IPART
New South Wales

Guide

to the

Arbitration of Disputes

under the

Water Industry Competition Act 2006

Contents

1 Introduction

1.1 The *Water Industry Competition Act 2006* ("Act")

The Act aims to promote competition and encourage innovation in the water industry by:

(a) Establishing a licensing scheme to provide for private sector involvement in the supply of water and the provision of sewerage services;

(b) Establishing an access regime to ensure that certain monopoly infrastructure services involved in the supply of water and the provision of sewerage services are available to persons seeking access to them;

(c) Facilitating the resolution of disputes between persons operating certain sewerage infrastructure and persons seeking access to the contents of that infrastructure;

(d) Facilitating the resolution of disputes between private sector bodies and their customers in relation to the supply of water and the provision of sewerage services;

(e) Facilitating the construction, maintenance and operation of infrastructure for the supply of water and the provision of sewerage services;

(f) Protecting private sector involvement in the supply of water and the provision of sewerage services by means of the creation of offences for that purpose.[1]

[1] Explanatory Note to the *Water Industry Competition Bill 2006*.

2 Disputes under the Act

The Act provides for the resolution of disputes concerning access to water and sewerage infrastructure.

Two types of Disputes are envisaged:

(a) Access Disputes; and

(b) Sewer Mining Disputes.

2.2 Access Disputes: section 40 of the Act

Access Disputes are disputes which exist between the provider of an infrastructure service and a person who seeks access to that infrastructure. The dispute may concern:

(a) the terms on which the access seeker is to be given access (or increased access) to a service which is subject to a coverage declaration or an access undertaking;

(b) any matter arising under an access agreement which provides for a dispute to be dealt with in accordance with section 40 of the Act; or

(c) any matter arising under a determination made under section 40 of the Act.

2.3 Sewer Mining Disputes: section 46 of the Act

Sewer mining is the extraction of the contents of a service provider's sewer, usually for recycling and other uses.

Sewer Mining Disputes are disputes which exist between a service provider and a sewer miner. A sewer miner is a person who draws from the contents of a service provider's sewers or who wants to do so. The dispute may concern:

(a) the terms of any agreement under which the sewer miner is to be permitted to draw from the contents of the service provider's sewerage infrastructure;

(b) any matter arising under an agreement referred to in paragraph (a) which provides for a dispute as to that matter to be dealt with in accordance with section 46 of the Act; or

(c) any matter arising under a determination under section 46 of the Act.

These definitions, referred to in paragraphs 2.2 and 2.3, are the basis on which a dispute can be referred to IPART for arbitration under the Act. You must therefore check that your dispute does come within these descriptions.

2.4 What happens when a dispute arises?

When a dispute arises, either Party can apply to the Independent Pricing and Regulatory Tribunal ("**IPART**") for the dispute to be determined by arbitration. Arbitration is a process whereby the Parties submit their dispute to an arbitrator who then makes a determination that is final and binding on the Parties, subject to certain limited avenues of appeal or review (which are explained elsewhere in this document).

It is important to note that the Act gives a Party a right to refer its dispute to IPART to be arbitrated. However, should the parties agree upon another method of resolving a dispute, they are free to do so. Nevertheless, where a party wishes to refer a dispute to IPART, then, unless there is a contrary agreement, the matter will be referred to IPART.

2.5 The purpose of this guide

The purpose of this Guide is to provide an easily understood, step-by-step explanation of the key events in the arbitration process. This Guide is not binding on IPART or any Party to an arbitration under the Act. The Guide only deals with disputes referred to IPART.

2.6 Arbitration under the Act

The process by which arbitrations are commenced, conducted and ended is governed by:

(a) the Act;

(b) those sections of the Independent Pricing and Regulatory Tribunal Act 1992 (NSW) ("**IPART Act**"), which the Act provides shall apply under the Act, as well as the *Independent Pricing and Regulatory Tribunal Regulation 2007* (NSW) ("**IPART Regulation**");

(c) the *Commercial Arbitration Act 1984* ("**CAA**"); and

(d) where applicable, the *Water Industry Competition (Access to Infrastructure Services) Regulation 2007* (NSW) ("**Access Regulation**").

Subject to the provisions of sections 40 and 46 of the Act, and (in the case of Access Disputes), subject also to some provisions of the IPART Act, the *Commercial Arbitration Act* applies to arbitrations under the Act.

This means that:

(a) any arbitration in relation to access must conform to the requirements of section 40 of the Act, sections 24B-24E of the IPART Act and, more generally, the *Commercial Arbitration Act*;

(b) any arbitration in relation to sewer mining must conform with the requirements of section 46 of the Act and, more generally, the *Commercial Arbitration Act*.

In accordance with the CAA, the arbitration is subject to the supervisory control of the NSW Supreme Court. What this means in practice is that whilst the Arbitrator will be responsible for the conduct of the arbitration, a Party may seek the assistance of the Court in certain circumstances including:

(i) where an arbitrator needs to be removed;

(ii) where production of documents from third parties is required;

(iii) review of a determination for an error of law;

(iv) enforcement of a determination.

