1 Introduction

This submission (**Second Submission**) is made by Telstra Corporation Ltd (**Telstra**) in response to the draft report titled "*Review of rental arrangements for communications towers on Crown land*" (**Draft Report**) as issued by IPART in July 2019.

The telecommunications industry provides significant benefits to the economy and to individuals. It provides the infrastructure for connecting people and allowing the flow of information, irrespective of distance. Mobile phones, fixed-line services, laptops, tablets, and wearable devices are examples of devices which rely on the infrastructure provided by the industry. In the future, we expect many more devices to be even more reliant on telecommunication infrastructure, for example vehicles, which will make telecommunications infrastructure critical to our nation's roads, power and water supply. .

Telstra appreciates the opportunity to comment on the Draft Report. Many of the points Telstra makes in this Second Submission have already been made in Telstra's earlier submission (**First Submission**) in response to the "*Issues Paper* – *Review of rental arrangements for communications towers on Crown land*" released by IPART in February 2019 (**Issues Paper**). They were also made by Telstra in the course of IPART's 2013 review.[1]

We consider that IPART's recommendation is inherently discriminatory within the meaning of the *Telecommunications Act 1997* (Cth) (**Telco Act**) sch 3 cl 44 and, if adopted by NSW's land management agencies, will be unlawful. IPART needs to revisit its analysis of this issue. The proper comparator for the purposes of that clause is not 'other lessees using Crown land for telecommunications purposes' but simply 'other lessees of Crown land'.

IPART's draft report also needs to adequately analyse, including by means of financial modelling, the impact of its recommendations on carriers generally and on Telstra specifically. Nor does it to compare the results of the application of its proposed rent setting methodology to rents charged to other users of Crown land.

In light of the fundamental issues in the Draft Report referred to above and the consequential need for IPART to revisit the whole basis for its recommendations, Telstra queries the utility of providing detailed comments on other aspects of the Draft Report. However, Telstra does make some observations below about certain matters which, in its view, should be addressed in the final report.

[1] There were reviews by IPART into the rental arrangements for communications towers on Crown land in 2005 and 2013.

2 Discrimination – Telco Act sch 3 cl 44

Telstra is of the view along with many other stakeholders who have provided public submissions to IPART, have submitted that recommended rents in the Draft Report will be discriminatory as they will be in breach of the Telco Act sch 3 cl 44 if implemented by the land management agencies (**LMAs**). Telstra has repeatedly made this submission since IPART's 2013 review.

Proper comparator – direct and indirect discrimination

IPART touches on the issue of discrimination in its Draft Report but suggests that, in order to determine if there is discrimination, carriers should be compared with some non-carriers that lease land for telecommunications purposes.[2] It appears that IPART's view on discrimination is, effectively, that there is no direct discrimination because the category of lessees for telecommunications purposes is broader than only licensed carriers and, accordingly, it is merely incidental that carriers happen to lease Crown land for telecommunications purposes.[3]

However, IPART does not address the matter of indirect discrimination. This is an important oversight. The Telco Act sch 3 cl 44 explicitly prohibits both direct and indirect discrimination. In Queensland, the relevant rent setting legislation did not directly target carriers. It targeted the use of land for telecommunications purposes (in symmetry with IPART's asserted proper comparator).[4] Yet carriers made-up more than 78% of all Crown leases issued in Queensland, with Telstra by far the single largest leaseholder. Indeed, as telecommunications in Australia is regulated by the Commonwealth pursuant to the Australian Constitution,[5] it would not be surprising that the largest category of lessees who use land for telecommunications purposes in NSW are those who hold carrier licences.

The Court, in *Telstra v Queensland*,[6] found that the relevant legislation was discriminatory notwithstanding that non-carriers were also captured by the rental category for telecommunications purposes. The fact that the rental category in question did not target only carriers for treatment at variance with the treatment of other users of Crown land, did not prevent the Court from reaching the conclusion that Telco Act sch 3 cl 44 applied.

The judgment in *Bayside* is also instructive.[7] In that case, the High Court held that there was discrimination against carriers even though owners of gas pipelines were also being charged in a similar way to carriers.

