12 April 2019

**Rental Arrangements for Communication Towers on Crown Land**
Independent Pricing and Regulatory Tribunal
PO Box K35
Haymarket Post Shop NSW 1240
Email: ipart@ipart.nsw.gov.au

Dear Sir,

**Re: IPART Review of rental arrangements for communications Towers on Crown land – Initial Submission**

The MCF, a Division of the Australian Mobile Telecommunications Association (AMTA), welcomes this opportunity to comment on IPART's issues paper on the Review of rental arrangements for communication towers on Crown land. MCF and its members, which include Telstra, Optus, TPG and VHA (Vodafone Hutchison Australia), have previously made submissions to your 2005 and 2013 reviews.

The mobile network Carriers operate networks comprising more than 29,000 facilities across Australia, servicing the needs of more than 34.84 million mobile telecommunications subscriptions.[1] In addition to their existing networks they are currently undertaking a significant deployment program of new and upgraded mobile network facilities across Australia to cater for the expanded network coverage required to deliver advanced mobile telecommunication services including 5G.

The Australian mobile telecommunications industry is thus a significant contributor to, and stakeholder in, the growth of the State of NSW's economic and social productivity and has considerable experience in establishing communications facilities on Crown land in NSW.

This submission seeks to address IPART's Issues Paper *Review of Rental Arrangements for Communication Towers on Crown Land*, issued 26 February 2019. It is noted with disappointment that many of the matters raised in the MCF response to the issue of the 2013 draft report by IPART remain unaddressed in the current issues paper.

As this MCF response has had the benefit of the conclusion to recent litigation in the Federal Court of Australia (FCA) which is pertinent to the IPART review, it is beneficial that a brief summary of that matter be addressed at the outset.

**Telstra v State of Queensland (2016) FCA 1213[2]**

In March of 2009, the industry became aware that the crown land management agency in Queensland, the Department of Environment and Resource Management (DERM) (later retitled the Department of Natural Resources and Mining (DNRM)) had reviewed its method

[1] ACMA, Communications Report 2017-18

[2] https://www.level27chambers.com.au/cases/telstra-corporation-ltd-v-state-of-queensland-2016-fca-tbc/

of determining rentals for telecommunications facilities and had gazetted the new Land Regulation 2009.

The DERM did not inform the industry of its intention to introduce this new regulation, nor did they seek to negotiate with the industry before gazetting the Regulation.

The new Regulation commenced on 1July 2010. All other users of Crown land were to pay 6% of the land value as determined by the Valuer General. However, all land occupied by telecommunications carriers were to be charged $15,000 p.a. in the 7 major Local Government Authorities in southeast Queensland and $10,000 p.a. for the rest of Queensland. The rentals were to be indexed at CPI annually

For land occupied by telecommunications carriers or supporting infrastructure providers these rentals did not have regard to the area of the land, the zoning of the land, the services available (power, roads etc.), the specific locations and most importantly the freehold value of the land. This method did not follow any standard valuation methodology in determining the rental value of vacant land and differed from the method used to determine the rental for all other users who leased Crown land from the DERM.

After some 2 years of failed negotiations, Telstra initiated proceedings in the Federal Court of Australia in 2012. The main hearing commenced on 26 April 2016.

On 14 October 2016, Rangiah J delivered his judgement in Telstra's favour finding that the Land Regulation 2009 was discriminatory and in breach of the Telecommunications Act 1997, cl.44. Subsequently DERM/DNRM refunded Telstra some $18.2m in restitution payments, interest and legal costs.

Some of the most relevant issues addressed in the precedent judgement which are pertinent to the review by IPART and the NSW Crown land authorities are noted below:

> ***125**. The objects of the Telecommunications Act are set out in s 3. That section provides, relevantly:*
> ***3 Objects***
> *(1) The main object of this Act, when read together with Parts XIB and XIC of the Competition and Consumer Act 2010, is to provide a regulatory framework that promotes:*
>
> > *(a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and*
> > *(b) the efficiency and international competitiveness of the Australian telecommunications industry; and*
> > *(c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.*
>
> *(2) The other objects of this Act, when read together with Parts XIB and XIC of the Competition and Consumer Act 2010, are as follows:*
>
> > *(a) to ensure that standard telephone services and payphones are:*
> >
> > > *(i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and*
> > > *(ii) are supplied as efficiently and economically as practicable; and*
> > > *(iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;*
> >
> > *...*

