IPART

Independent Pricing and Regulatory Tribunal
New South Wales

Regulatory Impact Statement

IPART Regulation (2017)

Contents

The Tribunal members for this review are:

Dr Peter J Boxall AO, Chair

Mr Ed Willett

Ms Deborah Cope

Inquiries regarding this document should be directed to a staff member:

Mr Ben Strate (02) 9113 7745

Invitation for submissions

The Independent Pricing and Regulatory Tribunal (**IPART**) invites written comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

Submissions are due by Friday, 9 June 2017.

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

You can also send comments by mail to:

Inquiry on IPART Regulation 2017
Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop NSW 1240

Late submissions may not be accepted at the discretion of the Tribunal. Our normal practice is to make submissions publicly available on our website <www.ipart.nsw.gov.au> as soon as possible after the closing date for submissions. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed on the previous page.

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

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

1 Introduction

The *Independent Pricing and Regulatory Tribunal Regulation 2012* (NSW) (**2012 Regulation**) is designed to modify the default arbitration rules to recognise the ways in which arbitrations under the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**) and *Water Industry Competition Act 2006* (NSW) (**WIC Act**) differ from commercial arbitrations. In brief, they differ because they:

- are infrequent
- are more likely to impact persons who are not parties to the dispute
- would normally be heard publicly
- need to be more permissive of appeals on points of law, and
- have precedent value.

We are proposing that the 2012 Regulation be re-made to apply for another five year period without modification. This document sets out the likely impact of remaking the 2012 Regulation, compared to the alternative of repealing it and relying instead on the default arbitration rules established by the *Commercial Arbitration Act 2010* (NSW) (**Commercial Arbitration Act**). It also considers the likely impacts of any alternative options to those contained in the proposed *Independent Pricing and Regulatory Tribunal Regulation 2017* (NSW) (**proposed Regulation**).

We have prepared a simple, largely qualitative benefit cost analysis that is proportionate to the small risk of imposing significant costs. The reason we have taken this approach is that the arbitration provisions of the 2012 Regulation and the regulations before it have been invoked very infrequently. In the circumstances, a comprehensive benefit cost analysis would not be proportionate. Also, such a quantitative analysis would be difficult to do based on the very limited precedents available.

We seek comment on this Regulatory Impact Statement. We will take account of stakeholder comments and submissions in deciding whether any amendments should be made to the proposed 2012 Regulation.

1.1 Overview of proposed Regulation

Title of regulation:	*Independent Pricing and Regulatory Tribunal Regulation 2017*
Parent Act:	*Independent Pricing and Regulatory Tribunal Act 1992*
Responsible Minister:	The Honourable Gladys Berejiklian, Premier

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

- identifies the objectives that the proposed Regulation seeks to achieve and the reasons for them
- identifies alternative options to achieve those objectives
- assesses the costs and benefits of the proposed Regulation and any alternative options
- assesses which of the alternative options involves the greatest net benefit or the least net cost to the community, and
- includes a statement of the consultation program to be undertaken with groups likely to be affected.

This Regulatory Impact Statement fulfils the requirements of the Subordinate Legislation Act for the making of statutory rules and is consistent with the Department of Finance, Services and Innovation's Guide to Better Regulation.

The proposed Regulation concerns the remaking of the 2012 Regulation[1] without alteration.

The proposed Regulation has the same main objective as the 2012 Regulation and the regulations before it. It modifies and clarifies certain provisions of the Commercial Arbitration Act that concern the conduct and cost of arbitrations of disputes regarding access regimes under the IPART Act and the WIC Act. In summary, the proposed Regulation concerns:

- the right to legal representation in those arbitrations (clause 5)
- the private hearing of disputes (clause 6)
- the recovery of the arbitrator's fees and expenses (clause 7), and
- appeals on questions of law arising out of arbitral awards (clause 8).

1.2 Background to regulatory framework

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

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

1 The 2012 Regulation is scheduled to be automatically repealed on 1 September 2017 under section 10(2) of the Subordinate Legislation Act.

