Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

12th February 2012

Review of Rental Arrangements for Communication Towers on Crown Land.

This submission is presented by ATI Australia Pty Limited (ATI) and its wholly owned subsidiary Wireless Broadband Engineering Pty Ltd (WBE).

- ATI provides services and equipment to customer organisations that use sites on state owned land. In this capacity ATI arranges the leases to access communications towers on behalf of those customer organisations.

- WBE is a small licensed Telecommunications Carrier wholly owned by ATI providing point to point data connections for customers in regional and rural areas of NSW and is a co-user on several sites located on state owned land. In this capacity WBE directly holds site leases to access communications towers.

We consider IPART should consider three significant issues in addition to those in the terms of reference.

1. **Market Rental Value** - How is the market rental value determined for communications towers located on state owned land? For this purpose we have engaged Preston Rowe Paterson to provide expert advice on the matter. Their report forms part of our submission.

2. **Method of Determining Market Rentals** – The crown's current means of determining rentals is flawed and lacks transparency. A market based approach to determining rentals is essential.

3. **Separate treatment of Large Carriers, Small Carriers and other users** – IPART fails to differentiate between the large telecommunications carriers who generate substantial income through their use of communications towers and hence have a substantial capacity to pay and small telecommunications carriers who generate only limited income and hence have only limited capacity to pay.

STEPHEN HANDLEY

Director

Market Rental Value

In considering site values, market rentals and other economic factors relating to sites, IPART should consider that there are four parties to each site;

1. The NSW government who own the undeveloped land on which sites are located.
2. Tower owners who may be primary users or infrastructure owners, who have developed the unimproved sites and have constructed and own the infrastructure, on the sites.
3. Co-users who install equipment on or in infrastructure owned by the tower owners.
4. The federal government effectively own the electromagnetic spectrum which all radio site users access and which is administered by the ACMA.

The Tower Owner incurs all the costs and risks associated with erecting a communications tower including obtaining relevant approvals, connecting power to the site, maintaining the site, being responsible for all insurances and indemnities as well sub licensing risks.

Bearing in mind the above risks burdened by the Tower Owner, any returns or profits resulting from co-users occupying space on the tower are the reward of the Tower Owner risk in erecting, operating, maintaining and leasing the tower.

It is also important to note that the ability of a communication provider to sub-locate onto a communication tower is solely due to the Tower Owner's investment in infrastructure erected upon the site.

Therefore, it is considered unconscionable for the Crown to charge additional co-user rentals given the Crown does not bear any of the risks associated in being able to generate potential co-user income and has not contributed to the Primary User's initial capital investment and ongoing maintenance costs.

Determining Market Rentals

It is evident there are a number of flaws and inequities in how rentals are determined and charged for communication towers on Crown land compared to communication towers on privately owned land and the wider commercial real estate market.

The establishment of a "fee schedule" for low-value sites and the current process in which co-users are also charged "rentals" by the relevant land management authorities in addition to the rentals paid to a Primary User or Infrastructure Owner (Head Licensor), appears to contravene standard head letting and sub-letting practice.

We are of the opinion that the Head Licensor only should pay a rental to the Crown and that an additional rental to the Crown should not be levied upon a co-user (Sub-Licensee).

Furthermore the crown should base its rental valuation on the value of the land on which the site is located and not take into account the infrastructure investment by the Head Licensor.

Given the Head Licensor has made the capital investment in erecting a communication tower and other infrastructure upon the site and bears all the associated risks, it is considered unconscionable for the Crown to essentially "double-dip" and charge additional co-user rentals on top of rentals charged to primary users.

It is evident that IPART have not considered the associated risks to the Head Licensor and have essentially levied a tax upon the industry given the lack of transparency associated with the published fee schedule and additional "rental" levied upon co-users.

Furthermore, as Head Licensor and co-users are not subject to a non-transparent fee schedule or co-user "rentals" should a communication facility be erected on privately owned land, we are of the opinion this will discourage investment upon Crown land.

We note there is also a lack of transparency in the published fee schedule adopted to determine the rentals for low value sites as well as a lack of market based assessments/evidence to support the fees adopted within the fee schedule.

In concluding, we are of the opinion a percentage of turnover approach is a far more equitable and transparent method to determine rentals for all (both low-value sites and high/strategic value sites) communication towers situated on Crown land.

We recommend strong consideration should be given to the rental scales adopted by Transport Roads & Maritime Services for in the Commercial Lease policy number 09/30789. Specifically the arrangements for determining market valuations and the Categories of Leases. Yields would be in the range of 2.5 to 5% of the gross revenue.

Under either approach we have proposed here, the Head Licensors and Co-Users will not both be charged rentals based on a non-transparent fee schedule and both users will have the ability to negotiate market rentals with their appropriate counterpart.

Separate treatment by IPART of Large Carriers, Small Carriers and other users

All telecommunications carriers are not created equally. The large carriers generate massive income from facilities spread across many customers and many facilities. Small carriers have limited income generated from a small customer base usually utilising facilities dedicated to each individual customer.

Should IPART adopt a categorised approach to rental fees, similar to the existing schedule it must consider separately the three major telecommunication carriers who have mobile voice and mobile data networks with many millions of customers and the small

telecommunications carriers who typically have less than 100 customers in total and total sales of less than $5 million per annum.

Small telecommunications carriers have far less capacity to pay the site rental charges being reviewed by IPART. Small carriers are effectively small businesses who should be encouraged to provide services to customers as an alternative to services offered by large carriers.

Response to questions in the Issues Paper.

Question 1.

(i) We believe the increase in the number of sites since 2005 is almost exclusively driven by the growth in the cellular telephone and related mobile data market sector. The rate of growth in the number of sites is proportional to the growth in that particular sector the telecommunications market which is the exclusive domain of the three major telecommunications carriers (Telstra, Optus and Vodafone). In the majority of situations economic viability of new sites is entirely dependent on the revenue from the major carriers.

The growth in customers and revenue experienced since 2005 by the three large licensed telecommunications carriers in the mobile data and mobile voice sectors of the telecommunications market are not reflected across all sectors of the telecommunications carrier market.

There has been minimal growth in the number of sites as a result of expansion in other sectors of the telecommunications market.

(i) We anticipate the rate of growth in the number of sites will decline in the next five years as much of the necessary vertical infrastructure to support the major carriers has been established

Question 2.

(i) Broadly we agreed with IPART's proposed principles for the review.

(ii) IPART must examine the economic and financial basis for the establishment and operation of telecommunications sites on crown land. Without having done this IPART will not have sufficient information to reach a valid and fair conclusion.

(iii) The sectors of the telecommunications market serviced by primary users and co-users of sites vary substantially in their capacity to generate income to the co-user and in turn the primary user and the land owner.

(iv) IPART must examine the core differences between market participants withion the existing user categories with a view to recognising the difference between

large and small carriers and their businesses. It is unfair and unreasonable to group all telecommunications carriers together.

Question 3.

(i) We do not support the concept of strategic sites and higher rentals for those sites. Notwithstanding that, the current definition of a strategic site is entirely wrong.

The number of users should not determine its strategic value. If the number of users must be a factor to determine strategic value then that number must be of the order of 50 users.

(ii) If strategic value must be assigned then it should be determined by its ACMA licensing designation and high, medium or low density.

(iii) We do not believe any sites justify being determined to be strategic sites.

Question 4.

(i) The cost to us of negotiating rental agreements are in the range of $500 per situation and are affordable to us and is preferred.

