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Review of communications towers on Crown land
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

Submitted electronically

Dear Sir/Madam

Review of rental arrangements for communication towers on Crown land

Please find enclosed a submission from Broadcast Australia in response to the *Review of rental arrangements for communications towers on Crown land – Other industries – Issues Paper, December 2012.*

Thank you for the opportunity to provide comments on this report. Should you have any questions relating to our submission, please don't hesitate to contact me on (02) 8113 4602 or email graeme.barclay@broadcastaustralia.com.au or Gary Wallis on (02) 8113 4672 or email gary.wallis@broadcastaustralia.com.au .

Yours faithfully

Graeme Barclay
Group Chief Executive Officer

Broadcast Australia's Submission to IPART

Review of rental arrangements for communication towers on Crown land

February 2013

Broadcast Australia (BA) welcomes the opportunity to respond to the Independent Pricing and Regulatory Tribunal (**IPART**) *Review of rental arrangements for communications towers on Crown Land, Other industries – Issues Paper, December 2012* (the **Review**).

BA owns and operates the most extensive terrestrial broadcast transmission networks in Australia and acts as a "neutral host" for a range of customers across a range of technologies. BA manages transmission services for radio and television (analogue and digital) broadcasters and offers site sharing, co-hosting and infrastructure services to the telecommunications, emergency services and broadcasting industries.

BA's network covers over 580 transmission sites located across Australia, providing opportunities for sharing in metropolitan, regional and remote locations. BA has a presence at over 140 sites in New South Wales (NSW). BA is the controller of 20 sites situated on Crown land. BA's relationships with the relevant land management agencies are as follows:

- 15 sites with the Crown Lands Division of the Department of Primary Industries, Catchment and Lands (the **CLD**);
- 4 sites with the National Parks and Wildlife Services of the Office of Environment and Heritage; and
- 1 site with Forestry NSW.

In 2005 IPART released its final report titled *Review of Rental Arrangements for Crown Land Communication Tower Sites (October 2005)* (the **2005 Review**). BA disagrees with IPART on key features of the scheme that has since been implemented by land management agencies, namely the concept of high value sites and the related issue of "strategic value", and the imposition of co-user fees. BA maintains that the only appropriate methodology for determining rentals is consideration of the land's unimproved value and an agreed formula to derive an appropriate yield. This position is consistent with the provisions of the *Crown Lands Act 1989* (NSW) (the **Crown Lands Act**).

Notwithstanding the foregoing, BA recognises that the scheme that has now been implemented forms the contractual basis of many agreements relating to the use of Crown land. BA notes that the Premier's Terms of Reference request that IPART review the fee schedule published in the 2005 Review and to ensure that it reflects fair market-based commercial returns. Besides establishing a basis upon which new arrangements applying to the use of Crown land will be determined, the obvious other purpose for reviewing the fee schedule is to undertake a periodic review of rentals currently being paid under existing agreements.

IPART must therefore remain mindful of the potential for the Review to unsettle existing commercial arrangements. BA is particularly concerned that the Review does not change the basis upon which existing tenure agreements have been executed (for instance through changes to categories and/or definitions of users). To the extent that IPART proposes changes to these aspects of the scheme, serious consideration will need to be given to how they are implemented. It is critical that this Review does not adversely affect existing and future investment in communications infrastructure at sites on Crown land.

With respect to the discussion of communications sector specific legislation summarised in section 2.4.2, please note that the *National Transmission Network Sale Act 1998* (Cth) also applies to sites situated on Crown land. This Act privatised the national transmission network and these assets form the majority of

BA's network today. There are provisions under this legislation that oblige BA to provide access to facilities for the provision of broadcast services on a regulated cost basis.

BA looks forward to the release of the consultant's report and participating in the public roundtable discussions scheduled for March 2013.

BA makes the following submissions with respect to the questions that IPART has raised.

IPART's ISSUES

Question 1

What has driven the increase in the number of sites, leases or licences since 2005? Will the demand for sites, leases or licences continue to increase over the next 5 years?

BA has not established a new site on Crown land for many years, and certainly not since 2006. In fact, BA has decreased its use of sites situated on Crown land due to analogue television services being switched off.

BA foresees reduced demand for sites on Crown lands in the future from broadcasters due to technology changes placing pressure on broadcasters and service providers to cut costs in order to deliver services across multiple platforms (free to air television, internet television, pay to view etc.).