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

1.2.1 IPART Act Arbitrations – rail access

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

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

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

1.2.2 WIC Act Arbitrations – water access

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

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

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

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

1.3 Submissions invited

IPART invites submissions on the proposed Regulation from interested parties.

3 IPART Act, section 24A.
4 This is required by the *Transport Administration Act 1988* (NSW), section 99C and Schedule 6AA, clause 2(1).
5 WIC Act, section 40(1).
6 WIC Act, section 40(5), WIC Regulation, clause 11.

2 Objective of the proposed Regulation

The principal objective of the proposed Regulation is to modify the default arbitration rules set out in the Commercial Arbitration Act for IPART Act Arbitrations and WIC Act Arbitrations.

These modifications adapt the Commercial Arbitration Act to the different circumstances that apply to IPART (or persons appointed by IPART), compared to arbitrators of commercial disputes in general. These differences include the fact that IPART Act Arbitrations and WIC Act Arbitrations:

- are infrequent
- are more likely to impact persons who are not parties to the dispute
- would normally be heard publicly
- need to be more permissive of appeals on points of law, and
- have precedent value.

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

Given these points the arbitrator may need to consider the broader public interest, and invite and consider public submissions, to determine the dispute.[7] There may also be a public interest in disclosing certain aspects of the arbitration, for example in order to establish precedents for other similar disputes. In contrast, commercial arbitrations tend to be one-off and bilateral in nature. Often they involve little or no precedent value or third-party impact.

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.

As stated above, the proposed Regulation would re-make the current 2012 Regulation without alteration.

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

3 Alternative options

An important task in undertaking a regulatory impact assessment is to identify whether there are any alternative options to achieve the objectives of the proposed Regulation. The Regulatory Impact Statement must establish a counterfactual scenario against which the regulation's costs and benefits are assessed.

In the analysis that follows, we consider the costs and benefits of the 2012 Regulation being repealed and not re-made. Under this scenario, IPART Act Arbitrations and WIC Act Arbitrations would follow the Commercial Arbitration Act as it currently stands instead of the 2012 Regulation. We also consider the costs and benefits of any alternative options to those contained in the proposed Regulation.

4 Assessment of the proposed Regulation

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

Given IPART's very limited practical experience with arbitrations under previous versions of this Regulation (due to the infrequency of IPART Act Arbitrations and WIC Act Arbitrations), it has not proved possible to quantify the actual costs and benefits associated with the proposed Regulation. Accordingly, this section sets out and compares the expected costs and benefits.

4.1 Costs and benefits are tested versus the counterfactual

We have evaluated the costs and benefits relative to the counterfactual scenario in which the 2012 Regulation would be repealed and not re-made, and also the costs and benefits of any alternative options. In the scenario where the 2012 Regulation is not re-made, arbitrations would be conducted under the rules of the Commercial Arbitration Act. We consider several features of IPART Act Arbitrations and WIC Act Arbitrations that differ depending on whether they are conducted under the 2012 Regulation or the Commercial Arbitration Act.

The arbitrations to which the proposed Regulation would apply differ from commercial arbitrations in the following respects. IPART (or persons appointed by IPART) may conduct arbitrations of disputes that arise either under:

- the NSW Rail Access Undertaking (**RAU**); or
- the WIC Act.

Generally any such dispute would be between an incumbent infrastructure owner, who is most likely to be a State-owned enterprise, and a private firm seeking access to that infrastructure. In some WIC Act situations, the purpose of seeking access would be to compete with the infrastructure owner. In the RAU setting, access seekers do not compete with the infrastructure owner because of the vertical separation of the NSW railway industry.

These features imply that, unlike most commercial arbitrations, IPART Act Arbitrations and WIC Act Arbitrations involve a significant asymmetry of bargaining power between parties. Infrastructure owners, particularly vertically integrated water utilities, hold substantial advantages over access seekers. They have better information, and are likely to have stronger balance sheets and be able to better afford to engage in and delay resolution of disputes.