(ii) The benefits of rental rates agreed through negotiation do outweigh the costs of negotiation. Fixed rates discourage development in situations where the scheduled rates are too high to justify the cost of a potential site. It is in the crown's intereesats to encourage development of sites both from the need to provide services to the public and business from thjose sites and to generate revenue for the crown.

Question 5.

(i) We do not support the concept of higher rentals for strategic sites. If a strategic value must be determined then it should relate to the service or services which operate on the site

Question 6.

(i) If strategic value is to be assigned to a situation, existing categories should be replaced by application based categories. Cellular telephone and data services operated by the three major telecommunications carriers have a vastly higher strategic value (determined by revenue derived from the service) than a point to point microwave radio system operated by a small telecommunications carriers or trunked radio service.

Question 7.

(i) In our experience market rentals are essentially unchanged according to location. We cannot provide more in depth commuent on the relationship between the crown land owner and the primary user as we are not a primary user on any crown land site.

Question 8.

(i) We do not support the concept of higher rentals for strategic sites. Notwithstanding this, implementation of a scale of charges relating to sites determined to have strategic value will limit to opportunity of small carriers and other non-carrier service provider to grow their business and therefore to provide services to their customers. This is particularly relevant outside the metropolitan areas where high speed business grade data services area unavailable and will continue to unavailable in the foreseeable future, certainly within the next 5 years.

Question 9

We are unable to comment on this question.

Question 10.

There is a major inequity in the implementation of the current user categories. The current user categories place all telecommunications carriers within a single category.

There must be a distinction between large carriers providing national cellular voice and data services and small carrier providing specialised data services. The specialised data services provided by the small carriers are generally low revenue services which are provided to customers who cannot obtain service from the major carriers. The major carriers have far greater capacity to absorb costs than the small carriers.

High site costs limit to expansion of services particularly to areas outside the Sydney metropolitan area.

Question 11.

We believe the categories can be reduced to four logical categories are;

A. The NBN Co as well as the major telecommunications carriers (cellular mobile voice and mobile data networks).
B. Regional TV and radio broadcasters
C. Commercial enterprises
D. Budget funded sector and community based organisations.

Question 12.

If the sole and exclusive purpose of the activity undertaken by the GME is related to a non-commercial or social activity which does not compete with a similar commercial usage, then it should fall into the D category (Question 11 above).

Question 13.

(i) The expansion of cellular mobile voice and mobile data services and their use of facilities located on state owned land has been driven by handset technology and demand in the community for these services. There has been little significant change in other sectors of the small telecommunications carrier market or the non-carrier market.

Question 14.

(i) NBN Co is effectively major telecommunications carrier with potentially millions of customers. NBN Co is sufficiently similar in operation and market sector to the major carriers to be grouped with them.

Question 15.

The fee structure is unfair to co-users who must pay a rental to the tower owner (primary user or infrastructure provider) and a similar rental to the crown. The tower owner also pays rental to the crown. The crown is double dipping by separately charging the co-users. Only the tower owner should be required to pay rental to the crown.

Question 16.

The infrastructure owner should be the only party to pay site rental to the crown on sites where the land is state owned. Charging co-users is double dipping.

Question 17.

(i) There is no reason to to apply discounts to infrastructure providers. Co-users should not be charged by crown lands for using a site located on state owned land.

(ii) Any change which results in an increased fee will create substantial hardship amongst small telecommunications carriers and other co-users who generally do not have the financial capacity to absorb the additional cost or pass it on to their customers.

Question 18.

We are unable to comment on this question

Preston Rowe Paterson

National Property Consultants

SUBMISSION TO INDEPENDENT PRICING AND REGULATORY TRIBUNAL OF N.S.W (IPART)

IN RESPONSE TO IPART'S REVIEW OF RENTAL ARRANGEMENTS FOR COMMUNICATION TOWERS ON CROWN LAND – ISSUES PAPER DATED DECEMBER 2012.

PREPAREDJANUARY 2013

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1.0 PREAMBLE

This submission has been prepared in response to the Review of Rental Arrangements for Communication Towers on Crown Land – Issues Paper prepared by IPART and dated December 2012. As part of our submission, we have had regard to IPART's previous *Review of Rental Arrangements for Crown Land Communication Tower Sites – Final Report October 2005,* as well as the current Issues Paper dated December 2012.

Based on our review, it is evident that there appears to be:

- A number of flaws and inequities with head licence and sub-licensing logic in how rentals are determined and charged for communication sites on Crown land compared to communication sites on privately owned land and the wider commercial real estate market.
- "Double-Dibbing" from the relevant land management authorities by collecting a rental from the primary user as well as collecting multiple rentals from co-users at a discounted rate of 50%; and
- A distinct lack of transparency in the published Fee Schedule adopted to determine rentals for low-value sites as well as a lack of market based assessments/evidence to support the fees adopted within the fee schedule.

In forming our view as to how rentals for communication facilities located on Crown land may be determined, we have reviewed the current lease structure since its implementation after the 2005 review as well as identified other issues of concern.

We have then provided our recommendation as to how rentals for communication sites on Crown land could be far more equitably and transparently assessed.

2.0 BACKGROUND

2.01 Overview

In July 2004 the NSW premier instructed IPART to commence a review into the rental arrangements for communication tower sites located on Crown Land.

The purpose of the review was to develop a policy framework for delivering a consistent Government approach covering tenure, licensing and rentals for communication tower sites on Crown Land administered by the Department, Forests NSW and National Parks and Wildlife Service. [1]

The process involved the release on an 'Issues Paper' in which IPART sought submissions from affected stakeholders within the industry, including both the associated land management authorities and communication providers. A draft report was then released from which further submissions from affected stakeholders was sought and a consultant was also engaged to further assist IPART in its review.

In October 2005, IPART released its final report; titled *Review of Rental Arrangements for Crown Land Communication Tower Sites*. It is reported the Government accepted 27 of the 28 recommendations detailed within the report and the three agencies mentioned above have been working together to implement the recommendations consistently.

The recommendations provided by IPART in the above titled report have been detailed hereunder:-

1. Rentals should reflect a conservative view of recent market prices;
2. Rentals and the terms and conditions of the occupancy should continue to be determined through site-by-site negotiations between the land management agencies and primary users for high-value sites.
3. For existing sites, the following criteria should be used to identify high-value sites for which rentals should be determined through negotiations:
    - Sites with more than 8 users, or
    - Sites where the total current annual rental for the site exceeds the highest fee for any single user in the published fee schedule.
4. The criteria for identifying high-value sites should only be applied to a site upon expiry of the full term of the licence (or lease) for that site;
5. In negotiating with the primary user, the land management agencies should have regard to the following:
    - The factors that determine the strategic value of the site(location, proximity to population centres, likely coverage area & availability of alternative sites);
    - Recent market rentals agreed for similar sites;
    - The potential for co-use;
    - Relevant land valuations; and
    - Any additional requirements that the land management agency is required to take into account under relevant legislation.
6. For all existing sites that do not meet the criteria for a high value site and Greenfield sites, rentals should be set according to a published fee schedule that takes into account the nature of uses of the site and its location.