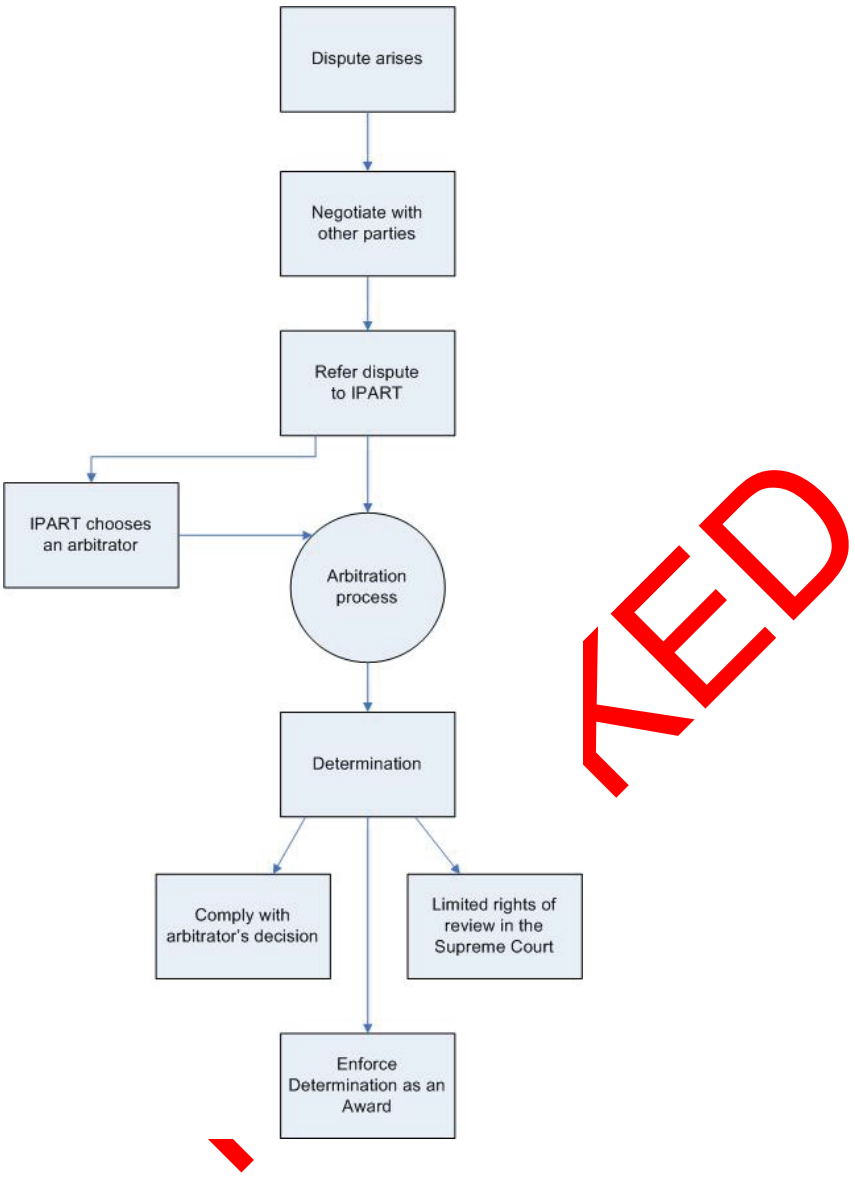
The provisions contained in the Act and the IPART Act (where applicable) are required parts of the arbitration process and the Arbitrator and the Parties must follow them. The provisions of the CAA also govern the arbitration process.

IPART has also produced a set of Practice Directions. These Practice Directions set out the way in which an arbitration should usually proceed and the recommended processes that will be adopted by the Arbitrator. However, apart from some Articles which reflect mandatory legislative provisions and which must be followed, these Practice Directions are not binding and the Arbitrator and the Parties can agree upon a different procedure if they want to do so (as long as that procedure is consistent with the requirements of the Act, the IPART Act and the CAA). Nevertheless, in most circumstances where IPART (or a person appointed by IPART) acts as the Arbitrator, it is likely that the Arbitrator would follow the Practice Directions.

The meaning of a defined term in this Guide is the same as the meaning of the same term as used in the Practice Directions, unless otherwise stated.