Accordingly, an analysis of whether IPART's recommended rents are discriminatory pursuant to Telco Act sch 3 cl 44 requires an analysis of the composition of all lessees who lease Crown land in NSW for telecommunications purposes. The correct question is whether, if IPART's recommendation is implemented, carriers (as a dominant member of the relevant category) will be treated in a manner at variance with other users of Crown Land.

In circumstances where IPART has been directed under s 9 of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) to present a report,[8] then an analysis of:

- the composition of all lessees of Crown land for telecommunications purposes; and

[2] Draft Report at 4.5. And see *Bayside City Council v Telstra Corporation Limited* [2004] HCA 19 at [40].

[3] Telstra refers to leases in this submission but appreciates that there are different Crown land tenue types (e.g. licences) covered by IPART's draft recommendations. However, as IPART's recommendations approach all relevant Crown tenue types as the same, so does Telstra.

[4] *Land Regulation 2009* (Qld) s 33; see *Telstra v Queensland* [2016] FCA 1213 at [56]. The classes of use identified in the (now invalidated) reg 33(1)(4)(a) are in strikingly similar terms to those identified in [2.3] of the IPART report.

[5] s 51(v).

[6] [2016] FCA 1213.

[7] *Bayside City Council v Telstra Corporation Limited* [2004] HCA 19 at [43]-[44] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

[8] Terms of Reference dated 6 November 2018, final paragraph.

- the existence and extent of any differential treatment of users of Crown Land who will be affected by its determination compared with other users of Crown Land,

should appear in IPART's final report. In the interests of both transparency and procedural fairness as such analysis forms a critical step in the reasoning process on which IPART's recommendations are based. It is incumbent on IPART to disclose such reasoning in circumstances where its proposed recommendations, on their face, are inconsistent with decisions of the High Court and Federal Court.

For the reasons advanced above, the only conclusion available to IPART is that its recommendation, if maintained in its current form, will be discriminatory because of its very nature (and arguably, as an inevitable consequence of the Terms of Reference) it will result in differential treatment of carriers. Indeed, the Draft Report concedes as much.[9] The basis stated in the Draft Report for disregarding this differential treatment is unsupported by any analysis and, in any event, is irrelevant having regard to how the Courts have construed the Telco Act sch 3 cl 44.[10]

IPART will be aware that the orthodox approach to valuing land (for rental and freehold sale purposes) is to value the land at its "*highest and best use*".[11] While reference to this well-known principle appears to have been eschewed by IPART in the Draft Report consistent with IPART not having regard to orthodox land valuation principles, the Draft Report does appear to accept that telecommunications is the most lucrative use of the land under review.[12]

However, the difficulties Telstra has with IPART considering only existing sites is that it leads to a situation where carriers are (effectively and despite some exceptions) the only category of Crown lessee exposed to paying for land valued as "telecommunications land". Carriers are also the only category of Crown lessee subject to the rent setting methodology recommended in the Draft Report. These matters are inconsistent with both how private market rents and rents for other parcels of Crown Land are set.

It highlights that IPART's Draft Report and its draft recommendations, do not for the purpose of setting rents, operate by reference to features of the land but, rather, features of the lessee[13]. In the private market, should a private individual seek to lease vacant land in the central business district of a capital city, they will (under ordinary circumstances) pay private commercial rates regardless of the use to which they will put the land. If carriers are subject to rents for Crown leases determined on the basis that the highest and best use is telecommunications, then all other Crown lessees should be subject to the same regime. At least, this is what would be expected on an application of orthodox land valuation principles and a non-discriminatory application of those principles. However, as IPART's recommendations target lessees who use land for telecommunications purposes only (which IPART would know is a category of lessees predominantly made up of carriers), it is necessarily recommending discriminatory rents for telecommunications use that will affect carriers.

It cannot be the case that the only Crown land suitable for telecommunications purposes is land that is currently leased for such purposes. If that were the case, Telstra would be unable to roll out 5G small cell technologies on new sites. However, the Terms of Reference, and IPART's approach to the Draft Report, should assume that Telstra can roll out new sites.

[9] Draft Report p 24, final paragraph.

[10] That the use of Crown land by other users referred to "is sufficiently different in nature and extent….".

[11] Adapted from *Spencer v Commonwealth of Australia* (1907) 5 CLR 418 pp 411-444.

[12] Draft Report pp 4, 17.

[13] Again, reference is made to Draft Report p 24, final paragraph and the process of reasoning there revealed.