[1] http://www.lpma.nsw.gov.au/__data/assets/pdf_file/0017/145052/telco_fs_infrmtn_cmmnctn_orgnstns_skng_occpyng_crwn_lnd.pdf

7. The following fee schedule should be adopted by the land management agencies:

Table 1 Tribunal's recommended fee schedule ($, annual, ex GST)

User category *(example)*	High density	Medium density	Low density
Community based organisations and community radio *(for example, Salvation Army, local volunteer and rescue associations)*	100*	100*	100*
Budget-funded sector *(for example, Police, Ambulance, NSW Fire Brigade, TAFE and Universities, local councils)*	4,500	3,000	1,500
Government radio broadcasters	6,000	4,000	2,000
Local service providers that provide services in one regional area only[3] *(for example, Countrywide Communications, Auzcom, Manning Communications, Fettell)*	7,000	5,000	2,500
Government business units and other commercial *(for example, Airservices Australia, TransGrid, Country Energy)*	10,500	7,000	3,500
Commercial radio broadcasters *(for example, 2UE, 2GB)*	12,000	8,000	4,000
Government television broadcasters	15,000	10,000	5,000
Telecommunications and data carriers *(for example, Telstra, Optus, Vodafone, Hutchison)*	22,500	12,500	7,500
Commercial television broadcasters *(for example, Channels 7, 9, 10, Prime and WIN)*	30,000	20,000	10,000

* It should be noted that the Crowns Land Act 1989 prescribes a minimum site rental of $350.

Source: Page 4, Review of Rental Arrangements for Crown Land Communication Tower Sites Final Report dated October 2005. We note the fee's detailed above have since increased in line with CPI.

8. Where the primary user is an infrastructure provider, the rental should be based on the discounted fee that the highest value co-user on the site would pay if it were the primary user – at a discount of 30%.
9. The definition of location categories on the recommended fee schedule should be as follows:
    - High – Greater metropolitan areas of Sydney, Central Coast, Newcastle and Wollongong;
    - Medium – Major regional centres with populations greater than 10,000 (As defined by the local council); and
    - Low – Rest of NSW
10. Land management agencies should levy co-user rentals directly on co-users if it is cost effective to do so;
11. Primary users should be required to notify the land management agencies of each user on the site. In the case of a new proposed co-user, notification should occur prior to that co-user locating its equipment on the site. Primary users should also be required to notify the land management agencies when any co-user vacates the site.
12. Primary users should be required to notify co-users that the co-user may be liable to pay a co-user rental directly to the land management agency.
13. Co-user rentals should be set by the fee schedule and be discounted by 50 per cent.

14. Licences should provide for the annual adjustment of rentals on 1 July, by the change in the Consumer Price Index for Sydney as published by the ABS for the year ending March quarter of each year.
15. Every five years from the implementation of the recommended published fee schedule, an independent valuer experienced in the communications industry should review the published fee schedule to ensure that it reflects fair market based commercial returns, having regard to:
    - Recent market rentals agreed for similar sites;
    - Relevant land valuations; and
    - Any additional requirements that the land management agency is required to take into account under relevant legislation.
16. A license should provide for rentals to be updated by applying the most recent published fee schedule at the 5, 10 and 15 year option periods of the licence term.
17. For low-value sites, a licence is the most appropriate form of occupancy instrument for the granting of the right to place communications structures on Crown Land in NSW. For high-value sites, the occupancy instrument should be open to negotiation.
18. Licenses should be applied to individual sites and not to site networks.
19. Land management agencies should enter into a licence with the primary user as the licence holder only.
20. Should a land management agency seek to charge a co-use fee directly to a co-user of a site, it should enter into a separate, standard form agreement with the co-user for this purpose.
21. The three land management agencies should work to develop within 6 months of the tribunals final report, similar standard form agreements of the following type:
    - A standard form of licence between the land management agency and the primary user.
    - A standard form of 'co-use' agreement between the land management agency and a co-user to be used where a land management agency seeks to charge a fee directly to a co-user of a site.
22. The standard form of licence between the land management agency and the primary user should provide for a 20-year licence term, comprised of a 5 year initial period and three subsequent 5-year periods at the option of the primary user.
23. Licences should be transferable with the consent of the land management agency/granting authority, and that such consent should not be unreasonable withheld in accordance with relevant governing legislation.
24. Section 48 of the Crown Lands Act 1989 should be amended to allow for the transfer of licences.
25. Land management agencies should give an incumbent licence holder a first right of refusal to replace an existing licence for a site with a new license, prior to considering other potential primary users of that site.
26. Subject to the development within a period of six months of the recommended standard form agreements, the recommended tenure and rental arrangements should be implemented as an entire package at the earliest practical opportunity while honouring existing written occupancy instruments.
27. Any existing unwritten agreements should be reviewed immediately, and replaced with new written agreements consistent with the tribunals recommendations within 2 years
28. Land management valuation expertise should be centralised with the valuer-general, or a private, independent valuer.

A more comprehensive summary of IPART's reasoning and rationale for some of the recommendations adopted has been provided below:-

2.01.01 Rentals Should Reflect Market Prices

In the 2005 review, IPART assessed the current approach for determining rentals, which generally involved site-by-site negotiations between the land management agencies and users, and a number of alternative options. Having regard to the Terms of Reference, IPART aimed to identify the approach that best:

- Ensures fair, market based commercial returns that reflects the benefits raised by all users of sites;
- Minimises the cost of making and managing agreements to both site users and site owners; and
- Maximises the utilisation and minimises the proliferation of sites.

After considering a range of views expressed by various stakeholders through submissions, IPART considered that to best achieve these objectives:

- Rentals should reflect a conservative view of recent market prices;
- For high value sites, rentals and the terms and conditions of occupancy should be negotiated; and
- For all other sites, rentals should be set according to a published fee schedule and the occupancy instrument should be a standard form.

Rentals should reflect a conservative view of recent market prices:

As mentioned above, IPART proposed that the rentals should reflect a conservative view of recent market prices. Various stakeholders expressed a variety of views as to the best approach for determining market rentals.

The Department of Lands and National Parks and Wildlife Service both argued that land management agencies are entitled to charge a rent for each site equivalent to the user's willingness to pay. However, the Department of Lands did not support taking a conservative view as this is inconsistent with Treasury guidelines and diminishes the value of the Crown estate[2].

Other stakeholders held the view that alternative methods of setting rentals were more appropriate. Broadcast Australia suggested IPART's 2004 review of Waterfront tenancies was relevant to the review as recommendations of the Waterfront Tenancies review forms an established approach for setting rentals and thus sets a precedent. Countrywide Valuers proposed that rentals should be based on a percentage per annum of statutory land value and Crown Castle submitted that rentals should be priced according to the marginal cost pricing principle[3].

In response, IPART have stated the approach it recommends must be consistent with the terms of reference which require it to consider and advise on a framework that is efficient and effective and allows the NSW government to obtain fair and market based commercial returns. IPART is of the opinion the framework that best meets this criteria is one where rentals are based on recent market prices for similar sites.

[2] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 16
[3] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 17

Rentals for high-value sites should be negotiated while those for all other sites should be set according to a fee schedule:

IPART considered three (3) options when determining what process should be used to reflect a conservative view of market prices. These three (3) options included the use of a formula based on the market price for comparable land or land value, site by site negotiations for all sites and a published fee schedule that reflects recent market prices. IPART's considerations in relation to each approach is summarised below.

Formula based on the market price of comparable land or the land value:

A number of stakeholders supported the use of a pricing formula to set rentals. As mentioned previously, Broadcast Australia recommended IPART's 2004 review of Waterfront tenancies be adopted as it can be used to set a precedent. In the waterfront review, IPART recommended that rentals should reflect the market value of domestic waterfront occupancies and that the precinct statutory land value be used as a proxy for market values as there were no market values for domestic waterfront occupancies. However, IPART hold the view that there is sufficient information to determine the market value of communication sites and as such a proxy for this value does not need to be adopted.