*(d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;*

*...*

*(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:*

*(i) the provision of telecommunications networks and facilities; and*

*(ii) the supply of carriage services;*

***141**. There is also a risk that State and Territory governments will jeopardise the availability and affordability of carriage services by taking undue advantage of the particular needs of carriers for the use of government-owned land to the detriment of the wider Australian community. To address this problem, cl 44(1) provides protection for carriers against the effects of discriminatory laws, including protection against the imposition of discriminatory taxes, rents and charges. Clause 39 confirms the liability of a carrier to taxation under the laws of a State or Territory, but cl 44(1) prevents such laws from discriminating against carriers or having the effect of discriminating against carriers. In Telstra Corporation Ltd v Hurstville City Council (2002) 118 FCR 198 at [24], the Full Court described the object of cl 44 as "to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier". More specifically, cl 44(1) can be seen as a legislative mechanism to promote and protect the long-term interests of end-users of carriage services and promote accessible and affordable carriage services, including the provision of standard telephone services and payphones to all Australians. This purpose is particularly evident when viewed against Telstra's universal service obligation and the fact that the bulk of rural and remote land, at least in Queensland, is government-owned.*

***142.** Clause 44(1) is cast in broad and absolute terms. It does not, on its face, allow any exception to the prohibition against the law of the State or Territory discriminating against carriers. Nor is any such exception expressly contained in any other provision of the Telecommunications Act. If any exception, such as the exception contended for by the State, is to be found, then it must be found by implication from the subject matter, scope and purpose of the Telecommunications Act.*

***146**. The Telecommunications Act allows individuals and corporations to discriminate against carriers. That is apparent from the fact that neither cl 44(1) nor any corresponding provision restricts the behaviour of such individuals or corporations. In contrast, cl44(1) expressly prohibits discrimination against carriers under State or Territory legislation. It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments. Individuals and corporations are free to charge carriers whatever rent the market commands, just as they are free to charge other businesses whatever rent they are able to extract. Clause 44(1) is quite inconsistent with the submission that State and Territory governments are in the same position. If State and Territory governments were intended to be free to charge carriers different rents on the basis that carriers are charged more rent in the private market, the exception would have been directly expressed. The State relies on the objects of the Telecommunications Act to infer such an exception, but those objects, unsupported by any substantive provision, are too imprecise and indefinite to overcome the express and explicit prohibition of discrimination against carriers under State and Territory legislation contained in cl 44(1).*

***147**. In addition, the purpose of cl 44(1), namely to promote and protect the long-term interests of end-users of carriage services and to promote accessible and affordable carriage services, is inconsistent with the submission that State and Territory*

*governments are permitted to charge carriers higher rents on the basis that carriers are charged more rent in the private market. In fact, price-gouging of this type by State and Territory governments seems precisely the type of conduct that cl 44(1) is designed to prevent. (Emphasis added)*

***149**.Telstra submits that in deciding whether the Land Regulation discriminates against carriers contrary to cl 44(1), it is not appropriate to compare the treatment of carriers in category 15 with the treatment of other businesses in category 13. As I have said, I understand the State's ultimate submission to be that such a comparison is not appropriate if the distinction drawn between carriers and other businesses on the basis of rents charged in the private market is a relevant, appropriate or permissible distinction. As I have rejected the State's submission that such a distinction is relevant, appropriate or permissible, the State's argument concerning the comparator falls away.*

Following the judgement, the Department adopted a rental mechanism of 6% of the Land Value for all telecommunication site occupied by Telstra, Optus, VHA and Axicom in accordance with the mechanism for all other occupiers and made restitution of approximately $24M to all of the Carriers for overpayments for 6 years (being the statute of limitations).

**Discriminatory rental regime**

The MCF members are of the view that, following the FCA judgement in this case, the rental regime adopted in NSW by the 3 Crown land agencies upon the recommendation of the IPART may not be consistent with Telecommunications Act 1997 cl.44.

The argument raised by the DERM/DNRM in this case is that they were entitled to charge a higher rental to carriers because they pay more in the private market. This is precisely the argument raised by IPART on behalf of the NSW Crown land agencies. The outcome is the same, discrimination arises when the Crown charges other users less than that charged to carriers. There is no ambiguity in this judgement by the FCA.

In our previous submissions, the MCF expressed an overarching concern that the premise of the existing rental regime is for a variable rental to be applied depending upon the type of user and the perceived capacity of that user to pay the rental demanded by the Crown. This regime ignores the freehold value of the land in vacant possession.

We have previously highlighted that the current and previous rental regimes are in the MCF members' opinion discriminatory to Carriers and therefore in breach of the Telecommunications Act 1997, cl. 44, as it applies to licensed telecommunications Carriers such as the MCF members. Accordingly, the MCF again recommends the IPART adopt a single user category rental regime based on the land value of the parcel occupied, which is consistent with the directions provided by the FCA in the matter of Telstra v the State of Queensland.

**Fair market return**

**The extract below from the issues paper (Box3.1) is addressed as follows:**

***Matters specified in our terms of reference***

*Our terms of reference ask us to advise on a fee schedule that reflects fair, market-based commercial returns, having regard to:*

The MCF considers that past reviews have not been "fair" and would appear to have been unduly influenced by purported "market based commercial returns" and the perceived capacity of the industry to pay these rentals.

