



New South Wales

Government Pricing Tribunal Amendment Act 1995 No 97

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New South Wales

Government Pricing Tribunal Amendment Act 1995 No 97

Act No 97, 1995

An Act to amend the *Government Pricing Tribunal Act 1992* to expand the functions of the Tribunal under that Act, to change the name of the Tribunal, to make further provision with respect to the membership of the Tribunal and to make a consequential amendment to the *Statutory and Other Offices Remuneration Act 1975*; and for other purposes. [Assented to 21 December 1995]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Government Pricing Tribunal Amendment Act 1995*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Government Pricing Tribunal Act 1992 No 39

The *Government Pricing Tribunal Act 1992* is amended as set out in Schedule 1.

4 Consequential amendment of Statutory and Other Offices Remuneration Act 1975 (1976 No 4)

The *Statutory and Other Offices Remuneration Act 1975* is amended as set out in Schedule 2.

Schedule 1 Amendment of Government Pricing Tribunal Act 1902

(Section 3)

[1] Long title

Omit the long title. Insert instead:

An Act to establish the Independent Pricing and Regulatory Tribunal of New South Wales; to confer functions on the Tribunal in relation to pricing, industry and competition; and for other purposes.

[2] Section 1

Omit the section. Insert instead:

1 Name of Act

This Act is the *Independent Pricing and Regulatory Tribunal Act 1992*.

[3] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

access regime means a scheme (whether of a legislative, administrative or other kind) set up for the purpose of implementing the Competition Principles Agreement in respect of third-party access to services provided by means of infrastructure facilities owned, controlled or operated by a public or private sector body, where *service*:

- (a) includes the use of an infrastructure facility (such as a road or railway), the handling or transporting of things (such as goods or people) or a communications service or similar service, but

- (b) does not include the supply of goods, the use of intellectual property or the use of a production process, except to the extent that that supply or use is an integral but subsidiary part of the service.

Competition Principles Agreement means the Competition Principles Agreement made on 11 April 1995 by the Commonwealth, the Territories and the States, as in force for the time being.

public infrastructure access regime means an access regime that relates to services provided by means of infrastructure facilities owned, controlled or operated by a government agency.

[4] Section 3 (1)

Omit the definition of *Tribunal*. Insert instead:

Tribunal means the Independent Pricing and Regulatory Tribunal of New South Wales established by this Act.

[5] Part 2, heading

Omit the heading. Insert instead “**Part 2 Tribunal**”.

[6] Section 5 Establishment of Tribunal

Omit “Government Pricing Tribunal”.

Insert instead “Independent Pricing and Regulatory Tribunal”.

[7] Section 6

Omit the section. Insert instead:

6 Members and procedure of the Tribunal

- (1) The Tribunal consists of 3 members appointed by the Minister as the permanent members of the Tribunal, and any number of additional members appointed by the Minister as temporary members.

- (2) Of the permanent members of the Tribunal, one is to be appointed as Chairperson.
- (3) A member of the Tribunal may be appointed as a full-time or part-time member.
- (4) The Minister is to ensure that the persons appointed as permanent members of the Tribunal have together a knowledge and understanding of economics, the interests of consumers and the interests of suppliers of services (including the interests of the Government as a supplier of services), whether the services supplied are monopoly services or not.
- (5) Schedule 2 has effect with respect to the members of the Tribunal.
- (6) Schedule 3 has effect with respect to the procedure of the Tribunal.

[8] Section 9

Omit the section. Insert instead:

9 Arrangements with other entities

- (1) The Tribunal may enter into arrangements with any government agency, or other body or person (whether in the public or private sector):
 - (a) for the provision of assistance to the Tribunal in connection with investigations or the exercise of other functions of the Tribunal, or
 - (b) for the provision of assistance by the Tribunal to the agency or other body or person by means of the provision of services that are within the Tribunal's field of expertise and relevant to its functions.
- (2) The Tribunal is not to enter into an arrangement for the provision of services by the Tribunal unless the Minister has approved of the arrangement.

