6 September 2019

Mobile Carriers Forum

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

Dear Sir,

IPART Review of rental arrangements for communications Towers on Crown land – Submission on Draft report dated 8 July 2019

The MCF, a Division of the Australian Mobile Telecommunications Association (AMTA), welcomes this opportunity to comment on IPART's Draft 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 and the current 2019 review.

The MCF submission dated 12 April 2019 and other submissions made by the industry clearly addressed the many shortcomings in the Issues Paper in the assessment of an appropriate rental to occupy Crown land. Regrettably the IPART has again ignored the submissions of the industry and again adopted an approach consistent with past reviews which generates an unacceptable cost to the MCF members.

As the IPART is aware, licenced Telecommunications Carriers are regulated under Federal law. Unlike other State regulated utilities, Carriers do not have the power to compulsorily acquire under the Land Acquisition (Just Terms Compensation) Act 1991. Those other utilities may take a lease of any land required for utility purposes and where the commercial terms cannot be agreed, they may acquire the freehold of required land via compulsory acquisition or they may take an easement at a value reflective of the value of the adverse impact upon that land. There is no consideration given to an "efficient" rental or value which considers the purposes that the public utility will put to that land; and nor should there be.

The MCF members are of the view that the Draft Review of rental arrangements has not addressed the concerns enunciated in its submission and those of other industry participants. IPART has not adequately considered the recent Federal Court Judgement and the ongoing inconsistency with Cl 44 of the Telecommunications Act by the NSW Crown.

While licenced carriers have some limited powers to occupy land and install telecommunications facilities without owner or planning consent, these powers to occupy are rarely used and a clear preference to enter into commercial agreements is in evidence. This preference is now at risk as it applies to Crown Land.

As mentioned at the recent Public Hearing on 22 July 2019, it is the MCF members' view that the starting point for this (and the prior) rental reviews, being the Terms of Reference (ToR) issued by the Premier, is incompatible with a fair and non-discriminatory outcome.

The ToR issued by the NSW Premier on 6 November 2018 is not dissimilar to previous ToRs provided to IPART for prior reviews. However, the precedent judgement by the Federal Court in the matter of *Telstra v the State of Queensland* (Queensland case) necessitated significant amendment to the current ToR for this review.

The ToR stipulates that the fee schedule reflects fair market-based commercial returns having regard to recent market rentals for similar purposes and sites. The Queensland case was clear that this approach is discriminatory. The Crown should adopt a single fee structure that applies to all occupiers of Crown land without regard to the purpose and the actual or perceived financial viability of the occupier.

In this regard, the fair market commercial return should be assessed on a reasonable return based upon the value of the land and rentals paid by other Crown Land occupiers. There does not appear to be any consideration given in IPARTs interpretation of the ToR in regard to relevant land valuations or rentals paid by other Crown land occupiers.

The draft Review has not, in our opinion, proposed a fee schedule that is as simple, transparent and cost reflective as practicable as set out in the ToR. In fact, with the introduction of an effective size penalty for new sites, uniformity in rentals will be lost in all current density categories.

Turning to the draft recommendations in the Executive Summary and using the same numbering, the MCF responses are:

1 That the appropriate basis for setting rents for communication tower sites on Crown land is rents agreed in a workably competitive market - that is rents paid by commercial users of communication tower sites on private land are the best available indicator of efficient prices.

Not Agreed. What licensed Telecommunications Carriers pay other owners in irrelevant to this assessment. What is relevant, is the rentals charged by the Crown Land agencies to ALL other uses of Crown land and the value of that Crown Land. To do otherwise results in discrimination and a breach of the Telecommunications Act, cl. 44 by the Crown.

The use of rentals paid on private land is not a fair comparator for land held by the Crown. Private land has a variety of uses permissible under the numerous zoning restrictions which may result in a higher rental being paid to compensate that land-owner for a limitation in the future development of that land.

