

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
IPART Issues Paper

**Rental arrangements for
communications towers
on Crown land**

April 2019

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to engage with the Independent Pricing and Regulatory Tribunal (IPART) in its review of rental arrangements for communications towers on Crown land (the review). This submission should be read in conjunction with the submission of the Mobile Carriers' Forum (MCF), of which Optus is a member.
2. This review, while nominally directly impacting a relatively minor number of sites, will have far reaching indirect impacts throughout the State; as IPART rates are typically used as benchmarks by other agencies when setting access charges for communications towers. This IPART review has the opportunity to promote the deployment of communications assets and to drive the consumer benefits and broader New South Wales (NSW) economy productivity gains associated with mobile technology.
3. IPART would be fully aware of the significant economy-wide benefits that flow from the use of mobile technology. Deloitte Access Economics estimates that the Australian economy will be \$65 Billion larger by 2023 as a result of mobile communications – representing 3.1% of the Australian economy.¹ Similarly, the Bureau of Research in the Department of Communications estimates that the productivity impacts of 5G alone could be worth \$2,000 in additional GDP per person by 2030.²
4. Optus fully supports NSW embracing the social and economic benefits flowing from mobile services. NSW has a clear Infrastructure Strategy to embrace connectivity and facilitate investment in communications infrastructure.³ Further, connectivity is increasingly being relied upon during emergency situations to ensure community safety and to protect life and property. It is important that all NSW agencies work together to achieve these goals.
5. To that end, Optus welcomes IPART setting rental arrangements that promote the efficient use of mobile technology; ensure that the long term interests of NSW end-users are promoted; and to put NSW at the forefront of 5G investment and take-up.

Scope to set communication-specific rental charges

6. The issues paper correctly states that this review is limited in its ability to set communications-specific rental arrangements that discriminate against carriers as an individual or as a whole. As IPART would be aware, since its last review the Federal Court has provided additional guidance on the limitations of State authorities to set rental arrangements for communications towers. Specifically, the Federal Court ruled against the use of market benchmarks by State authorities to set rental arrangements.
7. The application of this rule to the current review limits the ability of IPART to reference market based rental arrangements for communications towers. Optus submits that IPART should ensure that any rental proposal it makes can be utilised by State authorities.
8. Optus welcomes further clarification on how IPART will ensure that any recommendations as to the rental arrangements for communications towers are consistent with obligations not to treat carriers differently from any other occupier of Crown land and the prohibition on the use of market rent benchmarks.

¹ Deloitte Access Economics, 2019, Mobile Nation 2019.

² Bureau of Communications and Arts Research, 2018, Impacts of 5G on productivity and economic growth, Australian Government, Department of Communications and the Arts

³ <http://www.infrastructure.nsw.gov.au/sis-2018>

Setting efficient prices

9. Irrespective of the limitations on State authorities to set communications-specific rental arrangements, Optus agrees that rents need to set at the efficient level so that end-users in NSW benefit from the deployment of communication services.
10. Optus does not agree with the description of efficient prices in the issues paper. The issues paper defines the range in which market outcomes are achievable, but this range provides little guidance on what would be an efficient price set outside of perfect markets, as is the current case. We observe that IPART is setting regulated rental charges in situations where local authorities have local monopoly power – that is, local authorities have sufficient market power to impose rental charges that do not result in socially efficient outcomes.
11. To that end, Optus submits the upper bound of efficient prices is set by the opportunity cost of the land and the appropriate rental yield – that is, the value of the land's alternative use absent the presence of the communications tower. We also note this would be consistent with obligations under the *Telecommunications Act 1997* (Cth) (*Telecommunications Act*).
12. Efficient prices require that prices are set in a manner which achieves, or promotes, efficient outcomes. There is a strong argument that efficient rental arrangements should take into account the significant positive externalities that flow from the supply of communications services. In addition to the significant economic and social benefits, there are material public safety benefits that flow from improved communications coverage – this is an important consideration for setting rents on Crown land which include NPWS areas.
13. Optus submits that setting lower rents are more likely to result in beneficial and efficient outcomes for NSW end-users, and the NSW economy more broadly, than rents set in the range proposed in the issues paper.