- (3) In entering into an arrangement for the provision of services by the Tribunal, the Tribunal has a duty to ensure that giving effect to the arrangement will not interfere with the ability of the Tribunal to exercise its functions.
- (4) The Tribunal may engage consultants to assist it in the exercise of its functions.
- (5) The Tribunal is entitled to charge for the services that it provides under this section, whether or not regulations have been made under section 29 for or with respect to fees for those services.

[9] Part 3, heading

Omit the heading.

Insert instead “**Part 3 Investigations, reports and price determinations**”.

[10] Sections 12A–12D

Insert after section 12:

12A Investigations and reports on industry

- (1) The Tribunal is to conduct investigations and make reports on any matter with respect to pricing, industry or competition that is referred to the Tribunal by the Minister.
- (2) If the Minister so directs, a report by the Tribunal on an investigation under this section that relates to one or more access regimes is to include general guidelines for those access regimes.
- (3) The Tribunal may request the Minister to refer a matter to the Tribunal under this section and is to cause a copy of any such request to be published in the Gazette within 28 days after the request is made.

- (4) If the Minister has referred a matter to the Tribunal for investigation and report, the Minister may withdraw or amend the reference at any time before the Minister has received the report from the Tribunal. The Minister must give written reasons for the withdrawal or amendment to the Tribunal, and the Tribunal is to cause a copy of those reasons to be published in the Gazette within 28 days after they are given to the Tribunal.
- (5) In this section:
- industry* means industry of any kind (including any business or activity relating to goods or services), and a reference to industry is a reference to industry in general, a particular industry, a part of an industry, or a group or groups of particular industries.

12 Notice of proposed access agreements

- (1) A government agency that, under a public infrastructure access regime, proposes to enter into an agreement for the granting of access to services provided by means of infrastructure facilities owned, controlled or operated by it must notify the Tribunal of the proposal at least 30 days before entering into the agreement.
- (2) The agency must also provide the Tribunal with a copy of the proposed agreement if the Tribunal requests it, and with such details of the proposal as the Tribunal may request.
- (3) The Tribunal may give advice on the proposal to the agency and to the Minister.
- (4) A failure to comply with this section in relation to a proposed agreement, or a failure by the Tribunal to give advice on the proposal, does not affect the validity of the agreement.

12C Registration of access agreements

- (1) A government agency that, under a public infrastructure access regime, enters into an agreement for the granting of access to services provided by means of infrastructure facilities owned, controlled or operated by it must notify the Tribunal of that fact.
- (2) The agency must also provide the Tribunal with a copy of the agreement if the Tribunal requests it, and with such details of the agreement as the Tribunal may request.
- (3) The Tribunal must register the agreement and record the registration in the register maintained under section 12E, including in that record the names of the parties to the agreement, the service to which it relates, the date when it was made and such other details as the regulations prescribe.
- (4) To remove any doubt, it is declared that an agreement registered under this section is a document within the meaning of section 22A and therefore may be made available to the public, subject to that section.
- (5) A failure to comply with this section in relation to an agreement, or a failure by the Tribunal to register it, does not affect the validity of the agreement.
- (6) Nothing in this section or section 12B prevents the Minister, at the request of a party to a proposed agreement under an access regime, from submitting to the Tribunal a draft of the agreement before the party enters into it, or prevents the Tribunal from giving advice to the Minister in relation to it.

12D Failure to notify proposal or provide copy of agreement

- (1) If an agency fails to notify the Tribunal under section 12B of a proposal for an agreement or fails to notify the Tribunal under section 12C of entering into the agreement, the Tribunal may request the agency to provide the Tribunal with written reasons for that failure.

- (2) The Tribunal must report to the Minister on the failure, and include in the report any reasons provided by the agency.

12E Register of agreements

The Tribunal must maintain a register of agreements and must make the register available for inspection by any person during the office hours of the Tribunal or such other hours as the regulations may prescribe.

[11] Section 13 Investigations and reports by Tribunal—general

Insert “(if any) and, at the discretion of the Tribunal, to any person or body that may supply or use the relevant service” after “the government agency concerned” in section 13 (2).

