arbitration awards.

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 WIC Act Arbitrations do not have the same opportunity to agree on the scope of their arbitrations before a dispute arises.

Further, it is unlikely that the parties would agree to appeal on a question of law once their dispute has been referred to arbitration. It is also unlikely that parties would agree to appeal a question of law once the arbitrator has made an arbitral award. In practice, the parties may agree to an appeal if the arbitration award disadvantages all parties. However, that type of outcome is unlikely.

Therefore, on balance, we consider that the requirement for the parties to agree to appeal to a Court on a question of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations should not apply in such arbitrations. We note that if this requirement did not apply, the parties must still seek the Court's leave if they wish to appeal a question of law.

Recommendation

4 The proposed Regulation should provide that the requirement in the *Commercial Arbitration Act 2010* (NSW), section 34A(1)(a) for the parties to agree to appeal to a Court on a question of law arising out of awards does not apply in arbitrations under Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) and the *Water Industry Competition Act 2006* (NSW).

5.5 Need for the proposed Regulation

5.5.1 Stakeholders' responses

RailCorp considers that there is no need for the proposed Regulation since there is no evidence of any need to modify the CAA as proposed.[30] RailCorp also submits that it would be more appropriate to adopt the arbitration procedures contained in the access provisions of the *Competition and Consumer Act 2010* (Cth), which have been "tried and tested" and in place for many years.[31] That Act provides that:

- In an arbitration hearing before the Australian Competition and Consumer Commission (**ACCC**), a party may appear in person or be represented by someone else.[32]
- The arbitration hearing is to be in private unless the parties agree. The member of the ACCC presiding at an arbitration hearing conducted in private may give directions as to the persons who may be present but in doing so must have regard to the parties' wishes and the need for commercial confidentiality.[33]
- A party may request that the ACCC treat specified material as confidential. The ACCC may decide whether to give the material to other parties after considering this request and any objection or submissions made in relation to the request.[34]

However, the Law Society considers that the proposed Regulation is the appropriate process for implementing changes necessary to conduct IPART Act Arbitrations and WIC Act Arbitrations effectively.[35] All other stakeholders either generally support or do not query the need for the proposed Regulation as currently drafted.[36]

In relation to RailCorp's submission that there is no need for the proposed Regulation, we remain of the view that there is a need for the proposed Regulation. This is because, as outlined in section 2.4 above, IPART Act Arbitrations and WIC Act Arbitrations are different to commercial arbitrations, in particular:

- the arbitration avenue is provided for in legislation, rather than a result of the parties' commercial dealings, and
- the arbitrator may need to consider the public interest in IPART Act Arbitrations and WIC Act Arbitrations, which is not ordinarily a feature of commercial arbitrations.

30 RailCorp's submission, p 4-5.
31 RailCorp's submission, p 4-5.
32 *Competition and Consumer Act 2010* (Cth), s44ZE.
33 *Competition and Consumer Act 2010* (Cth), s44ZD.
34 *Competition and Consumer Act 2010* (Cth), s44ZL.
35 Law Society's submission, p 2.
36 Sydney Catchment Authority and Sydney Water Corporation have no concerns with the proposed Regulation. The Department of Finance and Services and Simmonds & Bristow do no query the need for the proposed Regulation.

Therefore, in our view, the proposed Regulation is the appropriate vehicle for making only the necessary amendments to the arbitration framework to take account of those differences.

We consider that there is merit in RailCorp's submission to adopt the arbitration procedures in the access provisions of the *Competition and Consumer Act 2010* (Cth). However, we remain of the view that it is appropriate for the proposed Regulation to give the arbitrator discretion over the conduct of the arbitration for the reasons given above. In addition, we note that all other stakeholders either generally support the proposed Regulation, or do not question the appropriateness of the proposed Regulation.[37] This indicates to us that the form of the proposed Regulation, with the recommended changes outlined above, should be adopted.

Finally, as noted in the RIS for the proposed Regulation, we have considered the alternatives to the making of the proposed Regulation. 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, we remain of the view that 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 Act 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.

Recommendation

5 The proposed Regulation should be made as currently drafted, but incorporating the amendments referred to in Recommendation 1 and Recommendation 4.

37 See note 36 above.

5.6 Qualification of arbitrators

The Law Society also suggests that due to the specialised nature of IPART Act Arbitrations and WIC Act Arbitrations, it is important to have well-qualified arbitrators.[38] Further, given that IPART may have its own policy or position in relation to a dispute, and may make submissions in relation to a dispute, ideally the arbitrators would not be individuals associated with IPART.[39]

We note the Law Society's comments on the qualification and identity of arbitrators. However, we also note that hearing and determining IPART Act Arbitrations and WIC Act Arbitrations is one of IPART's functions.[40] IPART would consider on a case-by-case basis whether it is more appropriate to appoint persons other than members of the Tribunal to act as arbitrator. We make no recommendation on this issue.

38 Law Society's submission, pp 1 and 3.
39 Law Society's submission, pp 1 and 3.
40 IPART Act, s24B(2); WIC Act, s40(5).

Appendix

A Proposed Regulation

New South Wales

Independent Pricing and Regulatory Tribunal Regulation 2012

under the

Independent Pricing and Regulatory Tribunal Act 1992

[The following enacting formula will be included if the Regulation is made:]
Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Independent Pricing and Regulatory Tribunal Act 1992*.

Premier

Explanatory note

The object of this Regulation is to remake, without substantial alteration, the *Independent Pricing and Regulatory Tribunal Regulation 2007*. That Regulation will be repealed on 1 September 2012 by section 10 (2) of the *Subordinate Legislation Act 1989*.

This Regulation modifies the application of the *Commercial Arbitration Act 2010* 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 a savings provision.

The provisions of this Regulation also apply to the arbitration of disputes under section 40 of the *Water Industry Competition Act 2006*—see section 40 of that Act and clause 11 of the *Water Industry Competition (Access to Infrastructure Services) Regulation 2007*.

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

Independent Pricing and Regulatory Tribunal Regulation 2012

under the

Independent Pricing and Regulatory Tribunal Act 1992

1 Name of Regulation

This Regulation is the *Independent Pricing and Regulatory Tribunal Regulation 2012*.

2 Commencement

This Regulation commences on 1 September 2012 and is required to be published on the NSW legislation website.

Note. This Regulation replaces the *Independent Pricing and Regulatory Tribunal Regulation 2007* which is repealed on 1 September 2012 by section 10 (2) of the *Subordinate Legislation Act 1989*.

3 Definitions

(1) 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*.

(2) Notes included in this Regulation do not form part of this Regulation.

4 Object of Regulation

The object of this Regulation is, in accordance with section 24A (2) of the Act, to modify the application of the *Commercial Arbitration Act 2010* to the arbitration of a dispute.

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 effect instead of section 24A of the *Commercial Arbitration Act 2010*.

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.

7 Costs of arbitration

For the purposes of section 33B of the *Commercial Arbitration Act 2010*, and without limiting the fees or expenses of the arbitrator or arbitrators, the fees and expenses of the arbitrator or arbitrators are taken to include:

(a) all costs incurred by the arbitrator or arbitrators, 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.

8 Saving

Any act, matter or thing that, immediately before the repeal of the *Independent Pricing and Regulatory Tribunal Regulation 2007*, had effect under that Regulation continues to have effect under this Regulation.