Disputes Over Access and Charges For The Use Of Publicly Owned Facilities

- **The Honourable Jerrold Cripps QC, Special Counsel Allen Allen & Hemsley, formerly Chief Judge of the NSW Land and Environment Court, Member NSW Court of Appeal.**

In 1994 the Council of Australian Governments ("CoAG") decided to implement Professor Hillman's recommendations, one of which referred to the entitlement of third parties to obtain access to major infrastructures such as electricity and gas distribution networks and rail tracks and other infrastructures of national significance, the duplication of which cannot be economically justified. On 11 April 1995 all Australian Governments signed the Competition Principles Agreement ("CPA"). In 1995 the *Independent Pricing and Regulatory Tribunal Act* 1992 ("IPART") was amended to authorise the Tribunal to arbitrate access disputes.

Under the CPA third party applicants and facility owners are encouraged to negotiate their own agreements. It is understood that the terms and conditions need not be the same for all users. If negotiations fail binding arbitration is the alternative.

The provisions of Part IVA of the *IPART Act* echo the provisions of Part IIIA of the Trade Practices legislation with one important difference, viz that arbitrations under Part IVA are to be undertaken in accordance with the *Commercial Arbitration Act* 1984 whereas disputes under Part IIIA of the *Trade Practices Act* 1974 are to be determined by the Australian Consumer Commission ("ACC"). To date, to my knowledge at least, there has been no criticism of the manner in which the Tribunal has discharged its function.

Before turning to the selected method of dispute resolution by the New South Wales Parliament it should be understood that the *IPART Act* is not the only legislation dealing with third party access. The New South Wales *Electricity Supply Act* 1996 provides a legislative framework for access. Chapter 8 of the Code under that *Act* requires access to be referred to the Tribunal. The *Gas Supply Act* 1996 adopts the New South Wales Third Party Access Code for Gas Distribution Networks. Also that *Act* contains provisions which limit the application of the *IPART Act.* For example, sub-section 24B(3) (to be referred to later) in Part IVA of *IPART Act* has been replaced by a similar provision in the Access Code. Finally the *Transport Administration Amendment Act (Rail Corporatisation and Restructuring) Act* 1996 makes provision for rail access disputes to be referred to the Tribunal. A rail access dispute was referred to the Tribunal on 23 August 1996 for arbitration. It was resolved by consent on 1 March 1997.

There is some overlapping between the States and the Federal Government concerning which body is responsible for dealing with access regime disputes. It appears to be accepted that access to the Moomba to Wilton transmission pipeline would be regulated by the Federal legislation and access to the distribution lines by the State. I do not know the status of, for example, the lines connecting Newcastle, Wollongong and Sydney to the Wilton City Gate.

I merely mention these matters to give some background to the topic under discussion. I do not have any real understanding of the implications of the various Acts of Parliament or the arrangement between the Commonwealth and the States. It is not without interest to note that Section 30A of the *IPART Act* introduced at the same time as Part IVA provides that the *Act* is to be reviewed as soon as possible after five years of operation and, in particular, the review is to address the question of overlap between the *IPART Act* and any corresponding Commonwealth legislation dealing with access regimes.

As part of the background I should also mention that the Tribunal has a price fixing function which includes a function to fix the methodology for fixing prices for Government monopoly services and in this regard the Tribunal is to have regard to the matters of relevance referred to in Part III of the *Act.* These include such matters as the cost of providing services, the protection of consumers, the appropriate rates of return on public sector assets, the need to promote competition, the social impact of determinations and recommendations and the need to maintain ecologically sustainable development. Again I merely mention these matters to provide some background

to the role of the Tribunal when determining disputes with respect to access. Part IVA of the *IPART Act* identifies what amounts to an access dispute and how that dispute is to be resolved. The dispute must relate to a "*public infrastructure access regime*" which in turn is defined to mean "*an access regime that relates to services provided by means of infrastructure facilities owned, controlled or operated by a Government agency*". (As I have said, the Tribunal has jurisdiction to deal with access to AGL's network by reason of the *Gas Supply Act* 1996).

The *Commercial Arbitration Act* 1984 applies to the arbitration but it is subject to Part IVA of the *IPART Act* and any regulations that may be made. (Section 24A(2)).