- *Recent market rentals agreed for similar purposes and sites*

  The recent FCA judgement makes it clear that such consideration of events in the private market where discrimination is not prohibited cannot be applied in the State and Territories sector where this discrimination is prohibited.

- *Relevant land valuations*

  The MCF has consistently argued that this is the ONLY relevant matter that should be considered in the determination of an appropriate rental for any and all users of Crown land.

- *The current rental arrangements, and*

  The MCF contends that the previous and current rental arrangements are and have always been discriminatory. Over time, the breadth of this discrimination has widened.

- *Requirements that the land management agencies must take into account under relevant legislation.* The MCF suggests that IPART and the 3 Crown land agencies consider what role they have in supporting or obstructing the Objects of the Telecommunications Act 1997 as enunciated in paragraph 125 of the recent FCA judgement. Governments at all levels are there to serve their constituents and should not act in a manner which is in conflict with State and national goals. Nor should they be in conflict with Telecommunications Act 1997 cl.44.

*In providing these services, other matters we are to consider are:*

- *The Government's preference for a fee schedule that is as simple, transparent and cost reflective as practicable*

  The MCF considers that for telecommunications carriers at least, the rental should reflect a fair return on the value of the land not the perceived value to the occupier. The MCF members encourage IPART to adopt recognised percentage of land valuation methodologies for this purpose.

- *The costs and benefits associated with implementing our recommended fee schedule.*

  The proposal above is fair, non-discriminatory and transparent to all users. Note that in assessing costs and impacts, it is important to also acknowledge that the IPART rental tables find applications in NSW government agencies (such as NSW Health, in regard to rooftop sites) and local government authorities, taking the IPART regime well beyond its intended application to free standing sites administered by the 3 land agencies.

- Whether a broader consideration of commercial rents would produce lower or higher rental rates than those in our recommended fee schedule and, if so, the context

  The MCF is of the view that consistent with the recent FCA judgement, such considerations are not relevant to the determination of Crown land rentals, for the telecommunications sector at least.

  Clause 44 of Schedule 3 of the Telecommunications Act 1997 (Cth), and

  The MCF is of the opinion that this consideration is of the utmost relevance to the current review. IPART and the 3 Crown land agencies are encouraged to seek independent legal advice on the application of the recent FCA judgment to circumstances in NSW.

Any other relevant matters

It is our view that the contamination of previous IPART rental reviews, which are seen more broadly as a floor price to work up from for other state and, in particular, local government authorities, has had a major inflationary impact on carrier rentals nationally. The members are regularly confronted by other NSW Government departments, local Councils and Departments in other States, seeking to "cherry pick" elements of the IPART rental regime to achieve inflated rental outcomes in their own jurisdictions. This may include rooftop facilities which have no alternative use and where the carrier has resisted the use of its Sch 3 powers, and which were never by design intended to be included in the IPART regime.

These other NSW government and local government land owners generally show a disregard to the carriers' objective of enhancing telecommunication services, even in areas deemed to be "Black spots".

The MCF considers that the Crown land agencies and the NSW government more broadly, should focus on supporting the telecommunications sector as its importance to the economic development of the State and the nation continues to increase into the future.

**Carrier rental Payment to the Crown**

Over the last 5 years the carriers have paid the Crown land agencies some $27.0m, detailed below.

| | |
|---|---|
| 2014 | $ 4,935,136 |
| 2015 | $ 5,012,110 |
| 2016 | $ 5,504,963 |
| 2017 | $ 5,516,295 |
| 2018 | $ 5,993,571 |
| **Total** | **$ 26,962,075; say $27.0m** |

In our opinion, the rentals charged annually would equate to or exceed the freehold value of the land, considering the very small lease areas required by the carriers. It is unreasonable to expect any tenant to effectively buy the land every year.

## Specific issues raised in the Issues paper.

Using the same numbering, the MCF responds to each issue as follows:

1. ***Do you agree with IPART's proposed approach for this review? Are there any alternative approaches that would better meet the terms of reference, or any other issues we should consider?***

   The MCF members do NOT agree with the proposed approach by IPART and note other approaches such as a fixed percentage of land value as used in Queensland. Where land valuation underpins the approach, recognised land valuation methods should be adopted. Other approaches include the Crown divesting its interest to the carriers or granting an alternative form of tenure to carriers. This will provide an incentive for carriers to expand and upgrade their networks with greater certainty on their future network OPEX.