Crown land is nominally zoned “Open Space”, has no future development capacity for which the Crown need be compensated by the occupier. There is no foregone opportunity cost to the Crown. In fact, there is an obligation on the Crown to assist in the facilitation of utility service development and operation for the wider population.
The Term “efficient pricing” reflects a value beyond which the occupier would not enter into an agreement. For carriers with national networks and thousands of facilities, the cost of relocating to a more affordable location if available, is unsustainable. As effectively “captured tenants” the use of an efficient pricing mechanism is more accurately described as a “ransom rent”. It will increase until the tenant departs the site or successfully litigates its cessation.

Since “efficient pricing” as adopted in the draft review has had no regard to the actual unimproved land value, the “efficient” rental in many cases, will exceed the land value

and in some cases many multiples of that land value. A rent equal to or exceeding the value of the land cannot be justified under any rational arrangement between negotiating parties. The best comparators for communications tower occupiers, are the rentals paid by other users of Crown land. As IPART is aware, the Telecommunications Act 1997 (as amended), Clause 44, prohibits States and Territories from discriminating against carriers. In our opinion, the draft recommendation above fails to address this breach of Federal Legislation.

2 For existing sites, the land management agencies implement the schedule of rents for all primary users other than telephony service providers (SCAX) shown in Table 5.1, where rent per site varies by location. Table 5.1 Draft recommendations on annual rents for primary users on existing sites from 1 July 2020 ($2020-21, ex-GST)

Sydney	**$33,700**
High	**$16,900**
Medium	**$13,500**
Low Rent	**$9,900**

Not Agreed. The rentals ascribed in each category are excessive and would represent a value in excess of the unimproved value of the land.

While the rentals appear to represent a substantial reduction in current rentals in 3 of the 4 categories, they remain discriminatory and non-reflective of a reasonable return on the value of the land. No other Crown Land occupier pays a rental approaching these amounts for very small parcels of land.

If the unimproved land values were applied, the difference in land values across the 4 current categories would result in a more equitable return to the Crown. e.g. Currently a site in Moree in Western NSW has a rental of almost 60% of a site in Western Sydney but a land value of perhaps only 4% of the land in Western Sydney. A site at Westmead has a rental twice that of Baulkham Hills and both suburbs are in Western Sydney and would have similar land values.

While the IPART is recommending these rentals be applied to all existing sites irrespective of size, there is in the opinion of the MCF members a strong likelihood that the Crown Land Agencies will apply the recommended rate per square metre to **all sites** (new and existing) to maximise the returns from the industry. Manipulation of the IPART rates has occurred in the past with the current NP&WS policy of a step increase in density category being an indicator of the land agencies' intention to maximise rental returns.

This matter is addressed further below in Recommendation 5.

3 Location definitions for High and Medium locations are refined. Locations are defined as:

Sydney: local council areas in metropolitan Sydney with a population density greater than 1,800 people per square kilometre (as listed in Appendix A)

High: ABS significant urban areas of Sydney (excluding local council areas included in the Sydney category above), Newcastle – Maitland, Wollongong, Central Coast and Morisset – Cooranbong.

<u>Medium</u>: areas within 12.5 km of the centre of the urban centres and localities (UCLs) defined by the ABS as having a population of 10,000 or more based on the 2016 census (as listed in Appendix B).

<u>Low</u>: the rest of NSW.

Not Agreed. As a first principle, the MCF members do not support the determination of rentals based upon these four categories, as they do not provide adequate granularity in the diverse values of land occupied by the carriers.

The use of broad geographic categories to determine rent boundaries has been an issue in every review. The changes have seen a gradual shift to increase rentals at each opportunity presented to the Crown. The Sydney Category appears to unreasonably inflate the already excessive "High" Category rental. The proposed inclusion of Maitland and Morisset-Cooranbong in the High category in the current review is simply unsupportable based upon comparative land values.

The proposed reduction in the rental for the "High" category to $\$273/m^2$ highlights the inequity of the Sydney rental category being $\$1,123/m^2$ or more than 4 times the "High" category rate. Neither of the rates/m^2 reflect a fair return based upon the value of the land.