Since 2005 BA has had a policy of not establishing new sites on Crown land where alternatives exist. This is on account of the increased cost associated with the use of such sites due to co-user fees and the uncertainty that exists with respect to the quantum of these fees in the future. BA is aware that other organisations in the broadcast industry share these views and are actively reviewing the disposition of their infrastructure to decrease their reliance on sites situated on Crown land.

In view of the above, BA agrees with IPART's conclusions that the increase in revenue and licences associated with the use of sites situated on Crown land is being driven by the introduction of licences for occupants already using 3rd party infrastructure. As such, BA does not believe that the increase in the number of leases and licences represents an increased market demand for the use of Crown land for communications sites and the quoted figures may be misleading.

Question 2

Do you agree with IPART's proposed principles for this review? Are there other factors IPART should consider?

BA believes that the principles that IPART has proposed are inappropriate in so far as they relate to land administered under the Crown Lands Act. In our opinion, these principles exceed what can lawfully be taken account of under that Act.

Based upon the 2005 Review, the then government implemented the majority of the recommendations of that report. Recommendation 16 was that licences established under the IPART fee regime "should provide for rentals to be updated by applying the most recent published fee schedule"1. BA's subsequent tenure negotiations with Land and Property Management (now CLD) have taken that recommendation into account.

The clear intention of the terms of reference and the timing of the review IPART has been asked to undertake is to review the fee schedule so that rentals under licences implemented by CLD (and presumably the other land management agencies) since 2006 can be updated. BA therefore asks that IPART remain mindful of this requirement.

BA has undertaken a review of the relevant legislation that applies to the Crown land in NSW. BA could find no guiding principles relevant to the use of Crown land for communications purposes under the

[1] Page 5 of the *Review of Rental Arrangements for Crown Land Communication Tower Sites (October 2005).*

National Parks and Wildlife Act 1974 (NSW) and the *Forestry Act 1916* (NSW)[2]. It is clear however that for tenure agreements made under Section 34A of the Crown Lands Act, the only principles that are relevant to a review of rentals paid for the use of Crown land are those set out in Section 143 of that Act. These are as follows[3]:

> *(a) the rent shall be the market rent for the land comprised in the lease, licence or enclosure permit having regard to any restrictions, conditions or terms to which it is subject,*
>
> *(b) any improvements on the land which were made by the holder, or are owned or in the course of being purchased from the Crown by the holder, shall be disregarded,*
>
> *(c) regard may be had to any additional value which, because of the lease, licence or enclosure permit, has accrued, or may reasonably be expected to accrue, to other land held by the holder,*
>
> *(d) regard may be had to the duration of the time for which the rent determined will be payable.*

Given the apparent intention to use IPART's review to re-determine rents payable for the use of Crown land, BA believes that IPART should confine itself strictly to these principles. BA's view is that these principles are adequate for IPART's purposes with respect to all Crown land the subject of this review.

BA makes the following specific comments in relation to the principles that IPART has outlined in the Review.

Market return: BA notes that IPART has set itself the task of taking account of the terms and conditions of use that apply to the use of Crown land. It is BA's experience that these vary markedly between the 3 agencies that administer Crown land. BA questions how IPART can successfully incorporate a consideration of specific terms and conditions in a general review. Also, BA observes that IPART should consider market return in the context of the vacant unimproved land that is being occupied.

Administrative efficiency: BA agrees with the general principles of administrative efficiency and cost effectiveness, however these are not considerations applicable under the Crown Lands Act. Cost effectiveness should also not be confused with cost recovery. BA does not consider it appropriate that cost recovery be a factor in determining rentals.

Transparency: BA agrees that decisions made with respect to rentals should be easily understood.

Consistent: Consistent fees across land agencies are only appropriate if the principles applicable under the Crown Lands Act are applied to all Crown land. For sites subject to the Crown Lands Act, the provisions of section 143 are the only relevant considerations.

Question 3

Does the current definition of a strategic site adequately identify sites that have strategic value? What are the characteristics of a strategic site that should be included in the definition? Please provide examples of sites that have strategic value but that do not meet the current definition of a strategic site.

[2] BA did not review the *Western Lands Act 1901* as it does not apply to any sites that BA has established.
[3] Please refer to subsection (1), paragraph (a) to (d).

