

12th February 2013

Review of Communications Towers on Crown Land
Independent Pricing and Regulatory Tribunal
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Dear Sir,

IPART Rentals Review – Telecommunications Facilities on Crown Lands

The MCF is a Division of the Australian Mobile Telecommunications Association (AMTA). AMTA is the peak industry body representing Australia's mobile telecommunications industry. MCF Members include Telstra, Optus, and VHA (Vodafone Hutchison Australia) being the three mobile Carriers currently deploying mobile network facilities in Australia.

The three mobile network Carriers operate networks comprising more than 18000 facilities across Australia, servicing the needs of more than 30 million mobile telecommunications subscriptions.¹ In addition to their existing networks they undertake a significant deployment program of new mobile network facilities across Australia each year. The mobile Carriers continue to make a considerable investment in network infrastructure to cater for the expanded network coverage required to deliver advanced mobile telecommunication services, in particular to mobile broadband subscribers.

Mobile broadband is in high demand throughout the economy with growth in traffic from advanced smartphones expected to increase 12-fold over the next five years² This has created a requirement for upgraded mobile network infrastructure at significant cost to the Carriers and a need to access facilities on Federal, State and Local Government land to facilitate Carriers' deployments in order to meet consumer expectations.

There is evidence of significant economic productivity benefits arising from investment in mobile network infrastructure and use of mobile telecommunication services. A 2010 Access Economics report commissioned by AMTA found that the industry contributed \$17.4 billion to

¹ ACMA, Communications Report 2011-12

² [Ericsson "Traffic and Market Data Report"](#) Nov 7, 2011

the Australian economy in 2008-09.³ This includes \$6.7 billion in direct contribution and \$10.7 billion in indirect contribution.

A recent industry report found that convergence and the availability of high-speed broadband networks (fixed and mobile) is driving investment in the media and communications sector with investment levels predicted to reach \$6.4 billion by 2014.⁴

The mobile telecommunications industry is thus a significant contributor to, and stakeholder in, the State of NSW's economic and social productivity and is therefore well placed to comment on the relative costs and benefits of establishing communications facilities on Crown land in NSW, and the MCF welcomes the opportunity to contribute to your review regarding the rentals levied by the NSW Government for the establishment of such facilities.

This submission seeks to address the Issues Paper published by IPART in December 2012 by way of general comments and providing specific comment on the issues raised in the paper. The information provided is a consensus view after canvassing input from our members.

1 General Comments

1.1 Discriminatory rental regime

The MCF has an overarching concern that the premise of the existing rental regime, and clearly that of any proposed new rental scheme, is for a variable rental to be applied depending upon the type of user and the perceived capacity of that user to pay the rental demanded.

Amongst other things, this is evident in the wider range in the pricing of communication tower sites for Telecommunications Carriers compared to other types of radiocommunications users (see Table 3.1 in the IPART Issues Paper). Telecommunications Carriers currently pay 5 times the lowest user category rate in High Density areas (excluding community based organisations which pay only a nominal rate), 4.17 times that rate in Medium Density areas and 5 times that rate in low density areas. This is despite the fact that the land area occupied would be similar for all users, as would the underlying land value and the purpose to which it is put. Accordingly there is no reasonable basis upon which such a wide variation in rentals could be justified.

The MCF member are of the view that such a scheme is clearly discriminatory to Carriers and therefore is in breach of the Telecommunications Act 1997, Clause 44, as it applies to licensed telecommunications Carriers such as the MCF members. Clause 44 of the Telecommunications Act 1997 provides that:

- (a) a law of a State or Territory has no effect to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;
- (b) without limiting paragraph (a), a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under a law of a State or Territory to the extent

³ Access Economics Report, *Economic Contribution of Mobile Telecommunications in Australia*, June 2010.

⁴ "Comms and Media Sector spend to grow to A\$6.4 billion by 2014:IDC" Communications Day 18 Oct 2011

to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally;

- (c) without limiting paragraph (a), a person is not required to comply with a law of a State or Territory to the extent to which the law discriminates, or would have the effect (whether direct or indirect) of discriminating, against a particular carrier, against a particular class of carriers, or against carriers generally.

Clause 44 also makes these provisions for particular eligible users, class of eligible users or eligible users generally.

One of our members, Telstra, proposes to test this proposition in legal action brought against the Department of Environment and Resource Management (DERM) in Queensland. The Department promulgated the Land Regulation 2009, with effect from 1 July 2010. That regulation introduced a rental regime that increased rentals for telecommunications Carriers well in excess of that charged to other users. In addition the assessment of the rentals departed from the assessment mechanism for all other uses.

Telstra has initiated proceedings in the Federal Court of Australia (FCA) citing the Land Regulation 2009 is discriminatory and therefore in breach of the Telecommunications Act 1997, Cl. 44. Telstra is seeking a declaration that to the extent the rental charges to telecommunications Carriers is discriminatory it is void and that the FCA should give direction to DERM on the adoption of an appropriate pricing mechanism consistent with other users.