It is also noted that IPART has not had regard to the land value, the zoning of the land and the land area occupied by telecommunications carriers in past reviews, which is inconsistent with standard land valuation methodology. In any type of real estate transaction where you have a willing, but not anxious seller or lessor and a willing, but not anxious buyer or lessee, the land area, zoning and value are the key determinates in the price to be paid as evidence of an arms-length market transaction. In the case of Telecommunications facilities, it would appear that none of these appropriate considerations has previously played a part in the determination of the current rentals. This is starkly at odds with the FCA's 2016 judgment in Queensland.

Central to IPART's approach has been the division of all Crown lands into four rental bands. The three Crown land agencies manage some 53.5% of all land in NSW. This equates to some 43.3million hectares of land. It is not a feasible proposition that all this land can be simply categorised into four broad economic value bands for the telecommunications industry only.

The four rental bands are Sydney, High, Medium and Low and are assessed largely on population density. The exceptions being High Value (Previously Strategic value) and SCAX sites. The banding mechanism should have more closely followed the variations in land value within each band but, as appears to be demonstrated by the current rentals, the MCF draws the conclusion that bands have been aligned with the perceived carrier revenues that each site band generates based on the population density they service.

The "High-Value" sites (not to be confused with the High Density category) where IPART rents need not apply has not found wide-spread adoption. . It is apparent that the 3 Crown land agencies see little value in pressing this argument (for individual site negotiations) and therefore the MCF's position is that this category should be removed from any rental regime IPART should consider following this review. Also, the fact that in the one case that this category has been referenced (NPWS), that Crown land Agency has not sought to apply separate negotiation on these sites based on individual features of those sites but has instead unilaterally declared all its sites to be High-Value, indicates the category is open to being exploited.

SCAX sites are limited to Telstra only, are part of the fixed line network and are not part of the mobile network infrastructure. The effect of their inclusion is to extract additional revenue from Telstra in its performance of its Universal Service Obligations. Therefore, they do not belong in this schedule and have further contaminated the Crown Lands rental data since the last review.

The below table reflects the current rental per $m^2$ p.a. for a primary user (P) with an average lease area of $50m^2$ and a co-user (C) with an average lease area of $15m^2$ and with the 50% rental discount.

Rent for standard sites ($2018/19, annual, ex GST)

| | | | |
|---|---|---|---|
| Sydney | $36,068 | P$721/m$^2$pa | C$1202/m$^2$pa |
| High | $30,056 | P$601/m$^2$pa | C$1001/m$^2$pa |
| Medium | $16,697 | P$334/m$^2$pa | C$557/m$^2$pa |
| Low | $8,014 | P$160/m$^2$pa | C$267/m$^2$pa |

These rental rates /m$^2$ are far in excess of what should result considering the freehold value of vacant crown land and the insignificant opportunity cost to the Crown.

If the rental rates, ranging from $160/m$^2$p.a. to $1202/m$^2$p.a. are capitalised at say 6% and then applied to larger allotments it would provide a value range of between $26.67million / hectare at the lower end and $200 million / hectare at the upper end. Clearly this is excessive and not realistic in any market most particularly for vacant Crown land.

In referencing the Telecommunications Act 1997, in the issues paper, it appears that IPART understands the potential legal risks to the Crown. The referenced legislation (State and Federal) clearly provides for the use of Crown land for telecommunications purposes on a non-discriminatory basis. Accordingly, this review provides the opportunity to correct the errors of the 2005 and 2013 reviews.

***2.*** **Do you agree with our proposed definition of efficient rents for communication tower sites on Crown land as the range bounded by a user's willingness to pay and the opportunity cost to the land agency?**

The MCF does NOT agree with the definition or the concept of "efficient" rents. The concept of an "efficient rent" is in our opinion discriminatory and predatory. It should be clear that mobile carriers invest significant sums in building network infrastructure as part of national and international networks to ensure optimal performance for their customers. Once erected, carriers are not inclined to relocate these as costs can be excessive. As such, carriers are largely captive tenants and as the State holds some 53.5% of all NSW lands, a monopoly in many areas will exist.

Carriers have a no greater willingness to pay in a non-discriminatory market than any other perspective tenant, be it on Crown land or private land and the opportunity cost to the Crown is negligible. The Crown is well aware of the funding provided by the Federal and State governments under the various Black Spot programs to assist in the provision of enhanced telecommunication services to rural and remote locations. The carriers are still required to invest significant CAPEX in these sites which will rarely be profitable. While the carriers consider this situation as part of the cost of running a national network, it is noted the Crown does not provide a rental discount to reduce the OPEX burden as perhaps it should, given the large benefit to the rural and remote communities they service.

The Crown should be encouraging carriers to expand their networks in the State to lift the social and economic wellbeing of the citizens, rather than inhibiting carriers with excessive rentals. These costs result in a lower appetite by the industry to invest in areas where the Crown is the only available land owner. These unjustified rentals add to the running costs of the network and are passed on to customers. As such this could be perceived as a tax on those customers.