The concept of "strategic value" was used in the 2005 Review to identify "high value sites". High value sites were by definition existing sites and IPART chose to differentiate these from greenfield sites, where the published fee schedule would apply, so that infrastructure owners and land management agencies could negotiate separately on rents.[4]

The following is IPART's original attempt to define strategic sites[5]:

> *For existing sites, the following criteria should be used to identify high-value sites for which rentals should be determined through negotiation:*
>
> - *sites with more than 8 users, or*
> - *sites where the total current annual rental for the site (being the aggregate of rental to the primary user and of any co-user fees charged to co-users of that site) exceeds the highest fee for any single user in the published fee schedule.*

Where a site exceeds the above thresholds, IPART recommended that infrastructure owners and land management agencies should have regard to the following[6]:

- *the factors that determine the strategic value of the site (such the location of the site, its proximity to population centres, the likely coverage area, the availability of alternative sites)*
- *recent market rentals agreed for similar sites*
- *the potential for co-use*
- *relevant land valuations*
- *any additional requirements that the land management agency is required to take into account under relevant legislation (for example, principles in section 143(1) Crown Lands Act 1989).*

BA does not accept the concept of strategic value and considers it inappropriate to distinguish between existing sites and greenfield sites when determining rental for the use of Crown land. BA also believes that the concept of high value sites is contrary to the provisions of section 143 of the Crown Lands Act.

Strategic value as conceived by IPART confuses the value of Crown land, for which the public is entitled to a fair and equitable return, with the value derived from the investment made on that land by others, to which there is no rightful claim. BA has always maintained that the only appropriate methodology for determining rentals is consideration of the land's unimproved value and an agreed formula to derive an appropriate yield.

The concept of high value sites goes further than a fair and equitable return for the value of Crown land by being based on the extent to which existing sites are utilised by others because of the infrastructure investment at that location. The concept of strategic value can therefore give rise to perverse outcomes which render it unsuitable for determining rentals for the use of public assets. A site may have many users because of the investment made by the infrastructure owner, not because the land on which it is situated possesses strategic value. For instance, BA sites have many users due to the requirement for broadcasters to be co-located, which is a characteristic of ACMA's licencing regime. Hypothetically, BA could pay a higher rent than a user of land immediately adjacent to BA's site simply because they had developed their site to accommodate only a small lightweight structure. The same would be the case for a user who wishes to establish a new tower on a greenfield site adjacent to a BA site. In these examples, the land on which both facilities are located has exactly the same characteristics and it is

[4] P.22 of the 2005 Review.
[5] P.24 of the 2005 Review.
[6] These considerations were incorporated into Recommendation 5 on p.25 of the 2005 Review.

therefore inappropriate that different parties should pay different rents for the same tenure over unimproved land.

It is difficult not to conclude that the concept of strategic value is a mechanism to derive a return from the investment that has been made on Crown land by others. To this extent, and with reference to section 143(b) of the Crown Lands Act where it is clearly stated that improvements on the land owned by 3rd parties are to be ignored, the concept of strategic value should not be considered in determining rent for the use of Crown land.

Question 4

What are the costs of negotiating rental agreements? Do the benefits of rental rates agreed through a negotiation process outweigh the costs?

BA's experience is that there is a direct relationship between time and costs when negotiating tenure. In the majority of BA's negotiations (and not just with land management agencies in NSW) the greatest amount of time is incurred in reaching agreement on the terms of use under the lease/licence, not with negotiations pertaining to the rental paid.

With respect to the implementation of the IPART scheme post 2005, it is our view that the costs and time taken to negotiate agreements for the use of Crown land have been excessive. A simpler, fairer and more streamlined approach is required.

Question 5

Should the definition of strategic sites be revisited to reduce the number of sites that are subject to negotiations? If so, should an additional category be introduced in the fee schedule to capture the majority of strategic sites?

BA does not consider the concept of strategic value to be a valid consideration for determining rents for the use of Crown land (see response to question 3). It would therefore be inappropriate for an additional category to be included in the fee schedule.

Question 6

What changes, if any, would you suggest to the factors to consider when negotiating strategic sites as recommended by IPART in 2005.

BA does not consider the concept of strategic value to be a valid consideration for determining rents for the use of Crown land (see response to question 3 and 5).

Question 7

What is the current market evidence on rentals by location? Does the market evidence still indicate that in general, higher rentals are charged for sites closer to metropolitan areas or population centres than regional and other areas?

BA's view is that higher rentals are charged in urban areas for communications sites than non-urban land due to the higher land values for the former.