In addition, the public ownership of the infrastructure, natural monopoly and essential service characteristics of water and rail transport imply that these disputes could have significant external effects on taxpayers and end-customers.

4.2 Legal representation (clause 5)

4.2.1 Objective

The objective of clause 5 of the proposed Regulation[8] is to enable the arbitrator to specify when parties may be legally represented in IPART Act Arbitrations and WIC Act Arbitrations.

4.2.2 Options

There are three options on the question of legal representation for parties to an arbitration:

(1) representation permitted (position under Commercial Arbitration Act)

(2) representation prohibited

(3) representation may be permitted at arbitrator's discretion (position under 2012 Regulation).

4.2.3 Proposed option

Clause 5 of the proposed Regulation provides that a party may be represented by an Australian legal practitioner[9] in arbitration proceedings only where the arbitrator grants leave. The arbitrator may only grant leave if they are of the opinion that:

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

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

24A Representation

(1) The parties may appear or act in person, or may be represented by another person of their choice, in any oral hearings under section 24.

(2) A person who is not an Australian legal practitioner does not commit an offence under or breach the provisions of the *Legal Profession Uniform Law (NSW)* or any other Act merely by representing a party in arbitral proceedings in this State.

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

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

8 References in this document to a clause of the proposed Regulation are based on the assumption that the clause numbering will be the same as in the 2012 Regulation.

9 The term "Australian legal practitioner" is defined under section 21(1) of the *Interpretation Act 1987*, to mean "an Australian lawyer who holds a current Australian practising certificate".

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

Clause 5 maintains the current position in the 2012 Regulation of limiting external representation to legal representation (where appropriate) and not preventing a party from appearing or acting in person. For instance, if a party is a corporation, it may be represented by its officers or employees.

4.2.4 Benefits

The principal expected benefits of clause 5 relative to the 'representation permitted' option are:

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

The principal expected benefit of clause 5 relative to the 'representation prohibited' option is that the arbitrator is able to ensure that parties are not unfairly disadvantaged through the lack of representation.

A further expected benefit of clause 5 relative to both alternative options is that it gives the arbitrator the ability to equitably manage a situation in which one party is much better resourced than the other. A blanket rule that permitted representation in all cases could disadvantage a small organisation that lacked financial capacity to engage suitable legal expertise. Conversely, a blanket prohibition on representation could disadvantage a party that lacked in-house expertise to argue its own case effectively.

4.2.5 Costs

If representation is prohibited, the following problems may result in certain circumstances:

- proceedings may be unnecessarily delayed and unnecessary costs may be imposed by a party's unfamiliarity with arbitration processes, which could have been overcome with the help of legal representation
- a party may be disadvantaged by the lack of legal advice in the preparation of its case, the assembly of evidence and the presentation of arguments, and
- the arbitrator itself may have benefitted from the availability of legal assistance through the parties.

Relative to the 'representation prohibited' option, clause 5 would lead to lower costs because it allows the arbitrator discretion to avoid these problems.

Relative to the 'representation permitted' option, costs associated with these problems are expected to be small because clause 5 provides a mechanism for the arbitrator to permit legal representation if, in the arbitrator's opinion, it would help to avoid any of those problems.

4.2.6 Relativity of benefits and costs

Given the potential benefits of clause 5, and the fact that any costs are likely to be immaterial in light of the protections provided by clause 5 (on the assumption that arbitrators are well-placed to assess whether there is a need for legal representation), we conclude that the benefits of clause 5 are likely to outweigh the costs on the question of legal representation relative to both alternative options.

4.3 Private hearing of disputes (clause 6)

4.3.1 Objective

The objective of clause 6 of the proposed Regulation is to provide for disputes to be heard in private as a default position, but to allow the arbitrator to direct otherwise.