A dispute is taken to exist if an applicant wants access to a service, or wants to change some aspect of its existing access and is unable to agree with the provider of the service on one or more aspects of the access (Section 24A(3)). The parties are the third party and provider of the service. The provider of the service is the Government agency that owns, controls or operates the infrastructure by means of which the service is provided (Section 24A(4)).

The Tribunal may act as an arbitrator for determining a dispute or it may appoint one or more persons from a panel approved by the Minister. Independent arbitrators may be appointed where the Tribunal has been actively involved in the access regulation for any other good reason.

Public notice must be given of the dispute and submissions must be invited within a stated time and the arbitrator must have regard to those submissions.

Section 24B(3) provides that the arbitrator must take into account the following matters:

(i) the matters set out in clause 6(4)(i), (j) and (l) of the CPA;

(ii) any guidelines referred to in section 12A(2) of the access regime to which the dispute relates; (Section 12A(2) provides, if the Minister so directs, for the Tribunal in its investigations with respect to pricing and the like to include in its report general guidelines for those access regimes);

(iii) any submissions made on the dispute by the public; and

(iv) any other matters the arbitrator considers relevant - (a very wide head of consideration and one not ordinarily given to a judge or a commercial arbitrator).

Section 24C provides that the determination of the dispute must be in writing and it 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. For example, the determination may do one or more of the following:

(a) require the provider to provide access to the service by the third party;

(b) require the third party to accept, and pay full, access to the service;

(c) specify the terms and conditions of the third party's access to the service;

(d) require the provider to extend the infrastructure facility;

(e) specify the extent to which the determination overrides an early determination relating to access to the service by the third party.

Clause 6(4)(i) of the CPA sets out eight separate heads of consideration. These include the owner's legitimate business interest and investment in the facility, the cost to the owners providing the access, the interest of all persons holding contracts for use of the facility, firm and binding contracts which the owner has with the other person already using the facility, the operational and technical requirements necessary for safe and reliable operations, the economic efficiency of the operation and the benefit to the public on a competitive market.

Clause 6(4)(j) provides that the owner may be required to extend or permit the extension of a facility that is used to provide a service but subject to the extension being technically and economically feasible and consistent with safe operations, the owners of legitimate business interest in the facility being protected and the terms of access for third party taking into account costs borne by the party for the extension and the economic benefits to the parties resulting from the extensions.

Finally clause 6(4)(l) provides that the arbitrator should only impede the existing right of a person to use a facility where there has been a consideration of whether there is a case for compensation for that person and, if appropriate, to determine that amount of compensation.

The *Commercial Arbitration Act* 1984 is, generally speaking, directed to the resolution of commercial disputes. Ordinarily the arbitrator is retained by the parties to resolve the dispute and although he must abide by the laws of the land there is no overriding requirements to consider the public interests or the effect the dispute might have on another person (unless that requirement is expressed in the arbitration agreement itself). The disputes contemplated by Part IVA will require the arbitrators to have regard to public interest issues and entitlements of persons who are not parties but who may be affected by the determination.

On 13 September 1996 the Independent Pricing and Regulatory Tribunal Regulation was published in the Government Gazette. The stated purpose of the Regulation was to modify the *Commercial Arbitration Act* with respect to Part IVA arbitrations. In particular, it deals with legal representation, the hearing of disputes in private and the recovery of fees and expenses of the Tribunal.

Under the *Commercial Arbitration Act* 1984, arbitrators have very little discretion to refuse to allow legal representation. The Regulation provides that legal representation is permitted only by leave and the arbitrator may grant leave only if the arbitrator is of the opinion that the representation of the party by a legal practitioner is likely to shorten the hearing of the dispute or reduce the cost of the dispute or that the party would be unfairly disadvantaged if that party were not represented by a legal

practitioner. The Regulation states, in terms, that the clause is to have the effect of replacing section 20(1) of the *Commercial Arbitration Act* 1984. This leaves the remainder of Section 20 of application in theory at least but it will have, I think, little relevance to access regime arbitrations.