Furthermore, IPART consider that the efficiency and effectiveness of adopting a methodology that uses a formula based on the market price of comparable land or the land value will be limited. Ultimately, this may lead to site-by-site negotiation with the underlying land value being negotiated between the land management agencies and users [4].

Negotiation for all sites:

IPART consider this approach provides the greatest flexibility for all parties to reach a rental agreement that reflects the characteristics of the site, recent market rentals for similar sites and the underlying value of the land. IPART also consider this approach is the approach that will most likely result in market based outcomes. However, this approach is considered by IPART to place a substantial administrative burden on both land management agencies and users as well as creating uncertainty for users regarding rental fees and costs involved.

Therefore, IPART considers that individual site negotiations should be used to set rentals for high-value sites only. It is considered the advantages of site-by-site negotiations for high value sites outweigh the disadvantages as the administrative burden outweighs the ability to negotiate rentals that better reflect the characteristics of the site.

Published fee schedule that reflects recent market prices:

The third option considered by IPART was the use of a published fee schedule that reflects recent market prices. IPART consider this process would result in site rentals that are reasonably consistent with market-based commercial returns. The approach is also considered to involve low administration costs, allow for a fast and straightforward approach and provide users with consistent rentals in advance.

[4] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 19

Therefore, IPART consider that a fee schedule based on recent market-based prices should be adopted for low-value sites and that the fee schedule should be updated to reflect recent market prices every five years.

2.01.02 Consistent criteria should be used to identify high-value sites

The following criteria has been used by IPART to identify high-value sites for which rentals should be determined through negotiations:

- Sites with more than 8 users, or
- Sites where the total current annual rental for the site exceeds the highest fee for any single user in the published fee schedule.

IPART consider that a site used by more than 8 users (including the primary user) is likely to be a high value site as the high site usage indicates that a site has a strategic value to a substantial number of users[5].

Furthermore, sites where the total annual rental for the site exceeds the highest fee for any single user in the published fee schedule are considered to be of high or strategic value. IPART consider this will create continuity between the fee schedule and the criteria for identifying high-value sites. It will also mean that the criteria for identifying a high value site will remain relevant in the future as the fee schedule will change to reflect market prices whereas a fixed figure will remain the same.

2.01.03 For low-value sites, rentals should be set using a published fee schedule

As mentioned above, IPART consider that a fee schedule based on recent market-based prices should be adopted for low-value sites. The majority of sites managed by the land management agencies are located in rural or regional areas and generally have little strategic value to uses primarily because there are several alternative potential sites that offer the same or similar benefits to users[6].
Given the low strategic value for a majority of these sites, the high administration costs involved in determining rentals through negotiation can erode the benefits that both parties receive from the rental of the site. Therefore, in order to promote efficiency IPART are of the opinion that rentals or the terms and conditions of occupancy for these sites should not be determined by negotiation but rather from a published fee schedule that reflects recent, market based rentals[7]. In addition to this, IPART also considers that:

- The fee schedule should contain nine user categories and three location categories;
- Rentals should be levied on the primary user and should reflect the user's use of the site only;
- Co-user rentals should be levied on co-users if it is cost effective for the land management agencies to do so;
- Co-user rentals should be set by the fee schedule, and should be discounted by 50 per cent;
- Rentals should be indexed annually by the change in CPI; and
- The fee schedule should be reviewed every five (5) years.

[5] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 23
[6] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 26
[7] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 26

IPART are also of the opinion that a published fee schedule will provide transparency and improve the level of consistency in the rentals charged for sites with similar characteristics. It will also provide potential users with a high level of certainty about the likely rental to apply to a site, which should facilitate investment[8].

The fee schedule should contain nine user categories and three location categories:

IPART instructed BEM Property Consultants to provide expert advice on market rentals and to review its proposed fee structure. After assessing BEM's recommendations and reviewing various stakeholder comments, IPART adopted nine (9) user categories and three location categories.

IPART note that the market-based evidence is inconsistent with sites in similar locations with similar characteristics obtaining vastly different rentals for both Crown and privately owned sites. However, the evidence reportedly does demonstrate that rentals paid for sites within metropolitan areas or close to population centres are higher than rentals for remote regional or rural sites[9].

The market based evidence submitted by stakeholders and BEM is reportedly broadly consistent with the rentals recommended. Where a range of current rentals was identified from the market based evidence, BEM took a mid-point of that range to reflect the tribunal's recommendation that rentals should reflect a conservative view of recent market prices[10].

IPART's concluded that the average primary user rentals for Crown land sites in each of the three location categories using the fee schedule is consistent with what the market based evidence demonstrates is the average rental paid by primary users for similar sites on both private and public land not administered by the land management agencies. IPART therefore believes that its recommended fee schedule provides rentals for each user in each location category based on the average rental paid in the market[11].

Rentals should be levied on the primary user which reflect its use of the site, except for infrastructure providers:

IPART believe that Primary-user fees should only reflect the primary user's use of the communication tower sites on Crown land, except for infrastructure providers whose primary user rental should reflect the rental that the highest value co-user on the site would pay if it were the primary user - discounted by 30%[12].

We note IPART initially held the view that the respective land management agencies should levy direct rentals on primary users only, however that these rentals should be established to reflect the number and type of co-users on the site. Furthermore, the primary user was expected to recover from the co-users an amount equivalent to the co-user fee proportion of that rental. However, after having regard to independent advice and stakeholder submissions, IPART realised it was unreasonable and impractical to expect primary users to effectively become agents or property managers for the land owners[13].

[8] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 27
[9] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 29
[10] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 29
[11] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 29
[12] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 34
[13] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 33

Co-user rentals should be levied on co-users if it is cost effective to do so:

IPART are of the opinion the land management agencies are entitled to levy co-user rentals where it is economic to do so i.e. if the potential benefits to the agencies is greater than the costs of charging co-user rentals[14]. This appears unlikely for low-value sites where the value of benefits derived by co-users is likely to be low or where the co-users have a limited capacity to pay.

Where a land management agency does pursue co-user rentals, IPART are of the opinion that it should establish a separate agreement with each co-user and levy such fees directly on the co-user. In order to minimise administration costs of charging co-user rentals, IPART believe the land management agencies should produce a single standard co-user agreement. Furthermore, the primary user is to notify the land management agency when a new co-user locates on its site and when a co-user leaves the site[15].

Co-user rentals should be set by the fee schedule and be discounted by 50 per cent:

After having regard to various stakeholder submissions, IPART consider a 50 per cent discount for co-use rentals is appropriate and will not discourage the co-use of communication towers.

Rentals should be indexed annually by the change in the CPI:

IPART consider that an annual increase in CPI is a nationally accepted approach and that CPI is a readily available source.

Fee schedule should be reviewed every five years:

IPART consider that rents set by the fee schedule should be reviewed against market prices regularly to ensure that rentals reflect recent market prices. IPART consider that reviews should occur every 5 years to maintain consistency with its recommended licence term of 20 years which is made up of a 5 year initial term and 3 x 5 year options.

Furthermore, given that a majority of rentals for communication towers on Crown land sites will have been determined by the fee schedule, these sites may form a large proportion of the available market evidence. As such, recent market rentals, relevant land valuations and any additional requirements that the land management agency is required to take into account under relevant legislation is to be considered by an independent valuer experienced in the communications industry.