IPART needs to set out a legally relevant justification for the discrimination that flows from its draft recommendations. It has not done so and, in our view, none exists.

IPART's Terms of Reference are discriminatory

Purported compliance with the Terms of Reference will not validate an IPART recommendation which is at odds with the Telco Act.

In Telstra's First Submission, the discriminatory nature of the Terms of Reference was raised as a concern. The essence of the concern was that the Terms of Reference appeared to direct IPART to review (narrowly) the rents for existing communications sites only and to recommend *"rental arrangements for communications on Crown Lands….that reflects fair market based commercial returns*" having regard to specified criteria which do not reflect the manner in which rents are set for other users of Crown land. Further, the Terms of Reference do not direct IPART to review all potential Crown land in NSW to determine if such land was suitable for telecommunications purposes and to then determine the appropriate rent for all such land.

Telstra's concern has since been borne out by the Draft Report in which IPART interpreted the Terms of Reference in the manner Telstra anticipated. IPART has set out draft recommendations which, if adopted, would involve a differential treatment of carriers in the sense referred to above. At the same time, in its Draft Report, IPART did not address Telstra's submissions concerning the Terms of Reference.

3 New land sized based categories

In its Draft Report, IPART recommends 2 distinct varieties of rental category. One variety involves flat rent depending on geographical region and is consistent with IPART's previously recommended categories (although with adjusted rates) (**Fixed Price Categories**). The other variety involves variable rent depending on the square metre size of the site leased and reflects a new approach applicable to newly created leases (**Land Size Categories**). The sole justification for the Land Size Categories appears to be that lessees should have an "*incentive to minimise* [the] *area*" leased[14] because IPART's analysis "*of land size for both Crown land and private market sites found that Crown land sites are generally larger than sites on private land*".[15]

However, it is not obvious that there needs to be an incentive for carriers, or others who lease land for telecommunications purposes, to reduce site sizes. IPART appears to have undertaken no analysis of the reasons why Crown sites might be larger than private sites. The LMAs likely share responsibility for the larger sites including for administrative purposes unrelated to a lessee's interests. The composition of a carrier's Crown and private lease portfolios are also different, making size comparisons inappropriate.[16] For example, Telstra's private sites are more likely used to deploy (smaller) mobile telecommunications equipment, whereas its Crown sites are more likely associated with (larger[17]) fixed line equipment.

The incentive may also be redundant in circumstances where Telstra is willing to work with the LMAs to ensure that the sites it leases are only as large as technically required.

IPART ought to consider the counterfactual that carriers, such as Telstra, have no incentive to maximise the size of land leased beyond technical requirements. Telstra does not profit from leasing site sizes larger than technically necessary. Rather, larger than necessary sites may increase Telstra's maintenance costs. As IPART has not demonstrated an understanding of the reasons for the different average sizes between private and Crown sites, IPART cannot be satisfied that a size-based price "incentive" will have any meaningful impact on future site sizes. That is, IPART may be recommending a solution to the wrong problem (if there is one).

Telstra is also concerned with the inconsistent reasoning that supports IPART's recommended Fixed Price Categories versus the Land Size Categories. IPART's Fixed Price Categories are justified by IPART on the basis that, within the 4 geographical regions, IPART sees no variation between private market rents due to land size.[18] However, if this is how the private market works, IPART's recommended Land Size Categories must represent a departure from its own analysis of the workings of private market rents. This means that the Land Size Categories do not, on IPART's own reasoning, reflect "*fair, market-based commercial returns*".

Further, IPART mentions in its Draft Report that there is a current and growing roll out of 5G small cell technologies by carriers.[19] IPART identifies that these technologies are also required in higher density but will be smaller than existing technologies. If IPART has analysed the private market for 5G small cell technologies, this is not clear from the Draft Report.

Telstra, and other stakeholders, have also previously pointed out that IPART's recommendations have a significant effect on the private market. While its recommendations do not necessarily reflect private market rents, they do set a benchmark for those rents (including those demanded by local government entities). As IPART is recommending that the

[14] Draft Report at 6.1.

[15] Draft Report at 6.2.

[16] If not also making comparisons that result in average rental categories across only 4 geographic regions inappropriate.

[17] Other than SCAX which are typically smaller but are less common than Radio Towers.