Proposed way forward

14. Optus proposed that the best way forward is for this review to determine rental arrangements that reflect an appropriate yield on the value of the land occupied by the communications tower. In other words, to set a per square metre rate based on land value and standard commercial yield.
15. This approach best meets the objectives of the review:
 - (a) Is consistent with the requirement to set non-discriminatory prices as the approach reflect the value of land irrespective of use;
 - (b) Would enable State and local authorities to reference the work of IPART when setting their own rental arrangements;
 - (c) Represents the opportunity cost of the land, which is the upper bound of the range of possible efficient prices; and
 - (d) Enables the rates to be used for a variety of communications tower types, ensuring the rates are fit for purpose for large macro towers and smaller small-cell devices.

SETTING EFFICIENT PRICES

16. This section provides Optus' views on the best method through which this review could set prices that reflect the outcome in a competitive market, are efficient, and which best promote the benefits that flow to NSW consumers from the use of communications services. Specifically, we address the:
 - (a) Scope for IPART to set rates that are specific to communications towers; and
 - (b) Setting prices that promote efficient outcomes.

Limitations on the ability of IPART to set communications-specific rates

17. Optus submits that IPART, when exercising its power under State legislation, should have regard to the limitation imposed by Commonwealth legislation that makes ineffectual any law or action under a law that could have the effect (directly or indirectly) of discriminating against a carrier or class of carrier. Importantly, IPART should be cognisant that its rental recommendations could be used by State and local authorities to set rental arrangements — and that these authorities are limited under the *Telecommunications Act 1997* (Cth) in the way that they can set rental charges.
18. Specifically, clause 44 in Schedule 3 *Telecommunications Act* states that State and Territory laws have no effect to the extent that the law discriminates against a particular carrier or carrier in general.
19. It is also necessary to note that IPART is required to consider the impact of clause 44 of Schedule 3 in the Terms of Reference for this review.
20. This clause has a body of precedent supporting its application to State and Territory planning decisions and rent setting processes. For example, the High Court has stated that the provision allows for a wide interpretation of discrimination.⁴ Further, the focus is on the effect of the action, namely whether exercise of a power leads to discrimination against a carrier or call carriers generally. The proper approach is to examine the operational effect or result of the outcome of the exercise of power.⁵
21. The Federal Court provided more guidance on the application of this clause in 2016 — that is, since the last time IPART considered rental arrangements. The Court directly addressed the question whether setting rents on Crown land by approximating the market rent that would be paid on private land — ie., the use of market rent benchmarks — is permitted. The Court rejected the argument that setting higher rents for carriers than other business on the basis of market rents for communications leases in the private market is permissible.⁶ The use of market rent to set Crown land rents discriminated against carriers and was found to be inconsistent with the cl.44 of Schedule 3 of the *Telecommunication Act 1997* (Cth). The Court found that:
 - (a) The non-discrimination clause can be seen as a mechanism to promote and protect the long term interest of end-users and to promote accessible and affordable services.⁷
 - (b) Non-discrimination is broad and absolute. It does not allow an exception to the prohibition against the law of the State or Territory discriminating against carriers.⁸

⁴ *Telstra v Hurstville City Council* (2002) 118 FCR 198

⁵ *Optus Networks v Rockdale City Council* (2005) 144 FCR 158

⁶ *Telstra v Queensland* [2016] FCA 1213, para. 148

⁷ *Ibid.*, para. 141

- (c) While individuals and corporations are allowed to discriminate against carriers, the Act expressly prohibits discrimination against carriers under State and Territory legislation. It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments.⁹
 - (d) State and Territory governments charging carriers higher rents on the basis that carriers are charged more rent in the private market seems precisely the type of conduct that clause 44 is designed to prevent.¹⁰
22. Optus submits that the judicial interpretation of clause 44 makes very clear the types of charges that can and cannot be levied on carriers. The use of benchmarking of private market rates for communication leases to set rents for Crown land is not permissible.
23. Optus welcomes further guidance from IPART on how it proposes to set rental arrangements for communications towers on Crown land in a manner consistent with the non-discrimination obligations under the *Telecommunications Act*. Optus notes that should IPART recommend arrangements that are based on, or informed by, private market rents, State and local authorities would not be permitted to use the recommended approach.