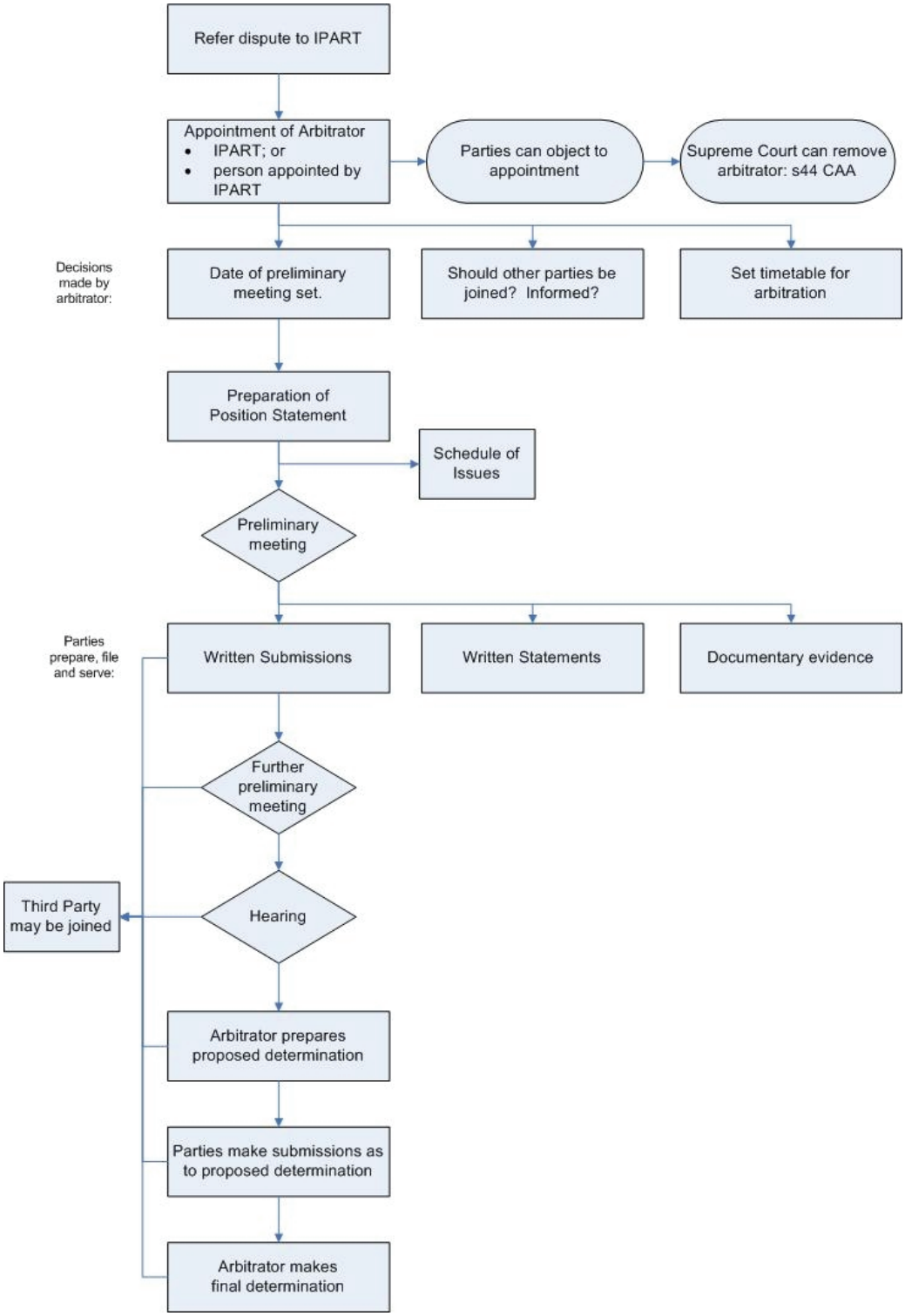
3 The process at a glance

3.1 The arbitration process in context



3.2 The arbitration process

The following flowchart shows how some of the key elements of the arbitration process fit together. It does not show every step in the process, but is a short guide to the way the arbitration proceedings will usually be conducted. For further information see the rest of this Guide and IPART's Practice Directions.



4 Before commencing an arbitration

IPART may refuse to accept the referral of an Access Dispute unless it is satisfied that the Parties to the Access Dispute have attempted, in good faith, to resolve the Access Dispute by negotiation (s 40(2) of the Act). So, before you begin the arbitration process in an Access Dispute, you should make a genuine effort to resolve the Access Dispute by negotiating with the other Parties to the Dispute.

You should bear in mind the requirements of clause 8 of the Water Industry Competition (Access to Infrastructure Services) Regulation 2007 and the protocols which it outlines with regard to negotiations required by s 40(2) of the Act. Clause 8 provides that IPART must have regard to the provisions in that clause when it is deciding whether or not you have attempted, in good faith, to resolve the Dispute by negotiation. Clause 8(2) provides that if an access seeker requests certain information from a service provider, the service provider must provide that information within five days. The information required is:

(a) a list of all infrastructure services provided by the service provider, which are the subject of a coverage declaration or access undertaking, as described in the relevant coverage declaration or access undertaking;

(b) the procedure to be followed to obtain access to each such service, and as to the time it is likely to take to negotiate access (assuming the matter does not go to arbitration);

(c) a copy of IPART's negotiation protocols, together with a statement to the effect that, unless otherwise agreed between the Parties, those protocols will apply to any negotiations for access to any such service;

(d) such information as IPART's negotiation protocols require to be provided; and

(e) such other information as the service provider considers appropriate to include in the package.

Although failure to take account of the requirements of clause 8 is not determinative of an absence of good faith attempts to resolve the Dispute, it is a factor which IPART is required to consider and to which it may give such weight as it sees fit.

The requirement to negotiate in good faith described in this section does not apply to a Sewer Mining Dispute. However, it is recommended that you attempt to negotiate with the other Parties to try and resolve the Sewer Mining Dispute and thereby avoid unnecessary time and expense on a Dispute.

5 Commencing an arbitration

5.1 How do I start the arbitration process?

If negotiation (where required or otherwise) has not solved the Dispute, then if you have not agreed to resolve the dispute in some other manner, you can start the arbitration process by referring the Dispute to IPART. You should do this by completing a Notice of Dispute. You should use the form in Appendix A. In the Notice, you should:

(a) state the names of the Parties to the Dispute;

(b) describe the nature of the Dispute; and

(c) provide any other information required by the form.

Once you have completed the form, you must file it at IPART's Arbitration Registry in person, by post, by fax, or by email. The Registry's contact details can be found in paragraph 5.2 below.

Within 5 Business Days, you should also provide copies of the Notice of Dispute to the other Parties to the Dispute.

The Arbitrator may copy the Notice of Dispute to any person whom the Arbitrator may require to be notified of the Dispute.

If IPART is not satisfied that the application discloses a genuine dispute between the Applicant and the Party or Parties named in the Notice of Dispute, then IPART can, in its absolute discretion, refuse to accept the application.

5.2 Arbitration Registry and the IPART Secretariat

IPART maintains the office of the "Arbitration Registry of the Independent Pricing and Regulatory Tribunal". The Arbitration Registry is open from 9.30am to 1.00pm and from 2.00pm to 4.30pm on every business day.

Contact details:

Location: Level 8, 1 Market Street, Sydney, New South Wales 2000.

Postal address: PO Box Q290, QVB Post Office New South Wales 1230.

Fax: 02 9290 2061

Once a Dispute is referred to IPART, the Arbitration Registry will be responsible for administration and support services in respect of the arbitration.

The Arbitration Registry's primary functions are to:

(a) support the Arbitrator in an arbitration under the Act;

(b) provide appropriate assistance or advice to the Parties; and

(c) provide information regarding the conduct of arbitrations to members of the public.

Where IPART acts as the Arbitrator it may consult with, or receive assistance from, the Secretariat. Should you have concerns about this (including any concerns with confidentiality of information provided to IPART, given its role as regulator) then you should raise these with IPART (as the Arbitrator) at the beginning of the Dispute. A good time for this would probably be at the first preliminary meeting.

All written correspondence and other documents passing between a Party and the Arbitrator to a Dispute or IPART will be copied to all Parties.

6 The Arbitrator

6.1 Who will be the Arbitrator?

IPART will maintain a Panel of Arbitrators. The Panel will comprise members of a panel approved by the Premier and any other individual whom IPART considers to be a suitably qualified person to act as Arbitrator.