The provision of a 12.5 km radius around all "Medium" density townships or an area of $491km^2$ per township was and is an unjustified burden on the industry and its customers. Once outside the townships (a much smaller distance than 12.5 km), the land values dramatically reduce per m^2 and an identical rental is unjustified and unsupportable.

No density categories are required if the rental is determined by a return on the value of the land. i.e. 6% as proposed in the MCF's previous submission.

4 The following services are included in the rents for new and existing primary users on Crown land:

- **All lessor costs of preparing and assessing lease applications**
- **Use of existing tracks at no additional cost. Where additional access roads are required the costs of building and maintaining should be set with reference to a benchmark rate.**

Noted. However, this needs to be expanded to include, cabling for power, optical fibre for transmission at no additional cost and solar arrays in remote locations based upon the value of the land occupied for these facilities.

The installation of communications facilities requires more than just the tower/ monopole, equipment shelter, space for a portable generator and an access track. Electricity supply needs to be delivered, together with an optical fibre cable to provide back haul transmission. These elements must be included in the tenure agreement but not included in the calculation of the area occupied as provided for in other tenure agreements. In some cases, at remote locations where the provision of mains power is cost prohibitive, a solar array will be installed. The industry would agree to pay a reasonable rental based upon the value of this remote land for this additional piece of equipment.

The cost and maintenance of any new access track should be shared between the users of such access track.

5 For new sites, the land management agencies implement the schedule of rents shown in Table 6.1, where rent per site varies by location and land size.

	Rent/ m^2	Area	Total Rent
Sydney	$1,123	30m^2	$33,690
High	$273	60m^2	$16,380
Medium	$203	65m^2	$13,195
Low Rent	$124	80m^2	$9,920

Table 6.1 Draft recommendations on annual rents for primary users on new sites and SCAX sites from 1 July 2020 ($2020-21, ex-GST)

Not Agreed. The rentals per square metre are excessive and would exceed the unimproved value of the land occupied. The inadequate land areas proposed particularly in the "Sydney" category will result in a substantial uplift in current rentals and not a reduction as falsely promoted in the draft review. A typical "Sydney" category telecommunication facility on Crown land has a 6mx10m compound. At $1123/$m^2$, this equates to $67,380 p.a. or a 66.8% increase.

The argument pressed in the draft report is that the introduction of a rental on the basis of land area for **new** sites is to ensure users limit the use of land required to the minimum. As the industry has built the competing networks over the last 34 years and evolved through numerous technical enhancements which already seek to minimise the land areas occupied, the imposition of the above very high rates per square metre arising from erroneous assessments of the average size of a typical primary user facility is unwarranted.

Firstly, as the three Crown land agencies control some 53.5% of all land in NSW or more than 44 million hectares, that land is hardly a scarce resource that needs to be "rationed" as proposed in the draft report.

Secondly, carriers do not as a matter of course, seek to lease more land than is necessary for the operation of the facility and the near future evolution of the technology, their objective being to limit the area of land for which the carriers are responsible for ongoing security and maintenance. On occasions in the past, carriers may lease a larger parcel, where the owner (usually a government body) preferred to lease an entire lot as opposed to the preparation of a lease plan or subdividing the facility compound from the entire lot.

Thirdly, Carriers are captive tenants and have little ability to reduce the area occupied by existing facilities. The proposed rental rates are not reflective of actual land values or land sizes used. The proposed area for the Sydney category at 30 m^2 is said to be based on private market evidence but is clearly erroneous. There is no reason why typical land size used in Sydney would it be half the size of that used in Western Sydney as is proposed by IPART. The MCF is of the view that the proposed compound area for Sydney has been unduly affected by the inclusion of rooftop and IBC facilities (i.e. not tower facilities) in the data used for the calculation and is therefore incorrect.