[18] Or, indeed, any other characteristic typically relevant to land valuation. See Draft Report at 5.1.

[19] Draft report at 7.1.

Land Size Categories apply to new sites (and not existing sites), by recommending a per square metre price, IPART is likely to be ***setting*** (or significantly influencing) the price in the private market rather than ***reflecting*** it; this is particularly so given the emerging nature of the private 5G small cell market.[20] IPART's draft Land Size Categories may unfairly interfere with Telstra's (and other carriers') ability to obtain truly market-based private market rents for telecommunications purposes through private negotiation. Telstra has already experienced an attempt by private lessors to negotiate prices based on the price per square metre recommended by IPART for Fixed Size Categories in the Draft Report.

[20] That is, however, only for 5G sites where there is a footprint and the minimum rent of $508 as recommended by IPART does not apply.

4 Specific concerns arising from the Draft Report

Telstra makes the following further comments on the Draft Report and certain requests for clarification from IPART which, in its view, should be addressed in the final report.

Improving the financial modelling – changes to categories

Telstra understands that IPART intends to recommend the reduction of rents in all Fixed Price Categories bar the "Low" Category. Under IPART's proposed scheme, "Sydney" rates will decrease by 10%, "High" rates will decrease by 46%, and "Medium" rates will decrease by 22%. In contrast, "Low" rates will increase by 19%. Telstra acknowledges that these changes in rent are based on IPART's recent analysis of the private market for commercial leases.[21]

However, the financial impact on Telstra of this change is not clear from the Draft Report. Telstra is the largest carrier in Australia and most likely leases the largest number of sites of Crown land in NSW. Telstra leases many sites because it has a legislative obligation to do so pursuant to the USO. If IPART does not attempt to analyse the financial impact of its recommendations on Telstra (if not all carriers) and to compare their impact with other users of Crown Land, then it will not have considered whether its recommendations are discriminatory and therefore complied with its Terms of Reference.

Telstra is concerned that IPART's purported decrease in revenue for the LMAs in the Draft Report may obscure that fact that, despite the rent decrease in 3 of the Fixed Price Categories, most of Telstra's existing leases likely fall into the "Low" category and experience a rent increase. The changes may therefore represent an overall increase in rent for Telstra.

Telstra requests that IPART investigate, and state in its final report (with supporting analysis), whether the increase in "Low" category rents will disproportionately impact Telstra.

Further, IPART has not modelled the economic impact on the various categories of licensees (e.g. as between community groups, government entities, broadcasters, carriers, etc) despite Telstra's specific request in its First Submission that this be done. Such modelling is required in order to analyse the impact of IPART's recommendations from a discrimination perspective.

Improving the financial modelling – 5G roll out

Telstra notes, without accepting its accuracy, IPART's estimate that there will be an approximately $2.7 million revenue decrease under its draft recommendations. However, the impact of this reduction on the different types of Crown lessee (e.g. community groups, government entities, broadcasters, carriers, etc) has not been set out and so it cannot be assumed that there will be a reduction for all lessee types. Further, IPART's Draft Report expressly identifies that the introduction of 5G technologies will lead to a need for carriers, like Telstra, to enter into new licensing agreements in respect of future sites. The impact of these additional sites on the LMAs' future revenue has not been modelled. The apparent reduction in revenue for the LMAs, claimed in the Draft Report, may not take into account that the LMAs are likely to receive an increase in revenue following the rollout of 5G technology particularly given the newly recommended Land Size Categories.

Clarification of "Existing Sites"

IPART has not clearly defined which sites will be classified as "existing sites" and which will be "new sites" and thus affected by the new Land Size Categories. Telstra is concerned this could

[21] Although it also suggests that 2013 review recommended rents were too high (and discriminatory) and suggests there is a possible weakness in IPART's recommended approach for setting rents because it has demonstrated a failure to reflect, over time, the private market.

lead to confusion when the LMAs seek to implement IPART's recommendations. Existing sites will need renewal. At renewal, it is not clear if IPART intends that existing sites will move to the Land Size Categories or intends that "new sites" are to be confined to "greenfield sites".