Setting prices that promote efficient outcomes

24. The issue paper identifies a range of possible price which would be consistent with the requirement to set efficient prices. The issues paper claims that a price would be efficient if it falls within the range bounded by the opportunity cost of the land and the willingness to pay of the communications provider.
25. While this range (reflective of a Coasean bargain) does reflect the possible range of negotiated outcomes between two parties in a perfectly competitive market (i.e. with zero transaction costs), it does not make any statement whether prices set by a government body are efficient or promotes the socially optimal consumption of communications services.
26. Optus submits the relevant question is what price level best promotes an efficient outcome. As IPART would be fully aware, economics defines economic efficiency into three main types: allocative (i.e. Pareto), productive (i.e. technical) and dynamic efficiency. The Australian Competition Tribunal has expressed this as:
- There is productive efficiency, allocative efficiency and dynamic efficiency. Productive efficiency is production at least cost. Allocative efficiency occurs when services are provided to those who value them most highly. Dynamic efficiency involves preserving incentives for innovation and investment.*¹¹
27. Allocative and productive efficiency demands that efficiency be promoted within the current period, maximising usage of the current assets with prices set at marginal cost without regard to sunk investments. The Australian Competition Tribunal has commented that productive and allocative efficiency related to “*the most efficient use of the resources and technology currently available to a firm, in **any given time period.***”¹² [emphasis added]

⁸ Ibid., para. 142

⁹ Ibid., para. 146

¹⁰ Ibid., para. 147

¹¹ Re Duke Eastern Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), [63]

¹² Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [160]

28. Further, allocative efficiency will be “*best promoted where the price of a service reflects the underlying marginal cost of providing the service.*”¹³
29. A sunk cost is an expenditure that has been made and cannot be recovered; investment expenditures are sunk costs when they are firm or industry specific.¹⁴ Once investment has incurred, a supplier should ignore the cost of a sunk asset in deciding whether to continue to produce a service. As long as the revenue received for the service exceeds the non-sunk costs of producing the service, the firm is better off continuing to supply the product.
30. Dynamic efficiency is a concept that involves consideration of adaptation by firms to the evolving supply and demand forces in the market.¹⁵ It involves two elements:
 - (a) Preserving incentives for innovation and investment;¹⁶ and
 - (b) Ensuring ongoing competition which forces firms to seek to improve their goods or develop new goods as part of the battle¹⁷
31. A price is efficient across investment cycles (i.e. in the long run) when it is set at a level which promotes these three types of efficiency. It is well established – and non-controversial – that the price level that maximises the three types of efficient is one that is cost based. Indeed, an efficient market would set prices at the long run incremental cost level.¹⁸ Adopting a cost-based pricing approach would reflect the prices that are set in competitive markets for any type of use and would represent a non-discriminative price level.
32. Optus acknowledges the observation in the issues paper that prices should be set with regard to the long term interest of end-users. We also note that the Federal Court accepted that the long term interest of end-users, and the promotion of communication services, is one of the aims of the non-discrimination rules in the *Telecommunications Act*.
33. Finally, we observe that setting cost-based rental arrangements appears to reflect the Terms of Reference which notes the Government’s preference for a fee schedule that is simple, transparent and cost reflective as possible.

Promoting community safety and the objectives of the NSW Government

34. A further consideration when setting prices that promote efficient outcomes, is to ensure that proposed rental arrangements are consistent with the community safety and strategic objectives of the NSW Government. In other words, to take into account the significant social benefits (positive externalities) that flow from the provision of communications services.
35. Optus notes that many of the society and wider productive benefits that flow from increased use of communications services would be considered to be positive externalities – and under efficient pricing could justify setting prices below a strictly cost basis. This is because wider society (that is, parties outside the land owner and communications companies) benefit from increasing the supply of communications – be it either increased coverage or increased throughput. Setting prices on a strict cost basis

¹³ Re Telstra Corp Ltd [2006] ACompT 4 (June 2006), [94]

¹⁴ Pindyck, R.S., “Sunk Costs and Real Options in Antitrust Analysis”, 1 *Issues In Competition Law And Policy* 619

¹⁵ Re Qantas Airways Ltd [2004] ACompT 9 (12 Oct 2004), [159]

¹⁶ Re Duke Eastern Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), [63]

¹⁷ Application by Chime Communications Pty Ltd (No 2) [2009] ACompT 2 (27 May 2009), [33]

¹⁸ The long run incremental cost level includes fixed costs. So that in the long run, total costs are recovered thereby ensuring efficient investment continues (dynamic efficiency).

may result in a level of supply of communications below that which society as whole would consider optimal.