IPART will decide whether it will act as Arbitrator itself, or whether it will appoint someone else to arbitrate the Dispute. IPART could decide to appoint a single Arbitrator or a tribunal of three Arbitrators. In the case of an Access Dispute, section 24B(1) of the IPART Act requires that IPART either acts itself as Arbitrator or appoints an Arbitrator from a panel approved by the Minister. If the Parties choose to arbitrate by way of IPART's process, then the Arbitrator will be appointed by IPART without reference to the Parties. The Arbitration Registry will write to the Parties to inform them of the name(s) of the person(s) acting as Arbitrator(s). In this guide a reference to an Arbitrator includes a reference to a three-member tribunal.

There is nothing which prevents the Parties to a Dispute from agreeing to resolve their Dispute by private arbitration. The Parties are free to agree on an arbitration process themselves, and to appoint an Arbitrator of their choice. The Arbitrator chosen in this way does not have to follow the Practice Directions, subject to any mandatory provisions which may apply in accordance with the relevant legislation.

6.2 What if I am unhappy with IPART's choice of Arbitrator?

If you are not happy with the one or more of the Arbitrators chosen by IPART, you have the right to object to IPART's choice. You should make such an objection in writing to IPART within 10 Business Days of receiving notification of the Arbitrator's appointment. IPART will consult with the Parties and, following that consultation, may appoint an alternative Arbitrator (or Arbitrators). If the Dispute is an Access Dispute, then IPART can only appoint itself or an alternative Arbitrator from the Premier's approved panel, referred to in paragraph 6.1 above. However, IPART is not required to remove the Arbitrator.

6.3 Removal of Arbitrator

You may challenge an appointment of an Arbitrator in Court if you wish.

Under s 44 of the CAA, where the Supreme Court is satisfied that the Arbitrator has engaged in misconduct, or has been subject to undue influence, or is incompetent or unsuitable to deal with the Dispute, it may (on the application of a Party) remove the Arbitrator.

6.4 What initial steps will the Arbitrator take?

When the Arbitrator has been appointed, some of the things the Arbitrator will do include:

(a) writing to the Parties to inform them of the time, date and place of a preliminary meeting;

(b) requiring each Party to prepare a Position Statement (as discussed in the next section);

(c) determining whether any other persons should become Parties to the arbitration;

(d) determining whether anyone else (including the public) should be notified of the Dispute;

(e) setting a timetable for the completion of preparatory steps before the hearing of the Dispute.

6.5 Compliance with Arbitrator's directions

The Parties must always comply with the directions of the Arbitrator and must not do anything to delay or prevent the Dispute being heard and determined by the Arbitrator.

6.6 Failure to comply with Arbitrator's directions

Where a Party fails or refuses to attend a preliminary meeting, attend a pre-hearing conference, attend the hearing or to comply with any requirement of the Arbitrator, the Arbitrator may, in the Arbitrator's complete discretion, continue with the preliminary meeting, or pre-hearing conference, or hearing, or determine the Dispute, or proceed in whatever way the Arbitrator thinks appropriate.

6.7 Powers of the Arbitrator

If the Dispute is an Access Dispute, the Arbitrator has those powers which IPART has under section 22 of the IPART Act. Those powers are:

(a) the power to take possession of, and make copies of or take extracts from, documents given to the Arbitrator; and

(b) the power to keep possession of such documents for such period as is necessary for the purposes of the investigation to which they relate.

During that period, the Arbitrator must permit them to be inspected at all reasonable times by persons who would be entitled to inspect them if they were not in the possession of the Arbitrator.

6.8 Adjournment

Under section 40(9) of the Act, if the Dispute is an Access Dispute, and a Party seeks access in relation to any activity for which the Party would require, but does not yet hold, a licence under Part 2 of the Act, the Arbitrator:

(a) may adjourn the proceedings for such time as the Arbitrator considers reasonable for the purpose of enabling the access seeker to obtain such a licence;

(b) may make a determination refusing the access sought, if the access seeker fails to obtain such a licence within that time.

6.9 Timing

The Arbitrator must use his or her best endeavours to determine the Dispute within 6 months of the referral of the Dispute (sections 40(8) and 46(7) of the Act). However, that may not always be possible.

Under clause 9 of the Access Regulation, once IPART accepts an application for an Access Dispute to be determined by arbitration, IPART must notify the Parties and the Minister of:

(a) the date on which the application was accepted; and

(b) the date (six months later) by which the Arbitrator must try to make a determination.

If at any time it appears to the Arbitrator that it will not be practicable for the Access Dispute to be determined by the notified date by IPART, the Arbitrator has to give written notice to the Parties and to the Minister of the date by which the Arbitrator expects the Access Dispute to be determined.

The notification requirements of clause 9 of the Access Regulation do not apply to a Sewer Mining Dispute.

6.10 Quorum for decision-making by IPART

If IPART has determined that it will act as Arbitrator, then at least two Tribunal members must be present when a decision is made concerning the Arbitration.

7 Position Statement

Before the Preliminary Meeting discussed in section 10 below, the Arbitrator will require you to prepare a document (or documents) called a Position Statement which sets out the following in clear terms:

(a) the nature of the Dispute;

(b) the issues which you think will arise in the course of the arbitration; and

(c) a brief summary of your contentions about the Dispute.

The Arbitrator may ask the Parties to attempt to agree on some or all of the matters in (a) and (b) and produce an agreed statement of those matters. Having an agreed set of facts and issues usually helps to make any determination more cost-effective.

8 Am I allowed to have legal representation?

As a general rule, Parties are not entitled to have legal representation.

However, a Party may be represented by a legal practitioner (who must be an Australian qualified lawyer) if the Arbitrator grants leave. You should note that the Arbitrator will only grant leave for you to have legal representation if the Arbitrator thinks that:

(a) representation is likely to shorten the hearing of the Dispute or to reduce the costs of resolving the Dispute; or

(b) you would be unfairly disadvantaged if you were not represented by a lawyer.