The current and proposed IPART methodology should be discontinued as it is inconsistent with the recent FCA judgement and it is the view of the MCF that adoption of an "efficient" rental methodology as proposed by IPART may result in a rental regime that is not consistent with cl.44 of the Telecommunications Act. The method adopted in Queensland, being 6% of land value for all land users is an alternative that could be adopted in NSW, or another method based on accepted land valuation methodologies. This will provide an easy and equitable method for determining an appropriate rental for any user type and land size and provide a fair return to the Crown. It also provides an incentive for carriers to expand and upgrade their networks with greater certainty on their future network OPEX.

***3.*** **What information should we consider to estimate users' willingness to pay (for example market-based commercial rents paid to private land owners)?**

The Telecommunications Act (1997), cl.44 prohibits State and Territories from discriminating against carriers. It DOES NOT prohibit private individuals and companies from such discrimination. The issues paper is suggesting that in determining the carriers "willingness to pay" it may have regard to excessive rentals charged in the private market, notwithstanding they would be considered discriminatory in the public sector. Carriers must be considered as anxious tenants in these cases and the rentals fail the test of Spencer v the Commonwealth[3] in the determination of "market" rents.

Carriers are licensed by the Federal Government to operate mobile networks in Australia and pay very high consideration for the radio spectrum to do so. In addition, carriers spend considerable CAPEX every year to build and maintain these networks and evolving technologies which, going on past evidence, have a life as little as 6 years (CDMA) and as long as 20 years (2G). The rationale proposed above which seeks to leverage Federal licensing, legislative mandates and operational costs for the benefit of the Crown is unreasonable. This is also discriminatory.

The issues paper notes that other users (government and private) have adopted the IPART rentals. In some cases, this has been for uses (such as building rooftops) that were never intended. This has led to the unsustainable inflation of rentals for telecommunications facilities in the public and private sectors not just in NSW but nationally. The IPART rentals, in some instances, have become a "floor price", the starting point for negotiations.

The issues paper is proposing an overage rental for the telecommunications business. This effective revenue -sharing will never be accepted by carriers. Carriers will pay a fair non-discriminatory rental, however they will not consider any model which considers the actual or perceived revenue generated at a specific location. Bearing in mind the very small parcels of land required for telecommunications facilities, the opportunity cost to the Crown is negligible.

Further, the proposition that a wind turbine is a potential lost opportunity due to the existence of a telecommunication facility is misconceived. When one considers the concentration of wind turbines in a general location, it is not reasonable to assume

[3] See https://www.austlii.edu.au/au/journals/SydLRev/2011/6.pdf

that a relatively small telecommunications facility could detract or influence the broader wind turbine deployment program.

4. **Do market-based rents typically cover all services related to access, use and operation of the land or are there any additional fees charged to users (such as fees for maintenance of access roads)?**

The MCF members advise that market-based rentals do normally cover all service and other costs related to access as detailed in commercial rental agreements. The land owner is normally responsible for access track maintenance when that land owner uses that access track. Where the access track is built by the primary user, they maintain that track. On occasions the cost of access track maintenance is shared by all users, albeit with a discount on the rental.

It should be remembered that for the vast majority of telecommunications facilities occupying very small allotments of crown land, that land is vacant. Further once construction is complete, the visitation to the facility by a carrier's maintenance personnel is limited.

5. **What characteristics of a communication tower site are users more willing to pay for? Are these different for users that provide services in different markets?**

The MCF is of the view that these questions are irrelevant to the determination of a non-discriminatory rental for carriers which should not be determined by the activity for which the land is put to use.

Nonetheless, characteristics of a telecommunications site are not ranked by a monetary value and willingness. The site either meets the coverage and capacity objectives or it doesn't. If the latter, the site will not be built.

The implication of the question is that the Crown should be able to apply a loading on a determined rental based upon perceptions of site attributes which are not correct.

There should be no presumption that the Crown should share in the economic value users can obtain from a site as a result of the business they carry out or the perceived profitability of that business. The Crown provides one small element, the land, to the business undertaken and it is inappropriate for it to assume it should receive any recompense beyond the value of the land occupied.

Further, the statement below is refuted:

*"The second main factor that drives value or benefits users can obtain is the site's characteristics. Previous reviews have indicated that in general, sites with easier access, higher elevation and line of site, better proximity to major highways and little availability of alternative sites are of greater value to communication tower site users".*

These characteristics should not be considered enhancements which drive any benefit which is not intended. They are simply the requirement for a facility to operate as intended. Firstly, easy access is a condition most tenants would expect. Nevertheless, there are occasions, usually in rural locations, where the primary user will build an access route to the site. This cost is capitalised into that site- specific project. Once built, the Crown should not attach a rental expectation on the Primary or co-users of the site based on the works funded by the Primary user.