36. To that end, we note that:

- (a) The wider economic benefits that flow from the use of mobile communications far exceeds to direct economic benefits of the industry. Deloitte Access Economics estimates that the mobile industry increases the size of the Australian economy by \$65 Billion in 2023 – or 3.1% of total GDP.¹⁹ Of which, more than one third is directly attributable to the NSW economy.
- (b) The NSW State Infrastructure Strategy acknowledges the opportunity for the NSW Government to realise the benefits of digital connectivity and technological innovation and ensure that NSW becomes a leader in the adoption and use of digital technology. To that end, the Strategy recommends that the Government seize opportunities to improve connectivity across the State to support state-wide access and to develop policies for adopting the IoT and connected infrastructure to achieve interoperability.²⁰
- (c) The NSW Government Innovation Strategy highlights the importance of Government playing a role as both a facilitator of investment and as an investor in early-stage technologies with significant growth potential.²¹
- (d) Mobile coverage has been consistently referred to as a key community safety issue especially in bushfire prone areas. We note this is particularly important issues when considering the rental arrangement that NPWS can set. Many councils affected by bushfire threats acknowledge the need for greater coverage and increased deployment of sites, for example;
 - (i) Blue Mountains City Council highlighted the need for bushfire-sensitive areas to have the best telecommunications options available to address safety risks for citizens.²²
 - (ii) Hawkesbury City Council, in its submission the Federal Mobile Blackspots Programme, noted that poor mobile phone coverage also raises serious concern for emergency situations in the area, which is prone to bushfires and flooding and being able to effectively conduct emergency response and communicate with residents and visitors (to local tourist facilities) who may be at risk.²³
 - (iii) Dungog Shire Council highlighted that its residents are concerned about the risks of not having adequate mobile services, especially in times of emergency or natural disaster.²⁴

37. Optus submits that IPART should consider the extent to which rental arrangements can promote the benefits to NSW by adopting rates which lie below the opportunity cost of land. IPART should set rental arrangements that promote the deployment of infrastructure on Crown land in order to ensure that the NSW economy and residents can receive the significant economic, social and safety benefits that flow from mobile services

¹⁹ Deloitte Access Economics, Mobile Nation 2019, Economic, business and social impacts of mobile technologies.

²⁰ <http://www.infrastructure.nsw.gov.au/sis-2018>

²¹ https://www.innovation.nsw.gov.au/sites/default/files/NSW_Government_Innovation_Strategy_Document.pdf

²² <https://www.bluemountainsgazette.com.au/story/4954644/better-mobile-coverage-for-winmalee/>):

²³ https://www.communications.gov.au/sites/g/files/net301/f/submissions/Hawkesbury_City_Council.pdf

²⁴ https://www.communications.gov.au/sites/g/files/net301/f/submissions/Dungog_Shire_Council_-_Submission_to_MCP_discussion_paper_Redacted.pdf

EMERGING COMMUNICATIONS TECHNOLOGY

38. The Terms of Reference direct IPART to consider the impact of emerging technology for communications in its review of rental arrangements. Optus submits that IPART should assess the extent to which its recommendations would apply to all types of communications towers, not just large macro-cell towers. This issue is of particular importance in this review due to the current investment in new 5G radio networks — which require a fundamentally different architecture than required under previous mobile generations.
39. IPART may be wondering why site rental arrangements and the cost of deployment has taken a higher profile of late. This reflects the fundamental change that is occurring in radio access network design due to the transition to 5G networks.
40. The change in radio network design and the significant growth in the number of sites required is demonstrated through the example below (Figure 1). This example covers the local government areas (LGAs) around Sydney – Sydney, Woollahra, Waverley, Randwick, Bayside, Inner West, Canada Bay, Ryde, Hunters Hill, Lane Cove, Willoughby, North Sydney and Mosman.
41. These LGAs have a residential population of around 1.5 million, and comprise major business areas of the CBD, North Sydney, Chatswood and Ryde. This area also covers major industrial areas including the airport and container terminals. These LGAs have a combined landmass of 295 square kilometres.

Figure 1 Limited dense metro small cell network



Source: Optus

42. Legacy and current radio design (3G and 4G) provide services in this area primarily through a layer of macro towers and micro towers on buildings. These sites, primarily utilising low and mid band spectrum, provide mobile wireless services. Under this model of radio design, the landmass of these LGAs are covered by around 400 sites.