Question 8

What are the implementation issues with applying the definition of high, medium and low location categories as per the 2005 Review? What are implementation issues specifically associated with the definition of medium locations applied by Parks and Wildlife and Catchments and Lands?

BA maintains the view that the only fair and sensible approach to determining rentals for the use of Crown land is consideration of the unimproved value of the land and an agreed formula to derive an appropriate yield. This approach is consistent with the principles set out in section 143(1) of the Crown Lands Act. Therefore, whilst BA does not strictly agree with the approach that was adopted by Government and that IPART has been asked to review, BA does see some merit in a tariffing regime that classifies Crown land in a way that reflects its underlying value. The criteria underpinning the classification of locations must be linked to land values and be fair and simple to administer.

BA believes that IPART should give greater consideration to this aspect of the IPART fee regime review and less to the concept of strategic value. Categorisation of land according to its unimproved value, and determining rents accordingly will lead to fairer outcomes for all stakeholders.

Any categorisation of land based on categories must be consistently applied by all land management agencies.

Question 9

Are there alternative definitions for location categories that are better supported by market evidence or are simpler to administer? What would market evidence support as thresholds for high, medium and low location categories?

BA encourages IPART to consider a simpler scheme whereby land is either "urban" or "non-urban". Urban land would be land that is within any built up area. Typically this would be residential, commercial, industrial land. Non-urban would be any other land. For urban land, this could be further categories by land within metropolitan or non-metropolitan areas.

BA believes that the methodology employed under the *Telecommunications (Low-impact Facilities) Determination 1997* (the **Low Impact Determination**) for determining the principle designated use of an area provides a clear and readily understood system that could be easily adapted for use in categorising sites. The principle designated use of a site is determined by land use planning zones. The relevant provisions of the Low Impact Determination are sections 1.4, and 2.1 – 2.4.

Where the principle purpose for zoning is to permit land to be used for residential, commercial or industrial land uses, then the principle designated use is that zoning. Where an area is described as having 2 or more uses in terms that show that 1 of these is predominant, than that use is the principle designated use. Where there is no suggestion of predominance, the principle designated use will be the highest use based on the following ranking: Residential, commercial, industrial and rural. [7] Consideration must also be given to surrounding zonings. These will have a bearing on the

[7] Under the Low Impact Determination, a category exists for land considered environmentally significant. For the purposes of defining land as "urban" or "non-urban", the definition of environmentally significant would be disregarded and the classification of the land would default to the principal designated use that would otherwise apply.

categorisation of sites in instances where the zoning is for a special use that does not neatly fall within an established category and for the zonings of small sites where the predominant use in the area surrounding the site is different. In both instances, if the principle designated use of the areas surrounding such sites was residential, the sites themselves would also be considered residential or whatever the predominant designated use of the surrounding areas may be.

Under the simplified categories proposed by BA, land would be considered urban where the principal designated use as defined under the Low Impact Determination was "residential", "commercial" or "industrial". Any other land would be non-urban. To distinguish between metropolitan and non-metropolitan land, IPART could use the definitions proposed in the 2005 Review. The greater metropolitan areas of Sydney, Central Coast, Newcastle and Wollongong would be "metropolitan". All other urban land would be "non-metropolitan".

Generally speaking, urban land is more valuable than non-urban land because the zoning permits it to be used for higher purposes. A classification system that is based on zoning therefore has merit in that it has a link to unimproved land value. Such a classification system would permit IPART to sensibly differentiate between sites on a meaningful basis and therefore determine rentals based broadly, but appropriately and fairly on the unimproved value of the land in each particular situation (for which data is readily available).

Question 10

Are there implementation issues with the current categories of users or occupancies in general?

BA maintains that the only appropriate methodology for determining rentals is consideration of the unimproved value and an agreed formula to derive an appropriate yield. Accordingly it is inappropriate that different rates apply to different organisation for the use of the same Crown land.

The government has other mechanisms that it can employ (grants and budget reallocations) to recognise social benefits arising from the use of communications sites by budget funded agencies and community organisations. BA's preference is that these be utilised in order that a simple and transparent fee regime based on the unimproved value of the land can be consistently implemented.

Question 11

Can categories of users be reduced, for example, into the 3 broad categories of commercial enterprises (including government businesses), budget funded sector and community based organisations? What user categories are used by other communications tower sites?

As outlined in Question 10, BA does not believe it is appropriate to determine rentals for Crown land on the basis of how communications sites are used. As such, BA is opposed to any categorisation of users.