2.01.04 Standard Occupancy Instrument

Having regard to the Terms of Reference, IPART has made the following recommendations regarding alternative occupancy agreements.

[14] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 34
[15] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 34

A licence is the most appropriate form of occupancy instrument:

IPART considers that a licence is the most appropriate form of occupancy instrument for granting the right to place communications structures on Crown land in NSW for the following reasons:

- Provides the land management agency the ability to impose conditions to protect its interests and the interests of the public;
- Provides for a commercial agreement with flexibility in the nature and extent of the rights granted to the user;
- Allows the land management agency to decide whether it should retain power to grant a sub-user rights or whether the primary user is to have that power;
- Avoids the legal technicalities associated with leases and easements; and
- Can place appropriate occupational health and safety obligations on the primary user.

Some stakeholder concerns were raised about the security of tenure provided by a licence, however, given that the land owner is the Crown, IPART consider that a licence will provide a user with adequate protection.

Licences should apply to individual sites, not site networks:

In its review, IPART found no cases where occupancy instruments were applied on a site network basis, although both individual site occupancy instruments and head/master agreements were used. IPART also considers that because of the dynamic nature of communication provider's networks, it would not be viable for land management agencies to enter into single licences for site networks[16].

Land management agencies should enter into a licence with the primary user only for occupancy of a site:

IPART consider that the respective land management agencies should enter into a licence only with the primary user/infrastructure provider of a particular site. Should a land management agency seek to charge a co-use fee directly to a co-user of a site, the land management agency should enter into a separate agreement with the co-user for this purpose.

Land management agencies should develop standard form agreements:

IPART consider that the respective land management agencies should develop and use a similar standardised licence to simplify the process for granting licences for communication tower sites on Crown land and reduce the transaction and negotiation costs for all parties concerned[17].

The Licence term for a standard form of licence should be 20 years:

IPART considers that a standard form of licence should provide for a 20 year term which includes an initial term of 5 years followed by 3 x 5 year periods at the option of the primary user. IPART considers this structure is appropriate as it allows for some flexibility for a communications industry characterised by technological change[18].

[16] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 43
[17] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 44
[18] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 47

In regard to high-value sites where occupancy terms and conditions are subject to negotiation between the land management agency and the primary user, IPART considers that the parties should be free to negotiate an alternative licence/lease term[19].

Licences should be transferable with the consent of the land management agency/granting authority:

IPART consider that occupancy instruments should be transferable with the consent of the land management agency and that such permission should not be unreasonably withheld[20].

Land management agencies should adopt a policy of giving an incumbent licence holder a first right of refusal to replace an existing licence with a new licence.

IPART consider that it is appropriate for the land management agencies to allow the incumbent primary user a first right of refusal to renew an existing occupancy agreement. It is important to note that IPART's intention is for the standard form of licence to not provide for an automatic right of renewal for the primary user at the end of the licence term. Instead, IPART are of the opinion that the respective land management agencies should adopt a policy of providing an incumbent license holder a first right of refusal to replace an existing licence agreement prior to the land management agency considering other potential primary users of that site[21].

[19] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 47
[20] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 47
[21] Review of Rental Arrangements for Crown Land Communication Tower Sites October 2005 – page 49

3.0 REVIEW OF RENTAL ARRANGEMENTS FOR COMMUNICATION TOWERS ON CROWN LAND – ISSUES PAPER 2012 SUMMARY

3.01 Overview

3.01.01 General

Since the 2005 review was completed, the communications industry, similar to most technology-based industries, has evolved with technological innovations, greater demand for mobile data capacity and the commencement of the National Broadband Network (NBN) rollout. Given the recommendation of periodic reviews (every 5 years) of the fee schedule and the developments in technology since, the government has asked IPART to undertake another review[22].

The *Review of Rental Arrangements for Communication Towers on Crown Land – Issues Paper 2012* generally outlines the Term of Reference signed by the NSW Premier, IPART's approach to reviewing the current rental arrangements for communication towers on Crown land, developments since the 2005 review and issues surrounding the market rentals for strategic (high-value) and low value sites.

The Terms of Reference singed by NSW Premier Barry O'Farrell instructs IPART to review the fee schedule published in its previous 2005 review and to advise on any revisions or amendments to ensure that it reflects fair market-based commercial returns, including:

- The level of the current fees having regard to:
  - Recent market rentals agreed for similar sites;
  - Relevant land valuations; and
  - Any additional legislative requirements
- The definitions and applications of high, medium and low density location categories;
- The types of use classifications; and
- The potential inclusion of an additional classification of use to cover NBN infrastructure.

Furthermore, the Terms of Reference has also instructed IPART to recommend principles to guide rental rates for sites considered by the tribunal to be of strategic or high value. IPART is to consider:

- The policy objective of the NSW Government to achieve fair market based commercial returns on publically owned land occupied for the purpose of telecommunications, data transmission or broadcasting;
- The governments preference for a fee schedule that is a simple, transparent, and cost reflective as practicable; and
- Any other relevant matters.

It is noted IPART should also consult with key stakeholders including agencies responsible for management of Crown Land, owners of communication infrastructure and access seekers.

A set of principles have also been developed by IPART to guide their decision making for this review and they include:

[22] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 1.

- **Market Return:** Rentals should be based on the markets willingness to pay for the site or facility, taking into account land values, terms and conditions of use;
- **Administrative Efficiency:** Arrangements for determining rentals should be simple to administer and cost effective;
- **Transparency:** Rentals should be calculated in a manner that is clear and easily understood; and
- **Consistency:** Arrangements for determining rentals should be applied consistently across different management agencies[23].

IPART have stated they will exercise a degree of judgement when making recommendations with the above principles in mind. Furthermore, the principle of market return will have regard to market evidence on current rentals charged for land owned by other government agencies and the private sector.

3.01.02 Summary of Key Findings of the 2005 Review

As part of IPART's current review, new evidence and developments since the 2005 review will be assessed prior to making any recommendations to proposed changes in the fee schedule. Summarised below are the key findings from the 2005 review:

- IPART's recommended fee arrangements in 2005 were designed to reflect a conservative view of market prices. The approach distinguished between strategic or high value sites, for which rentals should be negotiated, or, low value sites, for which a published fee schedule was recommended, taking into account the use of the site and its location. The fixed schedule was intended to avoid high administration costs involved in determining rentals for these sites since negotiation could erode the net benefits that both agencies and users gain from the rental of low-value sites[24].
- The fee schedule was introduced in 2006 and has been indexed to CPI since;
- A strategic (high value) site was defined as a site having eight (8) or more users, or, sites that generate a total aggregate rent which exceeds the highest rent published in the schedule for low value sites ($35,243 in 2012).

The 2005 review recommended that the terms and conditions of the occupancy of strategic (high-value) sites should continue to be determined from site by site negations between the respective land management agency and primary user. IPART also recommended that such negotiations were to have regard to factors such as location, recent market rentals, potential for co-use, relevant land valuations and relevant legislation[25].

The 2005 recommendations on strategic (high value) sites were not endorsed by the government and have not been implemented. Land management agencies have not actively negotiated for strategic sites since the 2005 review and have instead focused on implementing the fee schedule[26].

The fee for low value sites were based on recent market prices and having regard to the 2005 review, IPART recognised that location is a determinant of site value and that different user groups had different capacity or willingness to pay. IPART recommended fee schedule included:

[23] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 13.
[24] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 9.
[25] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 10.
[26] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 10.