9 Role of third parties

9.1 Notice of Dispute to other persons

The Arbitrator will direct that notice of the Dispute be given to a person who is not a Party where this is required by law.

Notice may also be given to any other third party to whom the Arbitrator considers it appropriate that notice be given. For example, the Arbitrator may give notice to a Potentially Impeded Third Party (see paragraph 9.3 below).

In an Access Dispute, the Arbitrator may require the service provider to give notice of the proceedings to all other persons to whom the service provider provides access.

In a Sewer Mining Dispute, the Arbitrator may require the service provider to give notice of the proceedings to other persons permitted to draw from the contents of the service provider's sewerage infrastructure.

9.2 Submissions from persons who are not Parties

Where the Arbitrator must take into account the interests of a person who is not a Party, the Arbitrator will require that the person be notified of the Dispute. The Arbitrator can also invite the person to make a written submission to the Arbitrator.

9.3 Potentially Impeded Third Parties

A Potentially Impeded Third Party is a person who, in the opinion of the Arbitrator, may be adversely affected by a determination of the Arbitrator. An adverse effect may include the imposition of an impediment (by reason of the determination) to the exercise of an existing right of such a person.

An Arbitrator may invite a Potentially Impeded Third Party to become a Party to the Arbitration for the purpose of hearing and determining whether the existing right of the Potentially Impeded Third Party should be affected in the manner contemplated. The Arbitrator may make whatever consequential directions he or she considers necessary so as to put the Potentially Impeded Third Party in a position to present an informed case on the issue described above.

10 The Preliminary Meeting

10.1 Schedule of Issues

Along with the notification of the time, date and place of the preliminary meeting, the Arbitrator will send to each Party a schedule of issues. This document will set the agenda for the preliminary meeting. It will list the matters which the Arbitrator intends to consider and resolve at the meeting. The Arbitrator should use the form set out in Appendix B.

10.2 What will happen at the preliminary meeting?

At the preliminary meeting, the Arbitrator will deal with the matters listed in the schedule of issues and may also deal with other matters such as:

(a) discussing with the Parties the scope of the Dispute;

(b) determining whether any third parties should be joined in the proceedings;

(c) determining whether the public should be informed of the Dispute;

(d) setting a timetable for the completion of any procedural steps as directed by the Arbitrator, in accordance with these guidelines; and

(e) any other matters which will help conduct the arbitration in an efficient and proper way including the provision of evidence and written submissions.

The Parties can raise any other issues with the Arbitrator for consideration at the preliminary meeting.

The Arbitrator may refuse to set a hearing date until all of the matters raised at the preliminary meetings are dealt with.

10.3 Further preliminary meetings

If there are issues which cannot be resolved at the first preliminary meeting, or if issues arise at that meeting which the Parties or the Arbitrator need to think about or to take steps to resolve, the Arbitrator may convene further preliminary meetings.

10.4 Pre-hearing conference

There will be at least one further preliminary meeting, called a pre-hearing conference. No less than 3 Business Days before the hearing of the Dispute, the Arbitrator will meet with the Parties to discuss the manner in which the hearing will be conducted. One of the purposes of this meeting is to make sure that all of the preparatory steps have been completed as directed by the Arbitrator and that the Parties are sufficiently prepared for the hearing to proceed.

10.5 Preliminary meetings by teleconference

If the Arbitrator sees fit, preliminary meetings (including the pre-hearing conference) may take place by means of teleconference.

11 What if I need an urgent solution to my problem?

In the case of Disputes which require an urgent resolution, the Arbitrator may decide on a timetable for an expedited hearing of the Dispute. The Arbitrator may decide to vary the timetable for completing the preparatory steps, or may decide that some of the preparatory steps can be missed altogether to ensure that the Dispute is resolved quickly. However, the Arbitrator will at all times ensure that the Dispute is heard and resolved fairly and with each Party being given a reasonable opportunity to present its case.

12 Evidence and submissions

12.1 Written submissions

The Arbitrator may require you to make submissions in writing. The situations where this may occur include, but are not limited to, the following:

(a) where there is disagreement between the Parties as to a legal issue;

(b) where there are large amounts of information presented in evidence;

(c) where there are discrepancies or inconsistencies in the evidence which has been presented to the Arbitrator;

(d) any other situation where written submissions would contribute to the effective and efficient conduct of the arbitration.

12.2 Written statements

Generally, you will be required to present your evidence in the form of written statements, sworn or affirmed by the witness giving the statement. The written statements must be in the form directed by the Arbitrator (and this is likely to be in the form referred to in the Practice Directions). In particular, they must be filed at the Arbitration Registry at a time before the hearing of the Dispute, as set by the Arbitrator. The written statements must also be served on other Parties. In any event, all written statements will usually have to be filed and served not less than 5 Business Days before the hearing.

The Applicant's statements will be required to be filed before those of other Parties. Usually, Parties will be allowed to file written statements in reply.

12.3 Agreed statement of facts

Ideally, Parties should try to agree to a set of facts, based on which the arbitration should proceed. The Arbitrator will probably discuss this possibility with the Parties or may order the Parties to produce an agreed statement of facts. If so then the Parties will have to prepare an agreed statement of facts. The details of what should be included in the statement, and the manner in which the document should be prepared, will depend on the directions given by the Arbitrator. In any event, it is a good idea for the Parties to consider preparation of such a document either before or just after the preparation of evidence in order to assist with defining the real issues and dealing with the Dispute efficiently.

12.4 Expert evidence

If a person is going to give evidence of their opinion on any matter (rather than, for example, evidence as to fact, such as whether something did or did not occur) that person will be considered an "expert witness" for the purposes of the arbitration.

The types of people who could qualify as expert witnesses include: economists; accountants; persons experienced in an industry or trade; academics; and (where legal issues are in dispute) lawyers.