How the arbitrators will exercise their discretion with respect to legal representation is a matter of conjecture. There has been only one arbitration. It was conducted by the Tribunal and, to my understanding, legal representation was permitted. But the matter was settled and because the arbitration was in private I do not know what contributions lawyers made to the process. An arbitrator is, of course, obliged to observe the rules of procedural fairness. In a given case refusal of an arbitrator to allow at least some form of legal representation may amount to a denial of natural justice. The issues in an access arbitration will be legally and factually complex. The amount of money involved will almost certainly be enormous. It would not be stretching things, I think, to opine that a court may accept that a person has been denied procedural fairness if that person is not allowed to have the assistance of a lawyer to present a case before the Tribunal. Moreover there may be good practical reasons for the Tribunal to encourage lawyers to participate in the process. The Tribunal will receive a great of deal of confidential information from persons concerned in the arbitration and from persons who have been subpoenaed to produce documents to it. In courts of law the problem is often accommodated by making the material available to one or more of the lawyers and/or, perhaps, some expert with appropriate undertakings being given to the court for the retention of confidentiality - the sanction being contempt of court proceedings if confidentiality is violated. Although arbitrators may not have the power of courts of law with respect to contempt, any lawyer who gave an undertaking to an arbitration to preserve confidentiality and then breached it would probably be removed from practice. If an expert witness did it, it would probably be his or her last arbitration.

The Regulation provides that an arbitrator has the power pursuant to Section 34(1) of the *Commercial Arbitration Act* 1984 to include as part of his fees and expenses the costs incurred by the arbitrator and the Tribunal including administrative costs, costs incurred in engaging consultants and expert witnesses and witnesses expenses. The power of the arbitrator to retain independent consultants derives, I would think, from Section 14 and Section 19(3). In its first arbitration the Tribunal took its own expert advice.

The Regulation also provides that disputes will be heard in private unless the arbitrator otherwise directs.

The Tribunal has published a Practice Note for arbitrations. It provides that, as far as possible it will "*ring fence*" the Registry from the Secretariat. The Tribunal will be publishing guidelines and it may, as arbitrator, wish to have the assistance of members of the Secretariat. If so, a question may then arise as to whether an independent arbitrator should be appointed. The Practice Note states that an application for the matter to be heard by an independent arbitrator would be considered by the Tribunal if a reasonable objection is raised.

The Practice Note also makes provision for the exchange of written statements which it is said should be sworn or affirmed by the witness. I am not persuaded that in areas of expert testimony the swearing of witnesses adds much to the reliability of the testimony. The Practice Note states that the Tribunal will try and limit each party to two expert witnesses and only one expert witness will be permitted in any one area of expertise. I am hesitant to criticise this ambition because I am not entirely clear how the proceedings will be conducted. However, it must be borne in mind that it is also the stated intention of the Tribunal (in the Practice Note) to allow any person who proposes to give an opinion on any matter to be treated as an "*expert witness*". The Tribunal is, understandably enough, anxious to minimise costs and to expedite a resolution of the dispute. Nobody could doubt the need to limit the number of expert witnesses as far as possible. But whether this will make the resolution of the dispute easier or fairer may be open to some conjecture. One of the many problems associated with the adversarial system (which is the plinth upon which the *Commercial Arbitration Act* 1984 stands) is that the arbitrator never knows how many expert witnesses have been consulted. Unless the witnesses are called he has no idea what their opinions are.

The Practice Note provides that ordinarily witnesses will not be allowed to give oral evidence to supplement written statements. But they may be examined by other parties to the dispute subject to any direction of the arbitrator as to the conduct, subject matter or direction of that examination. This, clearly enough, is a reference to cross examination. This will in the future I think pose significant problems for the arbitrators. Lawyers will insist on extensive cross examination as an almost Pavlovian response to seeing an expert witness giving evidence. Bearing in mind the sort of evidence that will be presented to the arbitrators, particularly expert evidence, the best course may be not to allow cross examination but for the Tribunal to rely on its own expert consultants to sort out the sort of problems that may be said to be capable of resolution by cross examination. Criticisms made by the independent expert and the parties expert response would be a speedier, and, I think, more reliable way to assess the quality of opinion. But it is, I think, too early to make any pronouncements about the matter.

Notice of the dispute must be given to persons other than those who are involved and, as I have said the arbitrator is required to take into account the interest of the person who is not a party to the dispute in appropriate circumstances. The Practice Note refers to "*Potentially Impeded Third Parties*". These are defined as being persons so affected by the determination for the case for compensation arises or might arise. The Practice Note says that in these circumstances the Potentially Impeded Third Party can become a party. But whether this will give those "*parties*" a right of appeal is another matter

entirely. Under Part IIIA of the *Trade Practices* legislation such persons are made parties by the *Act* itself (42ZE). I do not think they will be "*parties*" within the meaning of the *Commercial Arbitration Act* 1984. If a right of appeal is confined to "*parties*" under that legislation I doubt whether a court would extend that status to Potentially Impeded Third Parties merely because the Practice Note suggests they should be so regarded.