BA is also concerned that any re-categorisation of users in the fee schedule will change the basis upon which existing tenure agreements for the use of Crown land have been established. Substantial investments have been made, and will continue to be made, in communications infrastructure at sites on Crown land. If a re-categorisation of users under the IPART regime were to undermine confidence in the basis upon which existing tenure had been taken, then it would complicate future investment decisions by increasing the risk associated with Crown land sites.

If a change is proposed for the categories, a grandfathering of existing arrangements would appear to be a reasonable mechanism to implement any new categorisation.

Question 12

On what basis would we calculate the amount of community service obligation for government businesses or concessions for budget funded and community based organisations.

As noted in question 10, the Government has other mechanisms that it can employ to reflect the public benefit it sees in the use of communications sites by government business and community based organisations. These should be used rather than complicating the way in which rents for Crown land are determined.

Question 13

What is the relevance of the development of new technologies for the user categories that were defined in the 2005 review? What changes to user categories would better accommodate changing technologies?

BA has no further comment to add beyond the responses given to questions 11 and 12.

Question 14

Should the National Broadband Network be added as an additional user category or can it be accommodated within the current user categories? Why?

Please refer to BA's responses to questions 11, 12 and 13. BA has no further comment to make.

Question 15

What are implementation issues from applying the 2005 fee structure for primary users, infrastructure providers and co-users?

As outlined elsewhere in this submission, BA's view is that the only appropriate basis for determining rents for the use of Crown land is the unimproved value and an agreed formula to derive an appropriate yield. For these reasons, BA does not believe that there is a basis for imposing additional rents on any other party for the use of the same public asset.

BA's view is also that co-user fees are unnecessary to provide agencies with a fair market rental. If the rental charged to the leaseholder reflects fair market value for the use of the public asset, then there is no economic or commercial justification for additional rents to be paid by other parties for the use of that same asset. Co-user fees also discourage the sharing of infrastructure. As BA has noted elsewhere, BA has a policy of avoiding sites situated on Crown land due to the additional cost imposed by co-user fees as it is not economic.

Notwithstanding the foregoing, BA concedes that it would be impractical to "unwind" the significant number of co-user arrangements that have been imposed on users of sites on Crown land since 2005. The existing classifications for primary users, infrastructure providers and co-users are now an integral aspect of the scheme and BA cannot see how these would sensibly be changed.

BA would object to the removal of the category of infrastructure provider if that involved the loss of the discount that presently applies (being 70% of the highest category user at the site). Loss of the discount would be an unjustified windfall gain to land management agencies. As it stands, land management agencies already collect rent from multiple parties for the same asset at sites owned by infrastructure providers.

The more appropriate issue for IPART to address is the windfall gain that land management agencies already derive from co-users at sites where they continue to collect the whole of the rent levied against the original primary user. Under the scheme, once a co-user shares a site previously used exclusively by a primary user, the rent for the primary user should be reduced to at least the discount applied to infrastructure providers.

Question 16

What is the current market evidence on discounts being applied to infrastructure providers and co-users?

The concept of co-user fees imposed by land management agencies in NSW is unprecedented. BA is not aware of similar schemes existing prior to its introduction. Since applied in NSW, a similar scheme has been introduced by the Department of Environment and Resource Management in Queensland (**DERM**) for sites administered by the Queensland Parks and Wildlife Service[8]. Other than for relatively minor differences in rents for primary users, the DERM scheme is virtually the same as that which exists in NSW, including the discounts that apply to infrastructure providers and co-users.

Question 17

What are the reasons for continuing to apply a discount to infrastructure providers and co-users? What would be the consequences of lowering or removing the discount for infrastructure providers and co-users from the current fee schedule?

Removal of the discount for infrastructure providers and co-users would lead to an unjustified windfall gain to land management agencies for the reasons explained in Question 15. IPART's focus should be revising the existing scheme to address the unjustified returns accruing to land management agencies where they collect an undiscounted rent from primary users as well as additional rent from co-users.

Question 18

Should rental rates for Small Country Automatic Exchanges (SCAX) sites come under the fee schedule for standard sites? If so, on what basis should we determine appropriate rental rates? Should SCAX's be considered as a separate category in the fee schedule?

BA has no comment to make.

[8] Department of Environment and Resource Management, Operational Policy – Development and Infrastructure: Communications facilities on QPWS managed areas.