[12] Section 13 (6) and (7)

Omit the subsections. Insert instead:

- (6) An investigation and report with respect to a government monopoly service or other service may be limited to a particular part or category of that service or to a particular period during which that service is supplied or in any other manner.
- (7) An investigation and report may relate to a number of goods or services supplied by the same or different suppliers.

[13] Section 14A Determination of methodology for fixing prices

Omit section 14A (2) (g). Insert instead:

- (g) the need to maintain ecologically sustainable development (within the meaning of section 6 of the *Protection of the Environment Administration Act 1991*) by appropriate pricing policies that take account of all the feasible options available to protect the environment,

[14] Section 14A (2) (h) and (i)

Insert after section 14A (2) (g):

- (h) the need to promote competition in the supply of the service concerned,
- (i) considerations of demand management (including levels of demand) and least cost planning.

[15] Section 14A (3)

Insert after section 14A (2):

- (3) In any report of such a determination, the Tribunal must indicate what regard it has had to the matters set out in subsection (2) in reaching that determination.

[16] Section 15 Matters to be considered by Tribunal under this Act

Omit “the protection of the environment (within the meaning” from section 15 (f).

Insert instead “the need to maintain ecologically sustainable development (within the meaning of section 6”.

[17] Section 15 (i)–(l)

Insert after section 15 (h):

- (i) the need to promote competition in the supply of the services concerned,
- (i) considerations of demand management (including levels of demand) and least cost planning,
- (k) the social impact of the determinations and recommendations,
- (l) standards of quality, reliability and safety of the services concerned (whether those standards are specified by legislation, agreement or otherwise).

[18] Section 15 (2) and (3)

Insert at the end of section 15:

- (2) In any report of a determination or recommendation made by the Tribunal under this Act, the Tribunal must indicate what regard it has had to the matters set out in subsection (1) in reaching that determination or recommendation.
- (3) To remove any doubt, it is declared that this section does not apply to the Tribunal in the exercise of any of its functions under section 12A.

[19] Section 18 Implementation of price determinations and other reports

Insert after section 18 (4):

- (5) A government agency that is the subject of a determination or recommendation of the Tribunal is also required to include the particulars and statement required under subsection (4) in the submissions made by the agency to the Tribunal during any subsequent investigation of the same matter as that to which the determination or recommendation related.

[20] Section 21 Hearings in investigations

Insert after section 21 (3):

- (3A) The Tribunal may call for written submissions to be made before the hearings commence, and may specify a time and date by which those submissions must be made. The Tribunal may extend the time for the making of submissions.

[21] Section 22 Tendering information, documents and evidence

Omit section 22 (4).

[22] Section 22A

Insert after section 22:

22A Making submissions and documents available to public

- (1) The Tribunal must make a document (including any submission given to the Tribunal under section 21 and any statement or document given to the Tribunal under section 22) available for inspection on request by any person, unless the document is an exempt document within the meaning of the *Freedom of Information Act 1989*.
- (2) The Tribunal may make a document available for inspection on request by any person who the Tribunal considers has an interest in the investigation to which the document relates, despite the fact that the document is an exempt document within the meaning of the *Freedom of Information Act 1989*. However, the Tribunal may only do that if the Tribunal:
 - (a) has given the person that gave the document to the Tribunal (and, in the case of a document that is an agreement registered under section 12C, the parties to the agreement) an opportunity to make a submission to the Tribunal on whether the document should be made available, and
 - (b) has considered the submission (if any), and
 - (c) is satisfied that making the document available could not reasonably be expected to damage the commercial or other interests of the State or of the person that gave it to the Tribunal (or, in the case of a document that is an agreement registered under section 12C, of the parties to the agreement) or of any other person.

- (3) The Tribunal may, in making a document available (or instead of refusing to make a document available) under this section, do all or any of the following:
- (a) make parts of the document available to the public, being parts that would, if they stood alone, constitute documents that the Tribunal must or may, in accordance with this section, make available to the public,
 - (b) make the document available after deleting parts of the document that would otherwise prevent its availability under this section,
 - (c) impose conditions on the availability of part or all of a document (for example, conditions limiting the availability to certain classes of persons or requiring persons not to reveal the contents of the part or document).
- (4) In its deliberations under subsection (2), the Tribunal may take into account the likely effect of conditions that the Tribunal might impose under subsection (3).
- (5) A person to whom a document is made available under subsection (2) must not infringe any condition to which that availability is subject under this section.
- Maximum penalty: 100 penalty units.
- (6) Nothing in this section limits the operation of section 21 (5) (b).