In regard to land value, assuming a 6% return, the calculated land values of vacant Crown land effectively zoned Open Space based on the proposed IPART rentals would be:

Sydney	$187.17 Million/ hectare
High	$45.5 Million / hectare
Medium	$33.83 Million / hectare
Low	$20.67 Million / hectare

It is inconceivable that the actual land values for Crown land could ever achieve these amounts in any of the categories. However, it is a useful indicator of the excessive and discriminatory rentals being sought by the Crown and recommended by the IPART.

The adoption of these rental rates and proposed small site areas will likely result in a substantial uplift in the actual rental from that published in the Draft report in most cases, as the Crown land authorities are likely to apply these rentals **to all sites**, not just new sites (and indeed the question of whether lease renewals would be treated as existing or new sites was asked at the roundtable consultation session and not clearly answered).

A typical Sydney and High category Primary User facility will have a compound of 6m x 10m, being 60m^2. This will provide enough curtilage for a monopole and an equipment shelter with perhaps some additional capacity necessary to cater for technology changes. Based on that area, the rental would be $67,380 p.a. in the Sydney Category and $16,380 p.a. in the High category.

In Medium and low category areas, a freestanding lattice tower will require an area of 100m^2 ($20,300 p.a.) and a guyed mast up to 4000m^2 (1 acre). The rental for the guyed mast in a Low category area being $496,000 p.a. using draft rates. The rental rates proposed are constant over the total area and do not provide any discount for larger remote sites necessary to provide the communications services.

The proposed draft rentals, even where reduced are in the opinion of the industry clearly excessive and also discriminatory. No other Crown land occupier would pay rentals approaching these amounts.

6 That the rent for Small Country Automatic Exchange (SCAX) sites be set on a per metre squared basis as shown in Table 6.1.

Not Agreed. The inclusion of SCAX sites in this (and the last IPART review) was and remains inappropriate. While they are part of the “fixed” network and in most cases necessary under Telstra’s Universal Service Obligations (USO), they do not usually have a tower or monopole. As such, SCAX sites should not be included in this review.

7 That the rent for SCAX sites be capped at the flat rent per site for primary users on existing sites in the same location category.

Not Agreed. The rental should be determined at 6% of the unimproved land value.

8 That co-users on existing and new sites be charged for any additional land they occupy outside the perimeter of the primary user's communication tower site on the per metre squared basis as shown in Table 7.1.

Not Agreed. The rental should be determined at 6% of the unimproved land value.

9 That the co-user rent be capped at the flat rent per site for primary users on existing sites in the same location category.

Not Agreed. The rental should be determined at 6% of the unimproved land value.

10 That the minimum annual rent to occupy Crown land be payable for co-users wholly located within the primary user's site.

Agreed, but the rental should be set at $1.00 to reflect zero opportunity cost to the Crown for the co-user occupation wholly within the primary user's compound.

11 That the rent for small cell technology occupying additional Crown land be set on the per metre squared basis as shown in Table 7.1.

Not Agreed. The rental for small cells should be determined at 6% of the unimproved land value for the additional land area occupied.

12 That the minimum annual rent to occupy Crown land be payable for small cell technology installed on existing poles or structures with no additional footprint.

Agreed, but the rental be set at $1.00, as above.

13 That the rents for all communication sites on Crown land be set according to the rent schedule for the relevant location category, and the negotiation of rents for high value sites are not permitted in future.

Not Agreed. The rental should be determined at 6% of the unimproved land value in each of the current categories. Agreed, that negotiation for high value sites should not be permitted by the Crown.

14 That the Office of Environment and Heritage continue to set the rent for sites in national parks one location category higher that the site's actual category.

Not Agreed. The industry strongly disagrees with this recommendation. It is worth noting that the NP&WS only developed this category step increase in rentals after the previous IPART review. In the industry's view this was a strategy to claw back revenue reductions and has nothing to do with the promoted social and cultural values of the land.

IPART currently proposes to increase the rentals in the Low category by 19%, lower the rental in the Medium Category by some 22% and lower the rental in the High Category by some 46% for existing sites.