The Arbitrator may make directions, as the Arbitrator sees fit, as to the number of expert witnesses and the manner and form in which they give their evidence.

Each expert witness' evidence will usually have to be set out in a written statement as described in paragraph 12.2 above.

Each Party is allowed to question the capacity or qualification of a person who is presented as an expert witness. To do so, the Party must give written notice of its intention to do so to the other Parties and to the Arbitrator. The written notice must be given no less than 5 Business Days before the hearing of the Dispute. The Arbitrator will consider what if any weight is given to the evidence taking into account the objection and any comments on the objection made by other Parties.

The Arbitrator may require the expert witnesses to confer with a view to defining the issues and identifying any areas of disagreement between them. The Arbitrator may require the expert witnesses to provide a joint report.

The Arbitrator may appoint, or otherwise consult with, its own expert in order to assist in its deliberations.

12.5 Documentary evidence

If a Party intends to rely on documentary evidence at the hearing, then that Party must, at the time of providing its evidence and submissions, give notice to all other Parties, and the Arbitrator, of the documents which the Party intends to rely on. If the Arbitrator agrees, a Party may disclose further documents at a later time. However, this disclosure must occur no later than 10 Business Days before the hearing date.

Each Party should prepare and provide to the Arbitration Registry a bundle of documents on which the Party intends to rely at the hearing. This bundle of documents should be provided to the Arbitration Registry no later than 5 Business Days before the hearing of the Dispute.

Where a Party wants to get documents from a third party it must do so by issuing a subpoena in the Supreme Court. This is because, as a matter of law, the Arbitrator does not have the power to issue a subpoena against a third party who is not a Party to the arbitration. However, the subpoena and any issues arising from the documents will be dealt with by the Arbitrator.

12.6 Document exchange by electronic means

All exchanges of documents between the Parties, or between the Parties and the Arbitrator (other than the Notice of Dispute and the Notice of Withdrawal) may be by facsimile or by e-mail.

13 Hearings

13.1 Conduct of hearings

(a) The Arbitrator will conduct hearings in any way the Arbitrator considers appropriate, taking into account the need for the fair, efficient and timely resolution of the Dispute.

(b) The Arbitrator will conduct the hearing and determine the Dispute according to law.

(c) The hearing will be held in private, unless the Arbitrator directs otherwise.

(d) The Arbitrator may give written directions as to certain persons who may be present, but in doing so must have regard to the wishes of the Parties and the need to maintain the confidentiality of commercially sensitive information.

(e) The Arbitrator will not be bound by the rules of evidence.

(f) At the hearing, the Applicant will present its evidence to the Arbitrator first, followed by the other Parties.

13.2 Status of written evidence

Where written statements of witnesses have been prepared by the Parties, witnesses will not be allowed to give oral evidence further to those statements (unless the Arbitrator decides otherwise). A witness can, however, be examined by any other Party, subject to the directions of the Arbitrator as to the method by which that examination takes place.

14 Confidentiality, disclosure and procedural fairness

14.1 Confidentiality

Material used in the arbitration process will generally be of a commercially sensitive nature, and hearings should be held in private to protect confidentiality. However, as outlined, public interest issues must also be taken into account in the resolution of Access Disputes and Sewer Mining Disputes. Where public interest issues are relevant, these may weigh against considerations of privacy and confidentiality.

Generally, all proceedings (including preliminary meetings and hearings) will be held in private. All documentary evidence, written submissions, written statements and all other documentation involved in the arbitration will remain confidential. However, documents will not be confidential in circumstances where they are required to be disclosed as a matter of law or where their production is compelled as part of other litigation.

Each Party must sign an undertaking to maintain the confidentiality of the material and not to disclose such material (or any of the information contained in it) to anyone who is not a Party or who is not the Arbitrator. The form of the undertaking is set out in Appendix C.

14.2 Disclosure and procedural fairness

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

(a) notified of the Dispute (together with some information as to the issues involved in the Dispute); and

(b) given an opportunity to present a submission to the Arbitrator, explaining their interests and views.

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

15 How will the arbitration process end?

15.1 Withdrawal of the Dispute

A Party who refers a Dispute to IPART may notify the Parties of its intention to withdraw the Dispute. This can be done by filing a Notice of Withdrawal in the form set out in Appendix D. The Notice of Withdrawal must also be served on all other Parties to whom a Notice of Dispute had been provided. Withdrawing a Dispute can only occur with the consent of the other party to the Dispute (this does not include third parties who are given an opportunity to particpate or comment) so you should consider carefully any decision to withdraw as the other party would be entitled to continue with the Arbitration and seek an award of costs against the withdrawing Party.

Where a Party intends to withdraw its claim the other Party has a number of options. These are:

(a) it can consent to the withdrawal without anything further providing written confirmation to the Arbitrator;

(b) it can agree with the other Party that the Arbitrator will give a consent award (in agreed terms) dealing with the issue of costs or it can simply agree with the other Party as to how costs should be paid;

(c) in the event that no agreement on costs is reached, it can seek an award from the Arbitrator dealing with the costs of the Arbitration.

15.2 Settlement of the Dispute

(a) If all of the issues in dispute between the Parties are settled, then the Arbitrator should be notified immediately. Once notified, the Arbitrator will take steps to bring the proceedings to an end and, if the Parties have not agreed about costs, make a decision as to costs (see paragraph 15.1 above and 18 below).

(b) If some of the issues in dispute between the Parties are settled, then the Arbitrator should be notified as soon as possible. The Arbitrator will continue to hear and determine the Dispute in relation to those issues which are still in dispute.