- 3 location classifications (high, medium and low population density regions of NSW); and
- 9 use categories (ranging from local community, volunteer and rescue organisations to commercial television broadcasters).

In addition, IPART have recommended that where a secondary transmitter is attached to a 'primary' tower, the co-user should pay the relevant land management agency 50% of the scheduled fee. An infrastructure provider, who owns and operates towers to host other users only, pay the land management agency 30% of the scheduled fee[27].

3.01.03 Market Rentals for Strategic Sites

As mentioned previously, the government did not adopt IPART's recommendations on strategic sites and have asked IPART in its current review to recommend principles to guide rental rates for sites considered to be of high or strategic value.

It is understood that there has only been one (1) negotiation of a strategic site rental by land management agencies since the 2005 review. Approximately 55 of the existing 529 sites (approximately 10%) under the relevant management authorities would fit into the current definition of a strategic site. Such a number of strategic sites under the current definition may result in the costs of negotiating for some strategic sites may outweigh the benefits[28].

One option to reduce the administrative burden of negotiating a large number of sites would be to redefine strategic sites such that the number of strategic sites would be reduced, or, add an additional category to the fee schedule to account for a majority of sites currently identified as being of strategic value[29].

3.01.04 Market Rentals for Standard Sites

IPART's rationale for a standard site fee schedule was that it would remove the need to negotiate rents for the majority of the sites and therefore significantly reduce administrative costs for land management agencies and site users. It is also considered that a fee schedule would promote a more consistent and transparent approach across NSW[30].

IPART recommended location categories (being high, medium and low) be implemented in the fee schedule to take into account differences in market rental due to location. Since the 2005 review, the definition of 'medium' locations has created some confusion for industry stakeholders. The confusion lies in the words "as defined by local council" as this means assessing the population of a town centre closest to the site[31].

Since the 2005 review, land management agencies have adopted different interpretations of the medium location definition. Catchments and Lands have identified 26 major regional centres and sites that fall within a 12.5 kilometre radius of them are classified as medium locations. Parks and Wildlife applies the LGA boundaries and uses its discretion when determining if a site is considered

[27] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 10.

[28] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 16
[29] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 16
[30] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 18
[31] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 20

to be in a 'medium' location category by having regard to factors such as coverage, mature of the facility, number and type of users and the current rental fee[32].

Furthermore, IPART recommended that the standard site fee schedule include nine (9) user categories with the rationale for this being that different user groups derive different benefits from a given site and have varying levels of willingness and/or ability to pay. Whilst a higher number of user categories allows for greater flexibility and a more accurate estimate of market rentals, greater administrative costs are generally involved[33].

As there are a number of user categories which comprise a small number of licences, IPART intend to explore alternative sets of user categories, with one option to improve the administrative efficiency of the current fee schedule being to reduce the number of user categories.

4.0 RECOMMENDATIONS

4.01 General

Having regard to the 2012 Issues Paper as well as the previous review prepared in 2005, it is evident that there are a number of flaws and inequities in how rentals are determined and charged for communication sites on Crown land compared to communication sites on privately owned land and the wider commercial real estate market.

Prior to the 2005 review conducted by IPART, rentals for communication sites on Crown Land were determined by negotiation between the respective land management agencies and users. However, both IPART and the relevant land management authorities consider this approach to have a large administrative burden which in turn is considered to reduce the benefit of the site to both parties given the relatively low economic returns a majority of these sites generate.

The 2005 review saw the implementation of a Fee Schedule in which rentals for all communication sites on Crown Land considered to be of "low-value" were determined based on the nine (9) user categories and three (3) location categories described. From this schedule, Primary Users are charged the full amount detailed within the schedule whilst Co-Users are charged 50% of the published fee.

The establishment of a "fee schedule" for low-value sites and the current process in which co-users are also charged "rentals" by the relevant land management authorities in addition to the rentals paid to a Primary User, does not appear to follow the traditional/market accepted notion of how a Crown or commercial lease agreement operates.

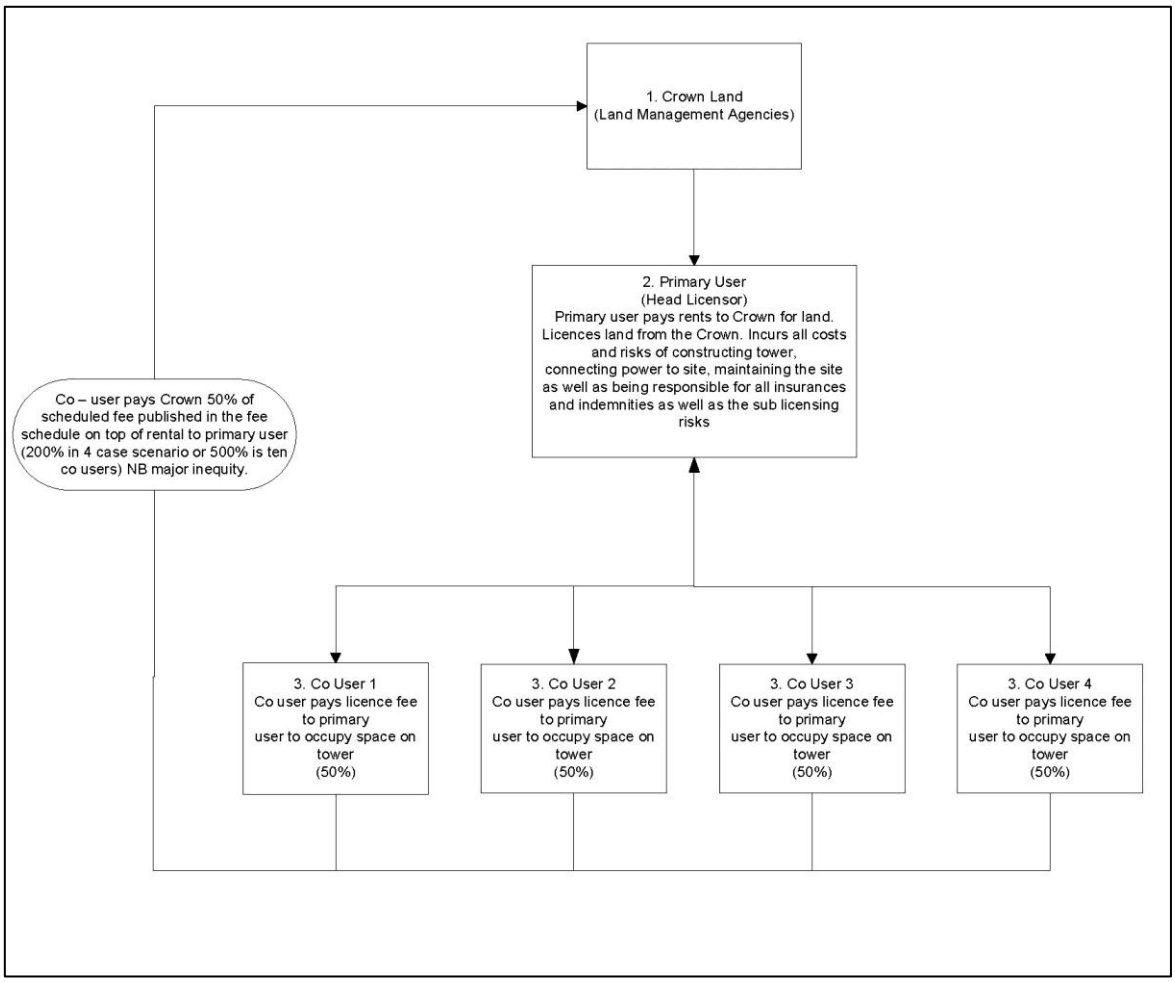
In forming our view as to how rentals for communication facilities located on Crown land may be determined, we have reviewed the current lease structure since its implementation after the 2005 review as well as identified other issues of concern. We have then provided our recommendation as to how rentals for communication sites on Crown land may be determined.