As the industry has no billable sites with NP&WS in the Low Category under their unilateral policy, the industry anticipates that NP&WS will likely vary its current policy to again recover the lost revenue resulting from the draft recommendation on rentals. As previously noted above, the MCF members believe that a more likely result will be the application of the draft rental rates per square metre on all sites (new and existing) by the three Crown land agencies. The maintenance of the category step increase (not recommended by IPART in the last Review) is indicative of the land agencies' willingness to manipulate the IPART recommendations and the IPART's continued support of such a manipulation of its 2013 recommendations is further evidence of discriminatory conduct by the Crown.

The rental should be determined at 6% of the unimproved land value for all sites.

15 That infrastructure providers should not receive a rental discount for communication sites on Crown land.

Agreed. But the rental should be determined at 6% of the unimproved land value for the land occupied by the assets of the infrastructure provider. The rental rate is to be non-discriminatory.

16 That the current rebates for Community Groups, Budget Funded Sector, Local Service Providers, and Telephony Service Providers be removed.

Noted. The removal of the rebates for community groups, budget-funded sector and local service providers could be construed to be an attempt to avoid scrutiny on the inconsistency with the Telecommunications Act, Clause 44 in relation to discriminatory conduct. Their removal is therefore supported.

However, the recommended granting of financial assistance and subsidies via other government processes to these parties further exemplifies the appearance of an inconsistent approach to the obtaining of income from all users of Crown lands, not just telecommunications carriers. As was the case in the previous review where rebates were introduced, this uneven approach has the effect that some users (carriers, who are unsubsidised) pay more. Again, this appears to be inconsistent with Cl 44 of the Act.

17 That the new rent schedule apply to all communication tower sites on Crown land from 1 July 2020.

Noted.

18 Those local service providers adversely impacted by our recommendations be able to apply for transitional financial and business advisory assistance from the NSW Small Business Commissioner for a period of three years.

See comments in 16 above.

19 That the NSW Government provide on-going financial assistance to those Community groups adversely impacted by our recommendations.

See comments in 16 above.

20 That the published rent schedule be updated annually by the change in the consumer price index (CPI).

The industry accepts that the rental should be adjusted annually to reflect changes in the value of money as expressed in the CPI, be it up or down. However, it needs to maintain relativity to the unimproved value of the land occupied. As the NSW Valuer General undertakes a General Valuation of all land on a 3-yearly cycle, it is suggested that the CPI apply only for the intervening 2 years.

21 That the published rent schedule be subject to an independent review every five years to ensure it reflects fair market based rental returns.

Not Agreed. The current review process lacks true accountability with no appeal right to the Crown land occupiers, short of commencing legal proceeding in the Federal Court. The serious and systemic shortcomings in the Draft review provide an indication to the industry that neither IPART or the Crown are willing to address the foundation mechanism in assessing Crown land rentals and remain inherently conflicted with a Terms of Reference which are not consistent with Cl.44 of the Telecommunications Act. The clear precedent set in the 2016 judgment against the State of Queensland has not been observed and IPART's continuance in setting rents on Crown lands is not supported by the MCF and its members.

General comments

The following comments address in more detail the major flaws in the Draft review where warranted.

In a non-discriminatory pricing regime as required by Cl 44, the purpose the lessee makes of the land is immaterial (unless it is destructive). The draft review (and previous reviews) seeks to justify a higher rental for the use of very small parcels of land utilised to provide national telecommunication services by the mobile carrier operators. There is an assumption, that telecommunications carriers will continue to pay excessive rentals due to the value of the sites to the proper operation of their networks. Whether or not the sites are of higher value to the mobile operators than to other users of Crown lands, Cl. 44 requires the NSW government to charge no more for the use of such land than it does to any other user of Crown lands for any other type of use.

The current limitation of the IPART review wherein only 3 Crown land agencies are captured under the review has not limited the IPART recommended rentals of the previous reviews being adopted in full or in part by other State bodies and local councils in NSW and other States. IPART rentals are also often cited by private landowners as an effective "floor-price" in negotiations with mobile carriers.