15.3 Termination by the Arbitrator in an Access Dispute

If the arbitration concerns an Access Dispute, the Arbitrator may terminate the arbitration at any time after the Arbitrator is appointed. The Arbitrator may do so of the Arbitrator's own motion or on receipt of a written request from a Party. The Arbitrator can terminate the arbitration on any of the grounds set out in section 24E of the IPART Act, namely:

(a) the notification of the Dispute was vexatious;

(b) the subject-matter of the Dispute is trivial, misconceived or lacking in substance;

(c) the Party who notified the Dispute has not engaged in negotiations in good faith; or

(d) access to the service should continue to be governed by an existing contract between the provider and the third party.

15.4 Determination by the Arbitrator

After a hearing is completed, the Arbitrator will do the following:

(a) after a hearing is completed, the Arbitrator will take time to consider the decision the Arbitrator will make (which is called a "determination");

(b) as soon as practicable, the Arbitrator will prepare a draft of the proposed determination;

(c) under sections 40(7)(a) and 46(6)(a), the Arbitrator must make the draft proposed determination available to the Parties;

(d) under sections 40(7)(b) and 46(6)(b) of the Act, the Arbitrator must then give the Parties an opportunity to make submissions to the Arbitrator in relation to the proposed determination; and

(e) as soon as practicable after receiving the submissions of the Parties as to the proposed determination, the Arbitrator will provide to the Parties a final written determination of the Dispute.

15.5 Matters dealt with in determination

If the Dispute is an Access Dispute, section 24C(2) of the IPART Act provides that the determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the Dispute. The determination does not have to require the provider to provide access to the service. Also, under section 24C(3) of the IPART Act, the determination does not have to require the provider to provide access to the service by a third party.

15.6 Notice of determination to be given to IPART

(a) Under sections 40(11) and 46(8) of the Act, the Arbitrator must give notice to IPART of the determination. This notice must include a summary of the determination.

(b) Under sections 40(12) and 46(9), IPART must then publish the information contained in the notice of the determination on its website.

It is unlikely that the notice of the determination (and the material published on IPART's website) will contain confidential information. If a Party has concerns about the confidentiality of matters which are raised during the arbitration proceedings, it should raise these issues with the Arbitrator.

16 Factors to be considered in making a determination

16.1 Access Disputes

Under section 40(5) of the Act (importing certain provisions of the IPART Act), in making a determination concerning an Access Dispute, the Arbitrator must have regard to the following matters:

(a) Clauses 6(4)(i), (j) and (l) of the *Competition Principles Agreement* between the Commonwealth and the States;

(b) Any other matters that the Arbitrator considers relevant.

Under section 40(1) of the Act, the Arbitrator must also give effect to any access undertaking to which the service concerned is subject. The Arbitrator must not include in the Arbitrator's decision, any provision that requires a service provider to do, or not to do, anything which would put it in breach of its obligations under any existing access determination or under any law.

In addition, clause 10 of the Access Regulation requires the Arbitrator to make any determination in accordance with the following:

(a) in order to make a determination within the time limits described in paragraph 6.9 of this Guide and in clause 9 of the Access Regulation, the Arbitrator may make a determination on the basis of the information which is then available to the Arbitrator, and on any assumptions which it is reasonable to make as to any information which is not then available;

(b) for the purpose of determining a Dispute between a service provider and an access seeker with respect to an infrastructure service which is the subject of a coverage declaration or access undertaking, the Arbitrator may assume, in the

absence of evidence to the contrary, that the service provider is able to provide the access seeker with such access to the service as is sought by the access seeker;

(c) before determining a Dispute the Arbitrator must give written notice to the Parties to the Dispute of:

(i) any assumptions that the Arbitrator proposes to make for the purposes of the Arbitrator's determination;

(ii) each Party's right to make submissions to the Arbitrator with respect to any of those assumptions; and

(iii) the date by which any such submissions should be lodged with the Arbitrator.

Failure to give such notice does not affect the validity of the Arbitrator's determination.

The Arbitrator's powers to make a determination on access to an infrastructure service as described above are subject to section 40(10)(b) of the Act which provide that an Arbitrator cannot make a determination if it would result in the service provider breaching any of its legal obligations, including obligations under lawful third-party contracts by which it is bound.

16.2 Sewer Mining Disputes

Under section 46(5) of the Act, in considering the terms of the proposed determination in a Sewer Mining Dispute, the Arbitrator must give effect to the service provider's policy with respect to the granting of permission to draw from the contents of its sewerage infrastructure. Subject to the preceding point, the Arbitrator must also have regard to such matters as are prescribed by the regulations. There are currently no such regulations made under this subsection.

17 What happens next?

17.1 Parties must give effect to determination

Once a final determination has been made and provided to the Parties, the Parties must abide by that determination (subject to rights of review discussed below). No Party is allowed to engage in any conduct which is designed to prevent or hinder the implementation of, or compliance with, the determination.

Under s 33 of the CAA, an award made by the Arbitrator may be enforced, by leave of the Supreme Court, in the same manner as a judgment or court order to the same effect.

17.2 Right of review

A Party has the right to appeal to the Supreme Court of New South Wales on any question of law arising out of the Arbitrator's decision. If an appeal is brought to the Supreme Court, the Court could do any of the following:

(a) confirm the award;

(b) vary the award;

(c) set aside the award;

(d) send the award back to the Arbitrator (together with the Court's opinion) for reconsideration, in which case the Arbitrator must make the award within 3 months of the date of the Court's order.

17.3 Misconduct

Under s 42 of the CAA, where there has been misconduct on the part of an Arbitrator or the arbitration has been improperly procured (for example, secured by corrupt means), the Supreme Court may, on the application of a Party, set aside the award in whole or in part.

18 Who pays for the arbitration?

18.1 The Arbitrator may request submissions as to costs

The costs of an arbitration include both the costs incurred by the Parties in arbitrating the Dispute and the costs of the Arbitrator involved in the arbitration.