4.3.2 Options

There are three options on the question of private hearing of disputes:

(1) disputes are always heard in private, unless parties agree otherwise (position under Commercial Arbitration Act)

(2) disputes are always heard in public

(3) disputes are heard in public at arbitrator's discretion (position under 2012 Regulation).

4.3.3 Proposed option

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

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

The confidentiality regime in the Commercial Arbitration Act reflects the private nature of commercial arbitrations, which concern the resolution of the parties' private interests. However, IPART Act Arbitrations and WIC Act Arbitrations often involve the balancing of the following private and public considerations:

- on one hand, a party's desire to keep the dispute or matters relating to it confidential, and
- on the other hand, the public interest in the arbitrator inviting and considering submissions from the public,[10] or publishing the arbitral award.

The Commercial Arbitration Act's confidentiality provisions do not take into account these public interest considerations, as they apply in most cases to private matters. In particular, the Commercial Arbitration Act's confidentiality provisions limit the arbitrator's ability to make aspects of the arbitration public, including any award ultimately made. These limitations may impair the efficient operation of the IPART Act and the WIC Act.

Clause 6 addresses these limitations by providing the arbitrator with discretion over the conduct of the arbitration. The arbitrator can decide whether public interest considerations outweigh any need to keep aspects of the dispute private, and invite submissions from the public where required.

The arbitrator's power to mandate a public hearing might have the effect of disclosing information on grounds that are not contemplated in sections 27E to 27I of the Commercial Arbitration Act. 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.

Disputes that IPART would arbitrate under the proposed Regulation may often have a public interest component that may be enhanced by third party submissions. In these cases, third party participation in public hearings under clause 6 may provide useful information to the arbitrator. Sections 27E to 27I of the Commercial Arbitration Act may make this more difficult.

4.3.4 Benefits

The principal benefit of clause 6 of the proposed Regulation is that the arbitrator can exercise discretion to hold public hearings. The arbitrator's ability to make the detail of the arbitration public under the Commercial Arbitration Act is limited by sections 27E to 27I.

Relative to the 'always private' option under the Commercial Arbitration Act, clause 6 also makes it possible for third parties, such as end-customers and taxpayers, to make submissions on any aspects of an arbitrated settlement that may affect them. This information may be useful to the arbitrator. This dimension may be particularly important where the end-customers or taxpayers ultimately bear the burden of costs that access arrangements may impose on an incumbent infrastructure owner, or where they stand to benefit from efficiency improvements that competitive entry by access seekers might bring.

A further benefit is that public hearings provide transparency of decisions and therefore can provide an indication of future likely decisions. Experience in other jurisdictions, notably

10 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.

ACCC arbitrations in the telecommunications industry, has shown the value of precedents for establishing realistic expectations and avoiding multiple disputes over similar topics.

Finally, the transparency provided by public hearings might provide the incentive to reach negotiated settlements rather than take disputes to arbitration in certain circumstances.

Relative to the 'always public' option, clause 6 permits the arbitrator to take steps to protect parties from commercially sensitive disclosures that are not in the public interest. The 'always public' option has similar benefits to clause 6 in the other respects mentioned above concerning third parties and precedents.

4.3.5 Costs

Relative to the 'always private' option, there is some risk that clause 6 may result in unwanted disclosure of confidential and commercially sensitive information. Nevertheless, the risk of inadvertent disclosure can be managed by the arbitrator. In reaching a decision about holding a public hearing, the arbitrator can seek and weigh the merits of submissions from the parties concerning the harm of disclosure and the importance of public involvement. Thus it is open to the arbitrator to find that the need for confidentiality outweighs the public interest in openness, if that is what the evidence suggests.

Furthermore, detailed protocols are also available for the management of confidential information within a public hearing.

Relative to the 'always public' option, clause 6 provides superior protections for the commercially sensitive information of parties.