The *IPART Act* provides that the arbitrator may make a determination terminating the arbitration at any time if he thinks that the dispute is vexatious, the subject matter trivial, access to the service should be continued by existing contract or "*the party who notified the dispute has not engaged in negotiations in good faith*". It also provides that if the dispute concerns a variation of an earlier determination the arbitrator may determine the arbitration if he thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form. (Section 24E). These two provisions may be difficult to apply.

So far as the last one is concerned it is not easy to see how such a decision could be made until after the arbitrator has in fact determined whether the access regime previously determined remains satisfactory. The arbitrator cannot arbitrarily terminate an arbitration. He must, as the section mandates, have sufficient reason to do so.

I have some difficulty in understanding precisely what it meant by "*negotiating in good faith*" or how an arbitrator is to determine the "*lack of good faith*". Obviously fraud is unacceptable and if parties do not abide by the directions given by the arbitrator, e.g. discovery orders (if they are authorised), a sanction may be to deny the party seeking relief, the remedy it seeks. But in commercial negotiations parties, ordinarily, are entitled to advance their own interests. We will have to await judicial elucidation. For example, would it be regarded as "*lack of good faith*" for one party to fail to disclose to the arbitrator a fact or circumstance which disadvantages his case or advantages that of the opponent?

There has only been one access dispute referred to arbitration. It was resolved by agreement eight months after the reference. The parties reached an agreement. The Tribunal issued a statement concerning the arbitration and it referred to the fact that the dispute was, in essence, about the charges to be paid by the National Rail Corporation for access to the New South Wales rail network. It was said that the dispute raised complex legal, economic, accounting and engineering issues. It was recorded that the arbitrators had obtained an independent submission from a selected expert. There is a brief discussion in the published account of the arbitration concerning the role of the arbitrators and meaning and application of such expressions as "*floor*" and "*ceiling*" tests which may mean a great deal to those of you here but mean little to me. The statement recorded that they were assured that certain matters had been taken into account in the settlement, for example, the RAC's obligation under the *Transport Act,* the arbitrator's obligations to take account of matters referred to in the Competition Principles Agreement etc, etc. The arbitrators made a formal order to determine the dispute on the basis of the consent award being sought by the parties.

I do not know why before making the consent award the arbitrators were required to be persuaded (if that is in fact what happened) that the parties took into account the Competition Principles, their level of community service obligations, the ability of RAC to pay, etc. The implication is that the arbitrators had a discretion to make the award or not make the award depending upon whether they were satisfied that certain pre-conditions had been met. Does this mean that once a dispute has been submitted to arbitration resolution must always be approved by the arbitrator? I doubt this is what was intended. As I have earlier said, the arbitration was conducted in private and my knowledge of it is solely from a statement published by the Tribunal with the agreement of the parties. I do not know why it was necessary (if it was) for a consent award to be made or why an award was considered (if it was) to be more easily enforced than an agreement. But if after an arbitration has commenced, it is necessary to have the imprimatur of approval of the arbitrator before an enforceable agreement can be reached then difficult practical questions may arise with respect to the implementation of the process.

Finally, I would mention that the Tribunal itself has the function of determining prices generally. It may fix a maximum price or it may determine a methodology for the fixing of maximum prices for monopoly services. I have referred briefly to this function earlier. If a dispute arises concerning the application of a methodology established by the Tribunal the dissatisfied customer may complain to the Government agency in the first instance and if it remains dissatisfied may request the matter to be reviewed by way of arbitration by an arbitrator to be appointed by agreement between the customer and the agency. The proceedings are to be conducted in accordance with the *Commercial Arbitration Act* 1984. It is to be noted the Regulation to which I have earlier referred does not apply to Part V of the *IPART Act* which means that the provisions with respect to the presence of legal practitioner and the provision with respect to costs remain unchanged.

- **This article has been developed from a presentation by the author to the NSW Chapter of The Institute of Arbitrators Australia.**