The Arbitrator's costs include all the fees and expenses which the Arbitrator incurred in the course of hearing and determining a Dispute. These include (but are not limited to):

- the Arbitrator's fees;
- incidental costs like room hire, administrative support, the cost of transcripts of proceedings, costs incurred in engaging consultants and expert witnesses and witnesses' expenses;
- all other costs which the Arbitrator may incur in hearing and determining the Dispute, such as the costs of any industry or expert assistance retained by the Arbitrator, or the costs of any assistance requested by the Arbitrator from any member of, or consultant to, the IPART Secretariat; and
- all costs incurred by IPART.

The Arbitrator may request submissions as to who should pay the costs of the arbitration and of the other Parties. The Arbitrator will take into account the factors outlined in section 34 of the CAA. Furthermore, the Arbitrator may have regard to the following facts:

(a) the conduct of the Parties during the arbitration of the Dispute;

(b) the nature and timing of any offer of compromise of the Dispute which may have been made by a Party;

(c) the nature of the determination made by the Arbitrator;

(d) any other matter which the Arbitrator considers relevant to the issue of who should bear the costs of the arbitration.

18.2 The Arbitrator may make direction as to costs

The Arbitrator can make any direction as to who should pay the costs of the arbitration as the Arbitrator considers appropriate.

19 Transcripts

A transcript must be made of the final hearing. A transcript may be made of the preliminary meetings, including the pre-hearing conference, if the Arbitrator sees fit. The cost of transcripts forms part of the Arbitrator's costs and the Arbitrator can make a direction as to who should pay those costs.

20 Whom to contact

Arbitration Registry
Water Industry Competition Act
Independent Pricing and Regulatory Tribunal
Level 8
1 Market Street
Sydney NSW 2000

Appendix A: Notice of Dispute and Appointment of Arbitrator

Form 1

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

NOTICE OF ACCESS DISPUTE

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

Existence of a Dispute

A dispute exists between the Applicant and the Respondent, with respect to access to infrastructure services under the *Water Industry Competition Act 2006*.

The Applicant by this notice refers the dispute to the Independent Pricing and Regulatory Tribunal (**IPART**) for resolution by arbitration.

Details of the Dispute

The dispute concerns the following issues between the Parties:

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

2.

3.

Certificate as to good faith negotiation

The Applicant certifies that it has attempted, in good faith, to resolve the dispute by negotiation.

Acknowledgment of Publication of this Notice of Dispute.

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

DATED: 200 .

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

Form 2

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

NOTICE OF SEWER MINING DISPUTE

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

Existence of a Dispute

A dispute exists with respect to sewer mining between the Applicant and the Respondent.

The Applicant by this notice refers the dispute to the Independent Pricing and Regulatory Tribunal (**IPART**) for resolution by arbitration.

Details of the Dispute

The dispute concerns the following issues between the Parties:

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

2.

3.

Acknowledgment of Publication of this Notice of Dispute.

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

DATED: 200 .

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

Appendix B: Schedule of Issues

Form 3

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

SCHEDULE OF ISSUES FOR PRELIMINARY MEETING

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

Details of preliminary meeting

A preliminary meeting is set down to occur on [*date*] at [*time*] at [*place*].

Agenda of preliminary meeting

The following matters will be considered at the preliminary meeting:

1. [Insert list of matters to be considered at the preliminary meeting.]

DATED: 200 .

.....
Signed by the Arbitrator(s).

Appendix C: Deed of Undertaking as to Confidentiality

Form 4

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

DEED OF UNDERTAKING AS TO CONFIDENTIALITY

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

I, of undertake to [names of other Parties] and to the Independent Pricing and Regulatory Tribunal ("**IPART**") [and/or the arbitrator(s) as the case may be] that:

1. Subject to the terms of this undertaking and any order of IPART [or the arbitrator(s) as the case may be], I will keep confidential at all times all information provided by [names of other Parties].

2. I will only use the confidential information which is provided to me by [names of other Parties] for the purposes of this arbitration.

3. Subject to paragraph 4 below, I will not disclose any of the confidential information of any other Party to this arbitration to any other person without the prior written consent of the Party to whom that confidential information belongs, or without first obtaining a written direction requiring such disclosure from IPART [or the Arbitrator].

4. Except as required by any law, within a reasonable time after the finalisation of this arbitration (by withdrawal of the referral, settlement, termination or provision of final determination) I will destroy or deliver to each Party all confidential information and any documents or things (or parts thereof) recording or containing any confidential information of that Party, which information, document or thing (or part thereof) is in my possession, custody or control.

5. This undertaking imposes no obligation upon me in respect of information:

   (a) which is in the public domain;

   (b) which has been obtained by me otherwise than from a Party to this arbitration, in the course of this arbitration, provided that the information has not been obtained by me by reason of, or in any circumstances involving, any breach of a confidentiality undertaking in this arbitration or a breach of any other obligation of confidence owed to a Party (whether at law, in equity, under statute or otherwise) or by any other unlawful means.

   In addition I may disclose the confidential information which is provided to me to:

(i) IPART [or the Arbitrator(s) as the case may be];

(ii) any employer, internal or external legal adviser, or independent expert currently employed or retained by me for the purposes of the conduct of the arbitration provided that the person to whom disclosure is proposed to be made has signed an undertaking in the same form of this undertaking

(iii) any person to whom I am required to disclose the information by any law.

SIGNED, SEALED AND DELIVERED by) in)
the presence of:)
)
)
.....)
Signature of witness)
)
.....)
Name of witness (block letters))
)

.....)
Signature of)

Appendix D: Notice of Withdrawal

Form 5

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

NOTICE OF WITHDRAWAL OF REFERRAL OF DISPUTE

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

The Applicant hereby provides notice that it intends to withdraws its application for a dispute to be determined by arbitration.

DATED: 200 .

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

Form 6

INDEPENDENT PRICING AND
REGULATORY TRIBUNAL
ARBITRATION REGISTRY No. of 200

NOTICE OF CONSENT AS TO COSTS

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

The Parties have agreed that the costs of the arbitration will be dealt with on an agreed basis in the following way:

1. [insert list]

DATED: 200 .

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

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