THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: jd:cl: 621967
Direct Line: 02 9926 0214

4 June 2012

Mr James Cox PSM
Chief Executive Officer
Inquiry on IPART Regulation 2012
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

Dear Mr Cox,

Proposed Regulation under the Independent Pricing and Regulatory Tribunal Act

Thank you for your letter of 2 May 2012 inviting the Law Society of New South Wales to comment on the proposed *Independent Pricing and Regulatory Tribunal Regulation 2012* (proposed Regulation).

The Law Society's Arbitration Liaison Committee (Committee) has considered the Regulatory Impact Statement and provides the following comments for your consideration.

General Comments

The Committee suggests that due to the specialised nature of arbitrations under the *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act Arbitrations) and the *Water Industry Competition Act 2006* (WIC Act Arbitrations), it is important to appoint well qualified arbitrators.

The Committee also notes that in light of the fact that the Independent Pricing and Regulatory Tribunal (IPART) may have its own policy or position in relation to a dispute, and may also make submissions in relation to the dispute, ideally, any arbitrator appointed should not be an individual associated with IPART.

Legal representation (clause 5)

The Committee acknowledges that as a consequence of public interest considerations, IPART Act Arbitrations are different to other arbitrations. This can result in a more complex arbitration process, which requires a different approach to how the arbitrations are conducted.

Whilst the arbitrators are responsible for the ultimate decision, the Committee takes the view that the additional public interest element necessitates fairly broad legal representation, as much to assist the arbitrator as the parties.

For this reason, the Committee suggests that the proposed Regulation should have a provision permitting the arbitrator to grant leave for legal representation where he/she is of the view that this will assist him/her in conducting the arbitration. While this may not lead to shorter proceedings or reduced costs, it may nevertheless result in a better outcome.

In regard to the suggestion that "it may be less useful to involve lawyers where there are only commercial or non-legal technical matters at issue"[1], the Committee is of the view that commercial considerations can be substantial, and it is anticipated that where both parties have a commercial interest at stake they would be willing and eager to employ legal representation. It is also anticipated that this would assist the arbitrator.

For the reasons set out above the Committee believes that there are likely to be some circumstances where, although legal representation does not reduce either the cost or length of a hearing, it will benefit the arbitrator, the parties, and the public, through a more thorough examination of the public interest issues. A collateral benefit would be a benefit to IPART, specifically through good decision-making and certainty.

Private hearing of disputes (clause 6)

The Committee agrees with the suggested approach to confidential information under clause 6 of the proposed Regulation, especially given the requirement on the arbitrator to give public notice of disputes under section 24B(2) of the *Independent Pricing and Regulatory Tribunal Act 1992*.

The Committee also agrees that where public interest matters have been canvassed and submissions received, an arbitrator may regard it as being in the public interest to publish the arbitral award.

Costs of arbitration (clause 7)

The Committee agrees that the costs of having independent consultants, including IPART, advise on public interest considerations, should form part of the costs of the arbitration.

The Committee is of the view that this approach allows for greater transparency and also introduces greater certainty as to what costs will be included in the arbitration.

Alternative options

The Committee is of the view that the proposed Regulation is the appropriate process for implementing the changes necessary to conduct IPART Act Arbitrations and WIC Act Arbitrations effectively.

Parties' right to appeal questions of law

One of the major objectives of arbitration is the resolution of disputes in a manner that is just, quick and cost-effective. The Committee is of the understanding that there is sometimes a resistance to using arbitration within the legal profession as a

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[1] Independent Pricing and Regulatory Tribunal, *Regulatory Impact Statement – Independent Pricing and Regulatory Tribunal Regulation 2012*, May 2012, p6.

result of the ease with which appeals can be launched. Such appeals tend to reverse all of the supposed advantages and benefits of the arbitral process.

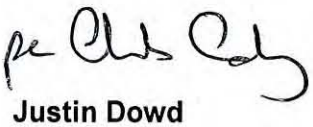
However, it is also acknowledged that if there has been an error of law there ought to be a right of appeal.

Accordingly, the Committee is of the view that the position under section 34A of the *Commercial Arbitration Act 2010*, which allows an appeal to the court on a question of law where certain conditions have been met, is preferable.

This provision should be borne in mind by any arbitrator who is considering allowing legal representation where such representation might bring all legal issues to the surface during the arbitration and may result in better decision-making. As legal error can never be eradicated, the appointment of appropriately skilled arbitrators would also assist.

The Committee thanks you again for the invitation to comment on the proposed Regulation under the *Independent Pricing and Regulatory Tribunal Act 1992*. Any queries in relation to this letter should be directed to the Executive Officer for the Arbitration Liaison Committee, Ms Carina Lofaro on (02) 9926 0214 or via email carina.lofaro@lawsociety.com.au.

Yours sincerely,



Justin Dowd
President