If IPART intends that "existing sites" are to convert to "new sites" at renewal, this could create difficulties for Telstra. For example, it may not be a simple matter for Telstra to reduce the size of its existing sites without altering the existing infrastructure (e.g. moving fences, buildings, towers, lines, etc). The large size of the existing sites may not have been a result of Telstra's requirements, but of historical matters including those which benefited the LMAs. For example, the ease of granting a larger site rather than changing existing subdivisions. If so, the Land Size Categories may penalise Telstra for circumstances that were beyond its control and in a manner not factored into the new rent.

While at the public hearing on 22 July 2019 IPART did appear to indicate that it does not intend that "existing sites" are to convert to "new sites" at renewal, Telstra requests that this be specifically clarified in IPART's final report.

Clarification of SCAX rents

IPART appears to be recommending that all SCAX sites, new or existing, be converted to the new Land Size Categories.[22] Previously SCAX sites were subject to a rebate that reflected their status as USO specific sites but IPART is also recommending the removal of this rebate.[23] Consequently, IPART identifies that the average rent for a SCAX site will increase by $1,024.

However, IPART also appears to recommend that SCAX rents be capped at the rents for the "*primary users on existing sites in the same location category*". In Telstra's view, the interaction between the SCAX recommendations is unclear and requires clarification. Will primary users see an increase in rent for existing SCAX sites or will a cap apply?

It is also not clear from the Draft Report whether IPART has compared private and Crown sites where SCAX are installed. It appears that IPART is simply assuming that rent for all private sites for telecommunications sites (in all the geographical regions) is technology neutral. This is not Telstra's experience in the private market. The average increase calculated by IPART (based on a 35m^2 site)[24] may also not be accurate given the average SCAX site is over 200m^2. If IPART's recommendation is not that SCAX sites are capped, shifting existing SCAX sites to the Land Size Categories may have a much larger impact than has been modelled by IPART.

There is a further observation to make about SCAX sites. IPART has identified that Telstra receives subsidies from the Commonwealth Government to partially compensate it for the USO.[25] However, the Draft Report indicates that IPART has not analysed the makeup of those subsidies.

Also, while IPART recommends the removal of all rebates in favour of subsidies delivered by the NSW Government by means other than via rents, Telstra notes that this approach will not prevent a finding of discrimination as the subsidies (if any) should be considered in combination with rents. The fact that rents were previously set by reference to user categories under both the 2005 and 2013 IPART Reports is a powerful indication that the change is one of form rather than substance. IPART may wish to note this in its final report for the benefit of the LMAs and those bodies which may provide subsidies.

[22] Draft Report at p 41.

[23] Draft Report at 6.3.

[24] Draft Report at 6.3.

[25] Draft Report at 9.3.

Inconsistent approach to the impact of elevation on site value

IPART attempts to justify the "*higher value of communication tower sites compared to other commercial uses of land*" on the basis of *"characteristics of the site which are of value to communication tower sites such as greater elevation, line of site and ease of access*".[26] IPART also draws a comparison between 2 sites 90 metres apart, one of them being in an elevated position. IPART suggests that the elevated site is valued at up to $23,459 per year more than the other site because it avoids the construction costs of building a taller tower.

This analysis is curious. It is directly inconsistent with IPART's recommended rental categories (both the Fixed Rent Categories and the Land Size Categories) which suggest that site characteristics such as elevation, ease of access, etc are irrelevant.[27] If anything, the example comparison of the 2 sites 90 metres apart suggests that IPART's recommended rents do not reflect the private market. This is because they do not account for construction costs which differ from site to site or take into account that a 90 metre difference can have a significant effect on land value (something inconsistent with having only 4 geographic regions).

Telstra requests that IPART clarify in the final report whether "*elevation, line of site and ease of access*" are factors the private market takes into account, and, if so, why such factors do not need to feature in IPART's recommended rents?

Rejection of unimproved land valuation approach

IPART has indicated that it could not adopt an unimproved land valuation approach with a percentage (as in Queensland) for two key reasons. First, it is said that it would not reflect "*fair, market-based returns*". Second, IPART contends that the LMAs could not implement such an approach without the NSW Valuer-General undertaking a significant number of additional valuations prior to 1 July 2020.

As to the first point, the Draft Report does not include an analysis of whether a method of determining rents using a multiple of unimproved value can achieve "*fair, market-based returns*" (assuming this be a legitimate objective having regard to what has been said above about unlawful discrimination). IPART merely assumes that a multiple of unimproved land valuation approach would not achieve "*fair, market-based returns*". But it is unclear how IPART can disregard an approach that received approval from the Federal Court without a specific and directed analysis.