The words “higher elevation and line of site [sic]” again assume a superior benefit not available at all locations. In a mature telecommunications network a higher elevation can be a disadvantage as the signal may “spill” beyond the desired coverage area and cause interference with other cells.

It is assumed that “line of site [sic]” refers to the transmission of backhaul traffic to an exchange via a microwave link. Again, this is a necessary part of network design where an optical fibre connection to the site is not available. If the term is in reference to actual coverage, it would be nonsense to assume that a carrier would build a site that does not provide the intended coverage or as referenced here “line of site [sic]”.

“Better proximity to major highways” should not be a consideration in the “value or benefit” of a site. It is most likely the reason for the site in the first place in that it services the users of the highway.

The availability of alternative sites beyond the IPART regime is limited where the 3 crown land agencies control 53.5% of all land in the State, effectively creating a monopoly in many areas. It is not appropriate that this pseudo monopoly situation be used to justify further benefit to the monopoly by the way of increasing site value due to the lack of alternative sites.

The availability of a comparable alternative site may influence the commercial demands in the private sector, which would ordinarily be considered predatory and discriminatory, but this is not relevant to the determination of a non-discriminatory rental. It also fails to recognise that a carrier may simply cancel a proposal if the costs are too high or would set an undesirable precedent.

Unlike other utility providers, telecommunications carriers are required to share infrastructure. Under IPART’s current rental regime, this comes at a significant cost to the co-user. A typical primary user facility comprises a monopole or lattice tower varying in height from 20 metres to 50 metres. The on-ground equipment is housed in a small airconditioned shelter of 7.5m$^2$. A co-user has only to accommodate its on-ground equipment which is similarly housed in a small airconditioned shelter of 7.5m$^2$. The co-users expanded occupation of the Crown land is relatively insignificant (7.5m$^2$) but it is charged 50% of the rental paid by the Primary user. This can only be seen as inequitable and discriminatory.

The Crown should not assume that it can receive a financial benefit from carriers adhering to the law. Moreover, the objective of this planning requirement is to improve visual and other amenity outcomes for the community. However, a pricing regime which imposes additional rents on co-users beyond that justified by any additional area occupied discourages carriers from co-locating infrastructure and frustrates this objective.

***6.*** **How should we estimate the land agency’s opportunity cost? Does this vary for sites in different locations?**

An opportunity cost is “the loss of other alternatives when one alternative is chosen”. In the case of vacant Crown land which would not derive any other return apart from that provided by a telecommunications user, there is no lost opportunity and hence the value would be nominally $1.00 for all locations.

The proposition that a wind turbine is a potential lost opportunity due to the existence of a telecommunication facility is misconceived as noted above.

7. **What do you consider to be a 'fair' sharing of any differences between a user's willingness to pay and the opportunity cost of a site?**

The MCF contends that this question is irrelevant to the determination of a non-discriminatory rental. How would the Crown share a nil opportunity cost and why would a user pay any premium above a fair return to the Crown?

IPART notes in this issues paper "our previous reviews have not recommended a rent schedule based on land values alone". In fact, it appears to the carriers that land values have been ignored entirely, and the rentals determined by reference to the private market. It is for this reason that MCF members consider the current rentals are discriminatory and not consistent with cl.44 of the Telecommunications Act 1997.

Carriers are largely captive tenants and it appears that this is being construed as demonstrating a higher willingness to pay.

8. **Does the current market evidence support continuing the existing schedule of rental fees by location? Would there be benefits to increasing or decreasing the number of location categories?**

As previously noted, the rentals paid to private owners are not relevant as they are not prohibited from discriminating against carriers. Carriers acknowledge that they do pay others more than the Crown on occasions. The issue that IPART needs to consider is do the Crown land agencies charge other users less than carriers. This analysis should not be confined to telecommunications users and should be applied across all user types. If the answer is yes, then this is not consistent with cl.44, and IPART must recommend a reduction in rentals to an identical amount.

The four core location categories are primarily based on a perception of profitability to the carriers. This appears to be why the previous "High" density category was split into "Sydney" and "High" categories. It assumes that users closer to the Sydney CBD are more numerous and consume more telecommunications services and as such the Crown is entitled to a share of the revenue.

An increase in the number of categories would lead to a further manipulation of the rentals to secure an unjustified increase in Crown rentals. The MCF remain of the view that their needs to be a single category with a single mechanism for determining rentals for all users based on recognised land valuation methods. In the event that this cannot be established, due to the inability of other users to meet the subsequent rentals determined for their user type, then the carrier rentals should be equal to that charged to the lowest user type.

The valuation of any parcel of land and the improvement on the land, in most instances, will be reflected in the capitalisation rate applied to the various use types. For example, premium commercial buildings in the Sydney CBD may reflect a rate of 5%, residential properties 3%, industrial properties 8%. The rate reflects the level of risk and the operating cost to the land owner.