4.3.6 Relativity of benefits and costs

It is important for the arbitrator to have access to and understand all relevant information in order to reach a determination that is in the public interest. The significant interests of third parties are better served through the judicious use of public hearings, at the arbitrator's discretion. Also, the precedent value of public hearings can be high, based on experience with telecommunications industry arbitrations. Therefore, there can be a substantial benefit in undertaking public hearings at the regulator's discretion, compared to the alternative options.

On balance, we conclude that the benefits of clause 6 outweigh the costs. That is the case whether the alternative is the 'always private' option or the 'always public' option.

4.4 Costs of arbitration (clause 7)

4.4.1 Objective

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

4.4.2 Options

There are three options on the clarification of which costs the arbitrator may recover:

(1) say nothing beyond section 33B of the Commercial Arbitration Act

(2) provide more specific guidance than clause 7

(3) use the clause 7 text (position under 2012 Regulation).

4.4.3 Proposed option

Clause 7 of the proposed Regulation expands on the Commercial Arbitration Act by identifying the types of fees and expenses that the arbitrator may choose to claim from the parties. While this clause does not override the Commercial Arbitration Act, its inclusion is expected to clarify, and avoid disputes about, expenses that the arbitrator may claim.

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

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

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

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

4.4.4 Benefits

The expected benefits of clause 7 relative to the option of saying nothing beyond section 33B are greater certainty and transparency in the application of section 33B of the Commercial Arbitration Act. This is expected to minimise the potential scope for argument about what is included in the costs of arbitration, resulting in consequent savings in overall costs. There is no inconsistency between this clause and section 33B of the Commercial Arbitration Act.

Clause 7 provides similar benefits to the option of providing more specific guidance because all costs that the arbitrator could reasonably want to recover are adequately dealt with in clause 7.

4.4.5 Costs

Clause 7 of the proposed Regulation does not modify the Commercial Arbitration Act. Therefore, it imposes no costs relative to the option of saying nothing beyond section 33B.

Relative to the option of providing more specific guidance, clause 7 may provide cost savings. The greater specificity would come at a cost of reducing the arbitrator's flexibility.

4.4.6 Relativity of benefits and costs

Given the expected benefits of clause 7 (greater certainty and transparency), and the lack of identifiable costs, we conclude that clause 7 of the proposed Regulation is the preferable option.

4.5 Parties' right to appeal questions of law (clause 8)

4.5.1 Objective

The objective of clause 8 of the proposed Regulation is to modify how the Commercial Arbitration Act allows parties to appeal to the Court on questions of law arising from awards made in IPART Act Arbitrations and WIC Act Arbitrations.

4.5.2 Options

There are three options on appeal rights:

(1) no change to the Commercial Arbitration Act

(2) no appeals permitted

(3) either party may seek leave to appeal on questions of law (position under 2012 Regulation).

4.5.3 Proposed option

Clause 8 of the proposed Regulation modifies sections 34A(1) and (2) of the Commercial Arbitration Act. Section 34A(1) of the Commercial Arbitration Act provides that parties can appeal to the Court on a question of law if two conditions are met:

- all parties to the arbitration must agree to the appeal, and

- the Court grants leave to appeal (if certain criteria are met).[11]

The proposed Regulation changes this position to permit appeals, with leave of the Supreme Court, from any party, irrespective of agreement from the other parties.

Removing the requirement for all parties to agree to the appeal in IPART Act Arbitrations and WIC Act Arbitrations is appropriate given the nature of those arbitrations, which is different from arbitrations between ordinary commercial players.

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

However, the IPART Act and the 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 may be unlikely that the parties would agree to appeal on a question of law once their dispute has been referred to arbitration.

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

4.5.4 Benefits

Clause 8 of the proposed Regulation makes it possible for a party to seek leave to appeal the arbitrator's decision on a point of law **unilaterally**. Under the Commercial Arbitration Act, leave may only be sought by agreement of the parties. The proposed Regulation makes it easier for parties to IPART Act Arbitrations and WIC Act Arbitrations to appeal arbitration decisions than under the provisions of the Commercial Arbitration Act.