Telstra informs the MCF that it is confident it will be successful in these proceedings. Subsequently, Telstra will be providing all Commonwealth, State and Local government agencies, including NSW government agencies, with an opportunity to review their published rental structures and adjust them accordingly to remove any discriminatory pricing towards Telstra and telecommunications Carriers in general.

1.2 Complexity of rental regime

Following the 2005 review and as detailed in the current IPART issues paper, the rental regime currently in force involves 9 user categories, 3 location categories, co-user and commercial tower owner discounts, and a further discretionary negotiable rate based on 'strategic value'. The MCF submits this is overly complex, resulting in up to 60 variable rentals not including those negotiated for 'high strategic value' sites.

Regardless of the merits of such categories (noting the MCF considers the user categories to be discriminatory as already described, and has ongoing concerns with the implementation of other category types – see later in this submission), it is clear that such a complex system of rentals cannot be conducive to the efficient management of Crown land accommodating communications facilities, and it also adds unnecessary complexity for the Carriers' own acquisition and management of facilities on Crown land.

The MCF notes the IPART's principles for this review as described in Chapter 4 of the Issues Paper:

- ensure the fee schedule reflects fair market-based commercial returns
- consider the government's preference for a fee schedule that is as simple, transparent and cost reflective as practicable.

The MCF does not consider that the current rental regime meets these criteria. In lieu of the variable rental regime currently in place and alluded to in the current IPART Issues Paper as a starting point for this review, the MCF proposes that a single user category system be applied where rentals are based solely on land values at the given location. The method of determining land value should be as objective as possible and could, for example, refer to land value as assessed by the NSW Valuer General as a point of reference.

Such a fee schedule would meet the requirement of reflecting fair market-based commercial returns as these are directly linked to land value. The proposal also meets the requirement of simplicity and transparency, particularly where an objective assessment of land value is taken as the reference point.

Without being prescriptive regarding this point, the MCF would welcome the opportunity to discuss this proposal further during the course of the IPART review.

1.3 Recommendations

1. The result of the Telstra v DERM proceedings, and any directions given, will have a material impact on IPART's own strategy regarding this rental review. It is likely that this matter will be determined in the fourth quarter of 2013, and it is therefore recommended that IPART defer finalising its report to the NSW Government until finalisation of the Telstra v DERM proceedings and the resolution of any directions given by the FCA.
2. The MCF recommends the IPART adopt a single user category rental regime based on the land value of the parcel occupied, where this is consistent with the directions provided by the FCA in the matter of Telstra v DERM

2 Specific Comments

In this section the MCF provides comments on the specific issues raised in the IPART paper. Not all the issues raised by IPART are addressed in this section, the MCF confining its comments to those issues for which it holds substantive views.

2.1 (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?

The MCF has consulted its members, who consider that the main driver of the purported increase in licences in the telecommunications sector since 2005 is as a result of a significant reconciliation of licences held by the Department of Primary Industries (DPI) but not finalised until 2009, together with existing Reserve Trust sites which DPI reclaimed (for direct licensing

purposes) from Trust bodies. While these appear as new licences they do not actually represent new sites. There has been no “surge” in Carrier tenancies on ‘new’ Crown land sites, and, with the current unfavourable rental regime imposed by the NSW agencies, Carriers have in fact favoured sites that are not situated on DPI, National Parks or Forests New South Wales administered Crown land (thereby potentially reducing the real increase in licences).

The MCF members are continually expanding the coverage and capacity of their mobile networks and further new sites will be required on Crown land where this cannot be avoided. However, with a range of joint ventures between our members enabling rationalisation of the required number of new and existing sites, any net increase in the number of telecommunications sector sites established on Crown lands as of this time is likely to be small, unless a more equitable pricing regime can be established.

2.2 (2) Do you agree with IPART’s proposed principles for this review? Are there other factors IPART should consider?

IPART nominates four principles underlying its review: market return, administrative efficiency, transparency and consistency.

For market return, IPART considers that rentals should be based on “...*the market’s willingness to pay for the site or facility, taking into account land values, terms and conditions of use*”. The MCF considers that only land values should be taken into consideration in regard to setting rates for the small parcels of often remote vacant land used for telecommunications facilities.

The MCF is of the view that neither the purpose to which a user puts the land nor the users’ capacity to pay a given rental is a valid consideration in determination of the rental.

In relation to the other principles of administrative efficiency, transparency and consistency, the MCF does not believe the current pricing regime, or any future similar pricing regime satisfies any of these principles.

The MCF draws to the attention of IPART the significant economic and social contribution of its members’ investment in network infrastructure, bringing advanced mobile telecommunications services to all the people and businesses of NSW. The MCF believes a further principle of this review should include the balancing of social and economic benefit to the State of facilitating telecommunications network deployment everywhere, including on Crown lands, against the potential return to those few select Government agencies who reap the benefits of potentially increased rentals on such facilities.

2.3 Strategic sites

(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.

(5) Should the definition of strategic sites be revisited to reduce the number of sites that would be subject to negotiation? If so, should an additional category be introduced in the fee schedule to capture the majority of strategic sites?