In the case of vacant Crown land, the operating costs of that land occupied by a carrier are negligible, the risk is exceedingly low (due to the financial viability of the carriers) and the likelihood of lease renewal is high (due to the longevity of this technology). The land value is readily determined by the NSW Valuer General.

The MCF therefore recommends a single category based on unimproved land value. All that remains is the determination of a suitable rate of return based on the assessment above.

***9.*** **Are the current location categories reflective of recent data on population density?**

The MCF contends that this question is irrelevant to the determination of a non-discriminatory rental.

The question appears to anticipate that some rural locations which are in the Low Density category may have had a population increase so that they would now fit in the Medium Density category. This may not be reflective of any increase in the land value of the telecommunications site. There is already a premium placed on townships in the Medium density category which extends to a radius of 12.5 km. from the town centre. This equates to some 490 square kilometres for each township where the rental value remains the same for telecommunications users. This is not a likely proposition and is in conflict with cl.44.

As previously noted, the categories appear to be based upon a perception of revenue generation potential only. This is not relevant as the rentals should be determined based upon the land value and a fair return on the land value, which reflects the variations in location.

***10.*** **What is the appropriate rent discount for co-users?**

Co-users should be charged only for the additional land occupied by their own infrastructure. There is no justification for duplication of rental charges where the co-user is effectively charged a rental to occupy assets built by the primary user, who pays a rental for the occupation of these assets. This appears to be another example of discrimination in this sector unless co-user fees applied to all users of crown land.

Under the current model, if a primary user is a carrier with one co-user, the Crown receives a rental of 150% of the locational rental. However, if the primary user is an infrastructure provider, the Crown receives 200% of the locational rental. These penalties are applied even though there is no increase in the area of land occupied. This methodology is discriminatory and excessive.

Further just because a carrier divests its interest in its towers to a 3rd party infrastructure provider, so that if may release capex from passive infrastructure, there is no justification for an inequitable rental charge to the primary and co-users. The 33% increase (150% to 200%) across all users will ultimately be passed on to customers in network operating costs. Again, this is an unreasonable outcome of the current rental model.

As previously noted, telecommunications carriers are required to share infrastructure under federal legislation. Under IPART's current rental regime, this comes at a significant cost to the co-user. The Crown should not assume that it can receive a financial benefit from carriers adhering to the law. Moreover, the objective of this planning requirement is to improve visual and other amenity outcomes for the community. The co-user fee structure imposes additional rents on co-users frustrates this objective

It is also our view that the advice from BEM in relation to co-user rentals are misconceived as it fails to recognise that carriers may co-locate on the primary user's structure without the consent of the land owner by utilising the powers and immunities granted under Schedule 3 of the Telecommunications Act. While carriers generally prefer a form of tenure agreement with land owners, in the event that commercial demands become excessive or discriminatory, the carriers may use the powers available to them with concomitant loss of rental return to the Crown.

***11.*** **Should infrastructure providers receive a discount relative to primary users?**

The removal of the discount altogether for infrastructure providers amounts to double dipping, with the increased costs passed on to the co-user who in turn passes it on to the customer. It is simply a further tax on the customer.

Rentals should be determined based upon a return on the land value. This is then equitable for all land users and is non-discriminatory. In the case of the infrastructure provider, the area of the land required for the structure would be the basis of determining their rental.

***12.*** **Does the current rebate system adequately address the benefits that community groups and government authorities provide to the public?**

As the MCF members are not generally eligible for these rebates, the MCF is unable to comment on their effectiveness. Telstra may comment in its own submission in relation to the rebates for some of its SCAX sites which form part of their fixed line network.

***13.*** **Should the current rent arrangements based on site-by-site negotiation for high-value sites be continued?**

The MCF's view is that this arrangement should be removed altogether.

It was proposed that site by site negotiations be undertaken for "high value" sites. This assumed that where two carriers occupied the same structure the land was somehow more valuable. This misconstrued that it was the tower, road and power supply built by the Primary user that was attractive to the co-user and not the land itself. As previously noted, the carriers are required under NSW State planning law and Federal Legislation to co-locate where it is technically possible. The Crown should not seek to profit from this compliance

With the exception of the NPWS's unilateral decision to determine ALL its land to be "strategically" important, and as such deserving of a step increase in density category, no agency has sought to undertake a separate site by site negotiation for a site with two or more users. NPWS's classification of its own land to its own advantage without independent assessment does not appear to be based on any accepted land valuation methodology and appears to indicate the arrangement is open to exploitation. It is not expected that application of the high value site definition in this way was intended by IPART when it was first implemented.