[23] Part 4A

Insert after Part 4:

Part 4A Arbitration of disputes

24A Arbitration of access disputes

- (1) If a dispute exists with respect to a public infrastructure access regime that provides for the application of this Part, any party to the dispute may refer the dispute to arbitration.

- (2) The *Commercial Arbitration Act 1984* applies to such an arbitration, but subject to this Part and the regulations.
- (3) A dispute is taken to exist with respect to such an access regime if a person (the third party) who wants access to a service, or wants a change to some aspect of the person's existing access to a service, under the access regime is unable to agree with the provider of the service on one or more aspects of access to the service.
- (4) The parties to the dispute are the third party and the 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.

24B Appointment and functions of arbitrator

- (1) The Tribunal may act as arbitrator to hear and determine disputes referred to arbitration under this Part. Alternatively, the Tribunal may appoint one or more persons from a panel approved by the Minister (whether or not the persons are members of the Tribunal) who may act as arbitrators to hear and determine a dispute referred to arbitration under this Part.
- (2) In the case of a dispute between a third party wanting, but not having, access to a service and the provider of the service, the arbitrator must give public notice of the dispute. The notice must invite submissions to the arbitrator from the public regarding the dispute and specify when and how those submissions may be made.
- (3) In the arbitration of a dispute referred under this Part, the arbitrator must take into account the following:
 - (a) the matters set out in clause 6 (4) (i), (j) and (l) of the Competition Principles Agreement,
 - (b) any guidelines referred to in section 12A (2) for the access regime to which the dispute relates,
 - (c) any submissions made on the dispute by the public, in a case to which subsection (2) applies,

- (d) any other matters that the arbitrator considers relevant.
- (4) An arbitrator in an arbitration under this Part has the powers of the Tribunal under section 22 (Tendering information, documents and evidence). In the application of that section under this Part, a reference to the Tribunal is taken to be a reference to the arbitrator.

24C Determination of dispute by arbitrator

- (1) The arbitrator is to determine the dispute by making a written determination on access to the service by the third party.
- (2) 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. 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 for, 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 earlier determination relating to access to the service by the third party.
- (3) The determination does not have to require the provider to provide access to the service by the third party.

24D Parties required to give effect to determination

The parties to an arbitration are required to give effect to the arbitration determination and, if the determination is in favour of the third party's access to the service, must not engage in conduct for the purpose of preventing or hindering the third party's access to the service under the determination.

24E Termination of arbitration

- (1) An arbitrator may, without making a determination, terminate the arbitration at any time if the arbitrator thinks that any of the following grounds exist:
 - (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,
 - (d) access to the service should continue to be governed by an existing contract between the provider and the third party.
- (2) In addition, if the dispute is about varying an existing determination, the arbitrator may terminate the arbitration if the arbitrator thinks there is no sufficient reason why the previous determination should not continue to have effect in its present form.

[24] Section 29 Regulations

Omit section 29 (2). Insert instead:

- (2) The regulations may make provision for or with respect to the following matters:
 - (a) fees,
 - (b) the procedure of the Tribunal,
 - (c) the arbitration of disputes under Part 4A.

- (3) The regulations may require the payment of fees:
 - (a) by recipients of services provided by the Tribunal, or
 - (b) to meet the costs of the arbitration of access disputes under Part 4A, or
 - (c) by a government agency, or members of an industry, to which an investigation, report or determination by the Tribunal relates, to meet the reasonable costs of the Tribunal with respect to the investigation, report or determination.
- (4) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

[25] Section 30

Omit the section. Insert instead:

30 Savings and transitional provisions

Schedule 4 has effect.