It is important to note that the rental data of private market leases is not relevant. Private individuals and companies are not prohibited from discriminating against carriers, and they do. These rentals fail the "Spencer Test" as carriers must be considered "anxious" tenants due to the technical limitations on site selection and attributes of the land.

States and Territories **are** prohibited from such discrimination and cannot use tainted evidence to achieve the same outcome as that in the non-prohibited discriminatory private

market. The Telecommunications Act and the Queensland case make it clear that such conduct by a State or Territory government is not consistent with Federal law.

Carriers build “Networks” not “Sites”. The IPART draft review appears to maintain a belief that the attributes of an individual site can be financially quantified and used to engender a premium on the rental to be paid for such sites.

Generally, it is agreed that an effective communication site needs to have adequate height to propagate its radio signals across the desired coverage area, be unobstructed, have power and back haul transmission nearby, have sufficient space for an equipment shelter, have space for a generator and have relatively easy access for construction and maintenance. These attributes are not a bonus in the site selection. Unless a site has all of these, the site is not built. Premium payments should not be expected for a site performing as desired and required in the deployment brief.

The economic value of a communications facility based on the number of potential customers (and therefore population density as implied by the site categories recommended by IPART) is irrelevant to the price of one small component in the delivery chain. Carriers are buying access to a very small parcels of land, the Crown should not seek to derive a premium which in any way could be considered “Profit Share” or an overage rental. This is particularly the case when dealing with a monopoly supplier for large parts of the network coverage area.

The IPART objection as expressed at the roundtable consultation session to using the Unimproved value of land as the determinant for the rental value is incorrect. It is argued by IPART that it would not reflect fair market-based returns. This is an acknowledgement of the current discriminatory regime and that the equitable rental will be lower than the current excessive rentals. The occupier’s use of the land (as long as it is not destructive) is irrelevant or should be irrelevant in compliance with the Telecommunications Act. There should be no delay in the implementation of the 6% methodology as most land valuations already exist in the Valuer Generals system.

The IPART considers in 4.5 of the draft review that basing rental on efficient prices in a workably competitive market is consistent with the Telecommunication Act as carriers are **not adversely affected relative to a relevant comparator.** The argument that the private sector where discrimination is not prohibited is a relevant comparator is incorrect. The Queensland case established that the private market is irrelevant when the Crown sets a lower price for other users of their land. The carriers’ view is that they should pay no more than any other user of Crown land.

Again, we refer the IPART to the relevant paragraph in the Queensland case

***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).*

Concluding remarks

Regrettably the 2019 draft review on rentals for the use of Crown land for communications facilities continues to adopt the same basis as taken in the 2005 and 2013 reviews despite the industry repeatedly highlighting the critical flaws in this discriminatory regime.

The State must correct the ongoing breach of Cl. 44 of the Telecommunications Act evidenced in the 2005 and 2013 review. The Federal Court judgement in the Telstra v State of Queensland matter is clear and not open to interpretation. If the Crown adopts the IPART recommendations that the communications site users pay a rental which is different and higher than other users of Crown land, then discrimination arises.

The adoption of rental evidence on private land as a valid comparator is incorrect and simply serves to perpetuate past errors.

While there no longer appears a mechanism for the industry to be treated fairly via the IPART process, the industry may have to seek to address this issue with the assistance of the Federal Court. This may include the lodgement of an application with the Federal Court of Australia seeking redress on the breach of Cl 44 consistent the precedent judgment on Queensland. If successful, it would then be open to the industry to seek the application of the rentals determined in this Federal Court judgment against the Crown, across all NSW Government Departments, Agencies and Government Trading Enterprises without exception. The industry is aware that the current discrimination is not limited to just 3 Crown land agencies. Those NSW agencies who persist with discriminatory rentals based on the IPART schedules will be the subject of further litigation and subsequent restitution payments.

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 (02) 8920 3555.

Yours sincerely,

Ray McKenzie
Manager
Mobile Carriers Forum
Australian Mobile Telecommunications Association