[32] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 20
[33] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 22

4.02 Current Lease Structure

4.02.01 Current Structure

A brief overview of the current lease structure is illustrated hereunder in the following flow-chart:-



From the flow chart illustrated above, the Primary User (Head Licensor) will lease land from the relevant land management authority (Crown Land) in order to erect a communication tower and emit frequencies relative to the primary users operations.

Co-Users (Sub-Licensee) may then co-locate on the communication tower in which a rental is paid directly to the Primary User for use of their facility. The co-user is also charged a co-user rental by the relevant land management authorities which are separate and in addition to any negotiated rental paid to the tower owner (Primary User).

We are of the opinion that the Primary User (Head Licensor) should pay a rental to the Crown only and that an additional rental to the Crown should not be levied upon a co-user (Sub-Licensee). In the wider real estate market, it is only the Head Lessee (in this instance the Primary User) who pays a rental to the lessor and not the sub-lessee (in this case the Co-User). The relevant land management

agencies are essentially "double-dipping" by enforcing that rentals are to be paid by both the Primary User and Co-User. This is further demonstrated in the example we have provided below:

A lessee (head lessee) rents a site from the crown within the Sydney CBD in order to construct a 10 level commercial office building. On completion, the head lessee leases the office accommodation to various tenants (sub lessee's). The sub-lessee's are only liable to pay a rental to the head lessee for the purpose of occupying a component of the office accommodation and are not required to pay a separate and additional rental to the Crown. The Crown is only concerned with and entitled to the rental received from the head lessee.

Furthermore, the Primary User (Head Lessee) incurs all the costs and risks associated with erecting a communications tower including obtaining relevant approvals, connecting power to the site, maintaining the site, being responsible for all insurances and indemnities as well sub licensing risks.

Bearing in mind the above risks burdened by the Primary User, any returns or profits resulting from co-users occupying space on the tower are the reward of the Primary Users risk in erecting, operating, maintaining and leasing the tower. It is also important to note that the ability of a communication provider to sub-locate onto a communication tower is solely due to the Primary Users infrastructure erected upon the site. Therefore, it is considered unconscionable for the Crown to charge additional co-user rentals given the Crown does not bear any of the risks associated in being able to generate potential co-user income and has not contributed to the Primary User's initial capital investment and ongoing maintenance costs.

4.02.02 Other Issues

Other issues which we have identified are as hereunder:-

- The fee schedule adopted to determine the rental for low-value sites does not appear to be transparent or provide any details/evidence as to how fee's have been determined for each user in each location category. The Terms of Reference specifically instructs IPART to consider "*the government's preference for a fee schedule that is as simple, transparent and cost reflective as practicable*". Whilst this approach may allow for low administrative costs and provides rentals for sites in an efficient manner, there is a distinct lack of transparency given the lack of published market based data used to determine the fee schedule.

- The fee schedule provides for nine (9) different user categories, each of which "*derive different benefits from a site and have a varying willingness and/or ability to pay*"[34]. We are of the opinion that a rental should not be based on the user's 'ability' or 'willingness' to pay, however, should instead be determined upon market based rents and having regard to supply and demand for similar available sites as per the wider real estate market.

- IPART is silent on whether or not the "rentals" within the published fee schedule are reflective of rentals for unimproved land or for established communication sites i.e. sites with established communication infrastructure erected upon them. Given the relevant land management agencies do not own the communication infrastructure and do not bear the associated construction, ongoing maintenance and leasing risks associated with such infrastructure, we are of the opinion the rentals used to determine the published fee schedule must be based on

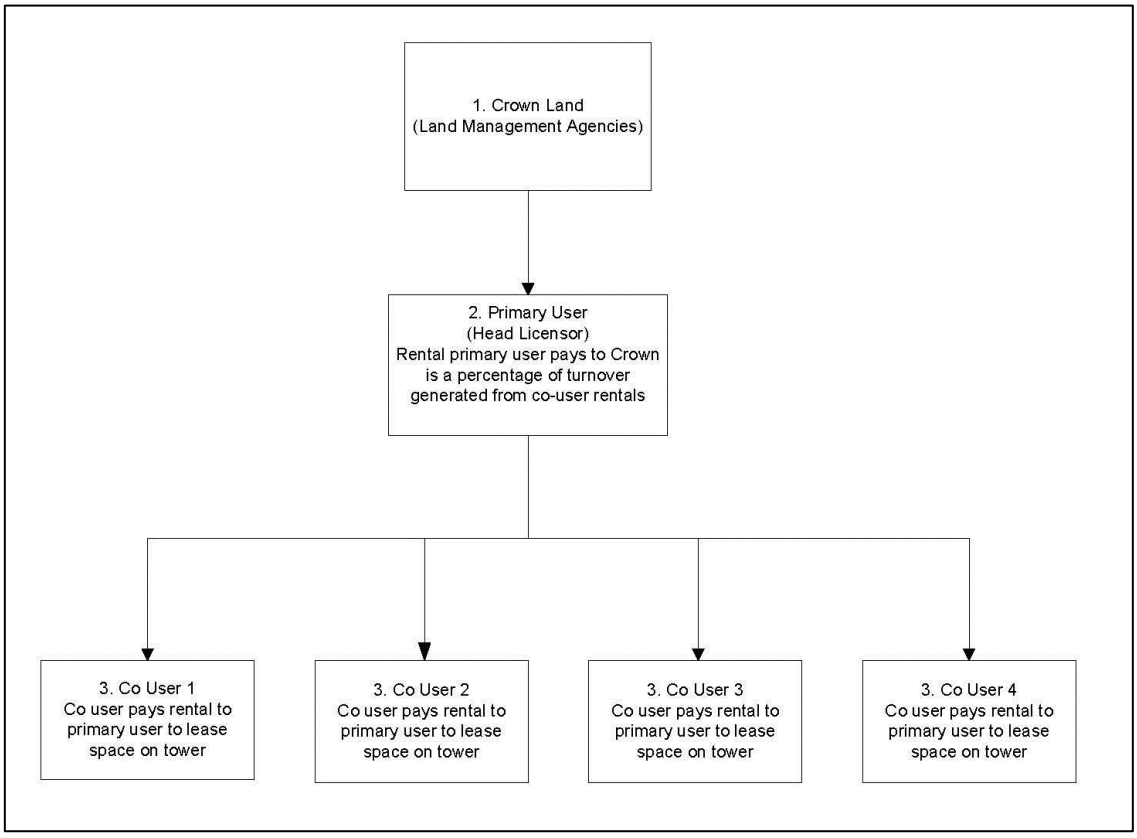
[34] Review of Rental Arrangements for communication towers on Crown Land – Issues Paper dated December 2012 – Page 22

rentals for the unimproved land component only and should not have regard to rentals of established communication sites.

- It is apparent there is a strong focus on reducing the administrative costs associated with the establishment of rentals as per the Terms of Reference. The establishment of rentals for all types of property involves some form of negotiation between the lessee and the lessor regardless of the amount of rental being determined. Administration costs in establishing a market rental are a commercial reality and are borne by a majority, if not all participants in the property market. Once a rental has been established, we are of the opinion that the maintenance of this rental, in particular for a relatively small parcel of land within a Crown land site, would not impose a significant administrative burden as the head lessee or primary user is responsible for the maintenance and up-keep of the site.