An arbitrator's error on a point of law would only be worth appealing if it affected the outcome, in which case one party would be better off and the other worse off as a result of a successful appeal. In those circumstances, it is unlikely that the parties would agree to seek leave to appeal. For this reason section 34A of the Commercial Arbitration Act provides little or no protection against errors of law if there is no prior agreement. The benefit of clause 8 of the proposed Regulation, in contrast, is that it provides some protection for aggrieved parties against such errors.

Clause 8 provides a similar benefit relative to the 'no appeals' option. By agreement, parties to a commercial arbitration choose the arbitrator. For IPART Act Arbitrations and WIC Act

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

Arbitrations, the parties do not have that freedom to choose. IPART (or one or more persons appointed by IPART from a panel approved by the Minister) is the arbitrator in those cases. Potentially, the protection offered by clause 8 would be more important to parties in circumstances where they were unable to choose their arbitrator.

The existence of this appeal mechanism when parties do not have the freedom to choose their arbitrator may have some beneficial effect on the quality of decisions, with a corresponding welfare benefit. This effect would be difficult to measure.

4.5.5 Costs

By making it easier to appeal arbitration decisions than under the Commercial Arbitration Act, clause 8 potentially increases litigation costs to all parties and costs to the Supreme Court. However, this increase in the expected cost of litigation is difficult to measure.

This cost of the 'no appeals' option would be similar to the 'no change to the Commercial Arbitration Act' option, since section 34A of the Commercial Arbitration Act makes appeals extremely unlikely by requiring consensus between the parties.

4.5.6 Relativity of benefits and costs

The net benefits from clause 8 reflect the net benefit of a Supreme Court appeal mechanism. The longstanding existence of this court appeal mechanism in NSW and all other Australian jurisdictions suggests that the benefits exceed the costs.

This conclusion applies equally for the 'no change to the Commercial Arbitration Act' option and the 'no appeals' option.

4.6 Conclusions of the cost-benefit analysis

Summarising our conclusions, we find that benefits exceed costs for clause 5, which enables the arbitrator to specify when parties may be legally represented in arbitrations.

We also find that benefits exceed costs for clause 6, which provides for disputes to be heard in private as a default position, but to allow the arbitrator to direct otherwise.

Those conclusions take account of the particular features of IPART Act Arbitrations and WIC Act Arbitrations, such as asymmetric power between parties and the public interest dimension. It is also relevant that risks of misjudgement and inadvertent disclosure can be managed by the arbitrator.

For clause 7, which clarifies the arbitrator's recoverable costs of arbitration, we find that the expected benefits (greater certainty and transparency) outweigh the costs.

Finally, we consider that the benefits exceed the costs for clause 8, which modifies how the Commercial Arbitration Act allows parties to appeal to the Court on questions of law arising from awards made in arbitrations. We make this inference by observing the continued existence of Supreme Court appeal mechanisms more generally. We presume that these

appeal mechanisms would not be maintained if they did not create a net public benefit, even though that is difficult to measure.

5 Consultation program

The Subordinate Legislation Act requires at least 21 days for public consultation on this Regulatory Impact Statement and the proposed Regulation.[12] In order to give stakeholders adequate opportunity to comment, and in accordance with Premier's Memorandum M2009-20 and the Guide to Better Regulation, we have allowed for a 28 day period.[13]

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

During this period of public consultation, IPART will also consult with the following parties by forwarding copies of the draft proposed Regulation and the Regulatory Impact Statement to them and inviting comments and submissions from them:

- all owners of relevant public infrastructure in NSW
- the central agencies in the NSW Government
- potential third party users of relevant infrastructure
- the Australian Institute for Commercial Arbitration, and
- the NSW Law Society as the representative body of the legal profession.

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

[12] Section 5(2)(a)(iv) of the Subordinate Legislation Act.
[13] Section 5(3) of the Subordinate Legislation Act.