It remains our view that the NPWS decision was influenced by the limitations placed on carriers in the exercise of schedule 3 powers on NPWS land. The rentals for vacant crown land under the administration of NPWS are excessive and discriminatory, particularly given that on some occasions the primary purpose of the

facility is to support the employees of the NPWS in the operation of the National park and the social and safety requirements of the public who visit these sites.

Further, it is unusual that these facilities are profitable for the carriers. The numerous black-spot programs where Crown land is required to provide coverage where it is uneconomic to do so demonstrates the non-existent or weak business case for the expenditure in these locations which would not proceed without special funding commitments from government. The telecommunication industry now seeks to avoid Crown Land in NSW, particularly that under the control of NPWS, and if this cannot be avoided for uneconomic deployments such as those of the black spot programs, those deployments may be ceased altogether.

***14.*** **Would a valuation formula based on observable site characteristics be a viable alternative for setting rents for high-value sites? If so, what site characteristics would need to be included in the formula to determine the rent?**

As repeatedly noted in this submission, the only characteristic that is important in the assessment of a non-discriminatory rental is the land value. If IPART and the Crown seek to use other characteristics which are NOT relevant to the assessment of the rental for all other users, then the MCF members are of the view that this is not consistent with cl.44 of the Telecommunications Act 1997.

The question above appears to canvas the following:

a) The act of co-location by carriers in compliance with NSW State planning law and Federal legislation is to be subject to a financial penalty by the State as land owner, even though the value of the land does not increase by virtue of another user sub-leasing space on the infrastructure from the primary user.

b) The infrastructure installed by the primary user being a tower/ monopole, access road and power supply for its own use and the use of subsequent co-users, is also subject to a financial penalty by the State as land owner.

c) The Crown assumes that the assets built by the primary carrier in the early 1990's which subsequently attracted co-users to the site and increased revenue to the Crown are open to reassessment on the assumption that because carriers have co-located, the land is in some way more valuable. This fails to recognise that it is the primary carrier's infrastructure that is desirable, not the land

d) The investment by carriers in these facilities is substantial and as captive tenants, the Crown is entitled to seek a higher return in the avoidance of relocation or discontinuance of service to the community.

The MCF contends that the above principles are not tenable and therefore rejects the proposition implicit in this question.

***15.*** **Do you agree with our proposed approach for assessing the impact of our recommendations on users?**

The MCF does not agree with this recommendation as it appears to already presume an outcome which is disadvantageous to carriers and does not address the concerns regarding its lack of consistency with cl.44 of the Telecommunications Act 1997.

The language in the issues paper appears to imply that the outcome of the review is already predetermined with rentals to increase and that this increase will necessitate a transitional period to reduce the burden on the carriers. The MCF does not accept that this outcome (an increase in rentals) is necessary or justified.

***16.*** **Is the current approach of adjusting rents annually by the CPI appropriate?**

The industry would accept an annual CPI adjustment subject to rentals being determined based on land values as determined using recognised land valuation methods.

***17.*** **Should the fee schedule continue to be independently reviewed every five years?**

The MCF's view is that IPART should not continue to be engaged in this review.

Assuming that rentals are assessed as a percentage of land value, for this industry at least if not for all users, or perhaps an alternative tenure arrangement is agreed, there is no further need for IPARTS's engagement. The industry would press the NSW government to cease such instructions to IPART.

**Concluding comments**

The MCF thanks IPART for undertaking this third review of rental arrangements for communication towers on Crown land. We believe there are strong arguments as to why the current rental regime is inappropriate and discriminatory, and therefore support the urgent need for this review.

However, we are concerned that the discussion paper and associated questions suggests the result of the current review would retain a similarly flawed regime and indeed the likelihood of yet another rental increase. The MCF urges IPART to consider and adopt a rental regime consistent with the FCA's judgement in the Telstra v State of Queensland (DERM/DNRM) judgement.

The MCF again draws to the attention of IPART the significant economic and social contribution of its members' investment in network infrastructure, bringing advanced mobile telecommunications services to all the people and businesses of NSW. As previously stated in our June 2013 submission, the MCF believes a further principle of this review should include the balancing of social and economic benefit to the State of facilitating telecommunications network deployment everywhere, including on Crown lands, against the potential return to those few select Government agencies who reap the benefits of potentially increased rentals on such facilities.

We trust the IPART finds this further submission to be an enlightening contribution for the creation and adoption of a fair and balanced rental regime for all users of Crown land including telecommunications carriers. Representatives from the MCF would be pleased to

discuss any matters raised in this letter with IPART and look forward to participating in the ongoing public consultation process.

If you wish to discuss this submission or any of the matters raised within it, or require any additional information, please do not hesitate to contact me on [redacted].

Yours sincerely,

[redacted]

Ray McKenzie
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**Mobile Carriers Forum**
**Australian Mobile Telecommunications Association**