43. However, the deployment of a 5G network fundamentally alters this design. 5G radio design is based primarily on small cells, no larger than back pack, able to be placed onto existing fixtures such as light posts, street signs, and utility poles. The features of 5G — low latency and very high throughput — require a dense radio network, utilising low to high bandwidth spectrum. Australia is currently deploying 5G networks in the 3.5 GHz band, with 26-28 GHz spectrum planned to be made available in the near future. While much of this technology is still developing, Australia is at the bleeding edge of 5G. What we do know is that 5G will require many more sites than current networks. Ericsson, for example, has shown that to offer 1 Gbps speeds, cells would have a coverage area of around 200 to 300 metres.²⁵ This is consistent with Optus' expectation of deploying a 5G radio network using 3.5 GHz spectrum.
44. This analysis implies that to provide 5G services to the limited number of dense metro LGAs listed above, a mobile operator would need to deploy up to 1,500 small cells to cover an area of less than 300 square kilometres. This is a fundamental re-design of current radio networks, with provides services in these LGAs with around 400 sites.
45. It is within this context that Optus has substantial concerns with the approach proposed by IPART to rental arrangements for mobile towers. Under the rates included in the issues paper — and assuming that the rates apply to all sites — annual rental charges for just these small number of LGAs would increase from \$15.2M to \$57M. Such an increase in the cost to deploy sites is prohibitive and likely to delay or prevent the deployment of 5G.
46. Optus cautions IPART against setting rates for sites at the level included in the issues paper. Should authorities adopt the IPART proposal, there is a very real risk that 5G networks would not be fully deployed in NSW. It is not clear how such an outcome would be consistent with the Terms of Reference or with the objective of promoting economic growth and social benefits to the residents of NSW.

ASSESSING REASONABLENESS OF PROPOSED RATES

47. Optus does not support the approach proposed in the issues paper. For the reasons outlined above, the NSW economy and residents would materially benefit from rental arrangements that promote the use of communications services through more efficient deployment of mobile infrastructure.
48. Finally, this review should recognise that NSW agencies are not free to adopt any rental arrangement that reflects market rates. While IPART may be free to suggest such an approach, the recent Federal Court decision clearly precludes government agencies from adopting such an approach.
49. Nonetheless, should Optus be incorrect with regards the above points, we also wish to highlight that the proposed rental rates in the issues paper far exceeds actual rates in the market for Sydney, High and Medium categories.
50. An analysis of the tower rentals agreed by Optus for new greenfields sites over the last three years shows that the existing and proposed IPART rental fees are far in excess of the typical rents that could be considered comparable according to land valuation definitions – see Figure 2.

²⁵ https://www.ericsson.com/assets/local/publications/conference-papers/5g_nr_sub6_coverage.pdf

Figure 2 Optus rental rates

	Sydney		High		Medium		Low	
	Avg \$	No. sites	Avg \$	No. sites	Avg \$	No. sites	Avg \$	No. sites
<i>Total Site 2016-2019</i>	15,750	6	16,301	22	12,993	34	9,349	63
% of total		4.8%		17.6%		27.2%		50.4%
2019 IPART Primary	36,068		30,056		16,697		8,014	
Variance	229%		184%		129%		86%	

Source: Optus

51. Figure 2 above shows actual rents for 125 sites in NSW, for which the average rent is \$11,871. Optus would be pleased to provide the full lease detail for each of these transactions if requested by IPART. The conclusion is that, with the exception of the Low category, the existing IPART rentals are significantly more expensive than comparable transactions being negotiated by Optus in the private market, with the Sydney and High categories 1.8 to 2.3 times comparable deals.
52. Nationally, the rents for 498 “greenfields” towers over the last 3 years have been set at rates below those above. The average rental for these sites nationally is \$11,592. The average rents for concluded new greenfields locations on average are very similar in every State, particularly the more populous states of NSW, Victoria and QLD. Optus contends there is no reason why the profile of metropolitan to regional/rural locations would differ substantially from the detailed data obtained for NSW. Optus contends the rents are comparable and reliable.
53. The evidence above, reflecting the legal upper bound of rates that can be recommended, demonstrates that the proposed rates in the issues paper are not reflective of current market arrangements.
54. Finally, Optus submits that while this evidence is useful to assess the reasonableness of the ‘market rent’ benchmark approach proposed in the issues paper, we repeat that State and local agencies are not free to utilise rents which are benchmarked off market rents. It is clear that Federal legislation requires State and local authorities to set rents below these market rates in order to promote the interests of consumers and to ensure critical mobile infrastructure can be efficiently deployed.