30A Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives. In particular, the review is to address the question of overlap between the Act and any corresponding Commonwealth legislation dealing with access regimes.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to the *Government Pricing Tribunal Amendment Act 1995*.
- (3) A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

[26] Schedule 2 Provisions relating to members of Tribunal

Schedule 2, clause 2 (2A)

Insert after clause 2 (2):

- (2A) The Minister may appoint a permanent member of the Tribunal to act in the place of the Chairperson during the illness, absence or unavailability of the Chairperson, and the acting Chairperson, while so acting, has and may exercise all the functions of the Chairperson and is taken to be the Chairperson.

[27] Schedule 2, clause 2 (5)

Insert after clause 2 (4):

- (5) The deputy of a member who is the Chairperson does not have the member's functions as Chairperson.

[28] Schedule 2, clause 3 (2)

Insert at the end of clause 3:

- (2) Subject to this Schedule, the minimum term of office that may be specified in the instrument of appointment of a permanent member is 3 years.

[29] Schedule 2, clause 4 (1)

Omit "Chairperson" wherever occurring.
Insert instead "permanent member".

[30] Schedule 2, clause 4 (2)

Omit "part-time".
Insert instead "part-time permanent member or temporary".

[31] Schedule 2, clause 5 (1) (d)

Omit “Governor under this clause or”.

Insert instead “Minister under this clause or the Governor”.

[32] Schedule 2, clause 5 (2) and (3)

Omit the subclauses. Insert instead:

- (2) The Minister may remove the Chairperson or any other permanent member from office for misbehaviour, incompetence or incapacity.
- (3) The Minister may remove a temporary member from office at any time.

[33] Schedule 4

Omit the Schedule. Insert instead:

Schedule 4 Savings and transitional provisions

(Section 30)

Part 1 Preliminary

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

Government Pricing Tribunal Amendment Act 1995

- (2) A provision referred to in subclause (1) may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which a provision referred to in subclause (1) takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done, or omitted to be done, before the date of its publication.

Part 2 Government Pricing Tribunal Amendment Act 1995

2 Definitions

In this Part:

GPT means the Government Pricing Tribunal of New South Wales as constituted immediately before the commencement of this clause.

IPRT means the Independent Pricing and Regulatory Tribunal of New South Wales.

3 Members of Tribunal

- (1) Appointments made under this Act by the Governor and in force immediately before the commencement of this clause are taken to have been made by the Minister.
- (2) A person who, immediately before the commencement of this clause, held office as a member of the GPT holds office as a member of the IPRT on that commencement for the remainder of the person's term.

4 Continuity of Tribunal

- (1) The IPRT is a continuation of and the same legal entity as the GPT.
- (2) Anything done or commenced by the GPT and having effect immediately before the commencement of this clause has effect after the commencement of this clause as if done by the IPRT.

- (3) In particular, any determination by the GPT in force immediately before the commencement of this clause (or, though due to come into effect after that commencement, has not been revoked as at that commencement) is taken to be a determination of the IPRT.
- (4) After the commencement of this clause, a reference in any other Act, in any instrument made under any Act or in any other instrument of any kind to the GPT is to be read as a reference to the IPRT.

5 Effect of amendments on pending investigations

In making a determination or recommendation pursuant to an investigation begun before the commencement of an amendment made to section 14A or 15 by the *Government Pricing Tribunal Amendment Act 1995*, the Tribunal is to use its best endeavours to have regard to the matters provided for in those amendments and, to the extent that it does not have regard to those matters, is to include in its report under section 14A (3) or 15 (2) a statement of the reasons why it did not have regard to the matters concerned.

Schedule 2 Amendment of Statutory and Other Offices Remuneration Act 1975

(Section 4)

Schedule 2 Public offices

Omit “Chairperson of the Government Pricing Tribunal (being a full-time member).” from Part 1.

Insert instead:

Chairperson of the Independent Pricing and Regulatory Tribunal (being a full-time member).

Full-time permanent member of the Independent Pricing and Regulatory Tribunal who is not the Chairperson.

[Minister’s second reading speech made in—
Legislative Assembly on 26 October 1995
Legislative Council on 14 December 1995]