As to the second point, the NSW Valuer General "*delivered over 2.5 million valuations to Revenue NSW, council and landholders*" in the 2016/17 financial year.[28] It would be surprising if the Valuer General could not value a further "*937 communication tower sites*" by 2020 given that unimproved valuations for such sites are likely being used for land tax purposes.[29]

As highlighted, a multiple of unimproved valuation approach was possible in Queensland and should also be possible in NSW.

NSW National Parks and Wildlife Service

NSW National Parks and Wildlife Service (**NPWS**) charges rents by adopting the next highest category recommended by IPART. This approach has been endorsed by IPART. However, no comparison to other lessees has been identified or analysed specifically in respect of NPWS

[26] Draft Report at 4.2.1.

[27] Draft Report at 5.1.

[28] NSW Valuer General Annual Report – 2016-17 at p 25.

[29] Draft Report at 2.2.

land. IPART does not appear to have assessed the impact of NPWS' approach under the Telco Act sch 3 cl 44. Telstra's view is that NPWS land should be dealt with in a manner which is consistent with other Crown land. IPART's endorsement of the practice, which is supported by vague reasoning by reference "*social, environmental and cultural values*", would appear to be at odds with its terms of reference, which require it to reflect "*fair, market-based commercial returns*" having regard to specified factors that do not include those that are said to justify the rents in question.

Data sample may not be representative

In the first instance, the proper comparison IPART should make is between carriers and other lessees of Crown land (e.g. utilities and/or commercial lessees). Accordingly, there is limited need for IPART to consider rents in the private market. However, IPART has not sought to assess whether the data sample of leases is sufficiently representative of the private market. Given IPART's recommendations hinge on its data sample, weaknesses in that data sample should be directly addressed in the final report.

Clarification of certain key terms

Telstra has experienced difficulty reviewing the Draft Report as many key terms are not defined. Examples include "primary user", "infrastructure provider", and "co-user". Further, "telephony service provider" and "SCAX" may be used inconsistently at various points in the draft report and/or the distinction between them is unclear. A glossary or dictionary would assist in interpreting IPART's final report, particularly given the legislative effect it will have.

Tower sites and telecommunications sites

The Terms of Reference, the title of IPART's Draft Report, and the title of the current and previous reviews suggests that IPART will recommend rents for Crown land that only affect tower sites. Telstra, however, refers to such sites in this submission as telecommunications sites as this appears to be a more accurate description of the land being reviewed by IPART.

5 Conclusion

IPART ought to consider changing the approach which is reflected in its draft recommendations fundamentally. IPART's use of other lessees of Crown telecommunications sites as a comparator will not reveal discrimination because it is primarily a category comprised of carriers. IPART's asserted proper comparator effectively compares carriers to carriers.

There are, no doubt, numerous available regimes for charging rent for telecommunications sites. Only one alternatively is canvased (superficially) by IPART in the Draft Report. It dismisses the Queensland approach of charging rents on the basis of the unimproved value of land multiplied by a percentage (e.g. 6%). This is disappointing given the land leased by the LMAs is unimproved. Telstra and many stakeholders have commended this approach but the reasons for IPART's dismissal of it are, as outlined above, unconvincing.

IPART's own analysis in support of the newly recommended Land Size Categories is inconsistent with the analysis that supports the Fixed Price Categories. Either the size of the land is a factor in private market rents (which IPART is seeking to emulate) or it is not. It cannot be both. The objective of seeking to incentivise carriers to reduce the size of the sites leased from the Crown may not be achieved by the new Land Size Categories. IPART should first seek to understand why Crown lease sites are larger, on average, than private sites. As Telstra has noted above, the LMAs likely influenced the size of the land leased historically and a price incentive on carriers may have little effect on the LMAs who will, under IPART's draft recommendations, be incentivised to increase the site of sites so as to increase revenue.

IPART's role is to independently advise the LMAs. IPART's has not properly discharged that function by recommending a rental regime that is discriminatory and thus unlawful under the Telco Act. While Telstra has addressed some points of detail regarding the Draft Report above, unless IPART eliminates the discriminatory effects of its recommendation, small changes which address only those points of detail will not confer validity on its recommendations.