4.02.03 Proposed Lease Structure

In considering a proposed method of determining rentals for communication facilities on Crown land, we have had regard to a number of methods which are accepted in the wider real estate market. We are of the opinion a percentage of turnover approach is the most appropriate method to determine rentals for all (both low-value sites and high/strategic value sites) communication sites situated on Crown land. Our recommended approach has been illustrated in the flow chart hereunder:-



From the flow chart illustrated above, the Primary User (Head Licensor) will lease land from the relevant land management authority (Crown Land) in order to erect a communication tower and

emit frequencies relative to the primary users operations. Co-Users may then co-locate on the communication tower in which a rental is paid directly to the Primary User for use of their facility. In turn, the primary user's rental to the Crown is a percentage of the total rental received by the Primary User from the Co-users which have co-located on their facility.

Under this approach, both Primary Users and Co-Users will not be charged rentals based on a non-transparent fee schedule. A Co-User will be able to directly negotiate a rental with the Primary User in order to co-locate on their communication tower and will not be liable to pay an additional fee to the Crown. This will essentially create a market place as there will be active co-users seeking to co-locate on communication towers which in turn will help establish market rentals.

Furthermore, we are of the opinion that once an established market place for co-users has been established, the market rentals for co-users will evolve or re-weight themselves from the current amount paid by a co-user to a primary user to reflect the fact that they would no longer be paying a fee to the Crown which bypasses the Head Licensor. In addition to this, the administrative burden on the respective land management agencies is kept at a minimum as their primary function will be the collection of rental and not establishing market rentals.

As there are no directly comparable Crown lease agreements for communication sites in which a ground rental is based on a percentage of turnover, we have had regard to the following surrogates which may assist in providing an appropriate percentage to which the Crown may be entitled to:

- Government/Crown land lease agreements within the Sydney CBD in which the percentage of gross receipts (rent or turnover) payable by the Head Lessee is in the order of 7% to 8%;

- Supermarket or large department store turnover clauses which generally range between 2% and 4% of turnover depending on the turnover thresholds detailed within their respective lease agreements. Furthermore, we note turnover clauses for specialty stores generally range between 4% and 8% depending on the same;

- The percentage of gross revenue rates adopted by Transport Roads & Maritime Services for commercial marina berths. In determining a rental for commercial marina berths on or over Roads and Maritime Services land, the percentage of Gross Revenue equates to: 8% for up to $750,000 gross revenue, increasing linearly at a rate of 0.1% for each additional $100,000 of Gross Revenue, up to $3,750,000 to a maximum of 11% of Gross Revenue.

  A number of other percentage of gross revenue rates for other income generating activities within a commercial marina lease aside from berthing have also been provided and include but are not limited to: 20% of gross sublessee rentals, 10% of gross retail revenue, 20% of

market rental for accommodation, 2% of gross sales for fuel, 5% of gross revenue for boat repairs, travel lift and tender service, 5% of gross revenue or market valuation for maritime industrial, and 2.5% to 5% of gross revenue from a registered club; and

- The rates of return detailed within the Maritime Commercial Lease Policy effective as at September 2009 which are as hereunder:-

Category of Use	Indicative Duration	Rental Methodology
Commercial Marina	25 Years	Percentage of Revenue
Maritime Industrial	20 Years	Market Valuation and/or market rate and/or percentage of revenue
Aquaculture Leases	25 years	Fixed rate per square metre: Rent of $3.50/m² of useable land; or $1.50/m² if site does not have water and road access.
Registered Club	25 years	2.5% - 5% of revenue (except for commercial marina operations)
Retail	10 or 20 years	Percentage of revenue, and/or market valuation, and/or market rate
Utilities	n/a	Value agreed between the parties
Public Access/ Amateur Club	5 Years	$400 per year (in 2007) plus CPI

Source: Commercial Lease Policy prepared by Transport Roads and Maritime Services.

The scenario's detailed above provide an indication as to the percentage of turnover rates which are accepted within the wider real estate market. In particular, we draw your attention to the rates adopted by Transport Roads & Maritime Services for commercial marina berths. Given these rates have been adopted by a New South Wales government department under a similar process with the aim of *"improving consistency, certainty and transparency in commercial marina lease negotiations"*[35], we are of the opinion a similar approach should be given heavy consideration by IPART and the relevant land management authorities as the current Terms of Reference provided to IPART by the NSW premier states *"the governments preference for a fee schedule that is simple, transparent, and cost reflective as practicable"*.

Notwithstanding this, we note that the use of commercial marinas are largely recreational and given the scarce location of potential marina sites, there is a limited opportunity to build new commercial marina facilities. Furthermore, the 'high-value' location of most commercial marina facilities (generally situated on prime waterfront land) compared to the location of communication towers on Crown land which are largely in remote/rural locations and are not scarce in supply, gives rise to the high levels of percentage turnover to the government/Crown and must not be considered in the context of this review.

Bearing in mind the above, we are of the opinion a reasonable percentage of turnover range for communication sites situated upon Crown land is in the order of 2.50% to 5.00%. We are of the opinion these rates are reflective of the fact that a majority of Crown land sites administered by the relevant land management authorities are located in remote/rural locations and are generally environmentally sensitive which in turn may result in a low economic return from the land.

[35] Commercial Marina Rental Procedure – RMS Core Business Policy Page 1

5.0 OUR CONCLUSION

As stated previously, it is evident that there are a number of flaws and inequities in how rentals are determined and charged for communication sites on Crown land compared to communication sites on privately owned land and the wider commercial real estate market.

The establishment of a "fee schedule" for low-value sites and the current process in which co-users are also charged "rentals" by the relevant land management authorities in addition to the rentals paid to a Primary User, appears to contravene standard head letting and sub-letting practice.

We are of the opinion that the Primary User (Head Licensor) should pay a rental to the Crown only and that an additional rental to the Crown should not be levied upon a co-user (Sub-Licensee). Given the primary user has made the capital investment in erecting a communication tower upon the site and bears all the associated risks, it is considered unconscionable for the Crown to essentially "double-dip" and charge additional co-user rentals on top of rentals charged to primary users.

It is evident that IPART have not considered the associated risks to the primary user and have essentially levied a tax upon the industry given the lack of transparency associated with the published fee schedule and additional "rental" levied upon co-users. Furthermore, as primary users and co-users are not subject to a non-transparent fee schedule or co-user "rentals" should a communication facility be erected on privately owned land, we are of the opinion this will discourage investment upon Crown land.

We note there is also a lack of transparency in the published fee schedule adopted to determine the rentals for low value sites as well as a lack of market based assessments/evidence to support the fees adopted within the fee schedule.

In concluding, we are of the opinion a percentage of turnover approach is a far more equitable and transparent method to determine rentals for all (both low-value sites and high/strategic value sites) communication sites situated on Crown land.

Under this approach, both Primary Users and Co-Users will not be charged rentals based on a non-transparent fee schedule and both users will have the ability to negotiate market rentals. This will essentially create a market place as there will be active co-users seeking to co-locate on communication towers which in turn will help establish market rentals. The administrative burden on the respective land management agencies will also be kept at a minimum as their primary function will be the collection of rental and not establishing market rentals.

6.0 CONSULTANTS SIGNATURES

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