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

The MCF rejects the concept of any site being more 'strategic' than any other for the purposes of setting rentals beyond the inherent land value of the parcel in question.

The IPART suggests a distinction be made between sites that:

1. Have a greater number of users (currently more than 8)
2. Generate a total rental exceeding the maximum rental category in the schedule
3. Has a particularly high elevation or some other 'strategic' physical feature
4. Has potential for co-use
5. Is close to population centres

Regarding proximity to population centres, this is already taken into account in the assessment of land value, and hence would also be accounted for in setting a rental based on the assessed land value as we have already recommended.

The number of users accessing the site (or even the potential for co-use) should not be used as a rationale for increasing rentals. It is the investment in infrastructure made by the primary or initial users which may result in the site becoming attractive to other users. The size and type of tower constructed, the roads built to the site, the electricity supply delivered to the site and the optical fibre availability for back haul transmission are the strategic assets, which the Crown neither owns or controls. The land itself is not strategic and the Crown has no rationale for increasing rentals to all users on the suggestion that it is. To the contrary, if the substantial investment made by the primary user attracts further co-users to the benefit of the Crown, the MCF suggests the primary user should be offered a discount on its rental.

Given the exceedingly high rentals proposed in the highest use category for Carriers, only two Carriers need occupy the same site or tower before the rental threshold for strategic sites is achieved under the current definition. At that point any other co-locator cannot rely on the published pricing and may be required to negotiate a rental in excess of these published rentals. At the expiration of the current licences, ALL occupiers will be subject to an increased rental demand on the basis that the site is now "strategic".

The current arrangement therefore discourages Carriers from entering into co-user arrangements. The result is not consistent with a stated aim of the State Government to encourage co-location of Carriers' facilities wherever possible and thereby reduce the proliferation of base stations generally. This is also a requirement of local government. It is recommended that IPART review its position on 'strategic' sites to be more consistent with these aims.

Finally, the notion that elevation or some other physical feature of the location makes the site strategic, mistakes the current advanced nature of modern mobile telecommunications networks. With the matured networks of most Carriers, sites are generally selected to meet coverage and capacity objectives of an existing network, which does not necessarily require any "so called strategic elevated area" (and in fact often dictates lower rise facilities in order to provide microcell infill coverage). Indeed, pursued to its logical conclusion, if so-called strategic sites warrant a higher rent than would otherwise be the case, then infill sites that service a very small area and/or number of customers, and which now comprise a significant component of Carriers' deployments, would warrant a lower rent than would otherwise be the case. Additionally, all the companion sites neighbouring a given site are critical to the effective operation of the network as a whole, and so no one site can be determined to be more strategic than any other within an established network.

2.4 Location categories

(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?

(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?

(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?

As indicated previously, commercial market rentals reflect the underlying value of the land concerned. For this reason, rentals for metropolitan areas are on average higher than those of regional and other areas, reflecting both the land value and demand for occupancy.

While the current regime of location categories ought to have provided a simple prescriptive framework within which to fix rental rates, in practice this has not been the case. Government land agencies have exercised discretion to place 'Low' and 'Medium' sites into higher categories contrary to the IPART definitions. This practice continues today, despite subsequent clarification of the IPART's intent on this matter following the 2005 review.

It is the MCF's view that the previously proposed method of determining rentals based on a percentage of land value is simple and prescriptive enough to avoid further manipulation, especially if the land value as determined by the NSW Valuer General's office, removing any doubt or discretion that land agencies may seek to exercise on this point. The variation in land values will provide the desired level of variability for remote, regional and metropolitan sites within an equitable and non-discriminatory framework.

2.5 User categories

(11) Can the 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 lessors of communication tower sites?

(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?

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

The MCF has already made clear that it views the regime of user categories currently in effect and the proposed basis of this review to be inappropriate and discriminatory. The use of the land or the nature of the user (private, government or community sector) has no impact on the underlying value of the land or the rental it should return to the Crown.

The MCF members may sometimes distinguish between 'Carrier' and 'Non-Carrier' users, but this is for administrative and health and safety purposes. Rentals and charges continue to reflect only the type, volume and structural loading of the equipment deployed on the primary users' infrastructure, while ground rentals for freehold land required in association with deployment of such equipment is consistent across both types of users.

Just as land use and user type should not reflect on rentals, likewise the nature of the technology deployed by the user at the site is immaterial to the determination of rentals. Hence changes in technology are not relevant to any proposed user categories whether existing or new.

Finally, it is noted that the National Broadband Network (NBN) is a significant new user in the wireless telecommunications space. However, the nature of NBN deployment, while serving a fixed wireless user base rather than the mobile telecommunications user base of the Carriers, is in fact substantially similar. Both the nature of the infrastructure deployed and the area of land occupied will be consistent across both NBN and Carriers, as it often will be for other user types. Hence there is no justification for a new user category to accommodate NBN.

To reiterate, the MCF believes a single user category with rentals determined by the value of the land parcel occupied remains the most effective and equitable method providing a fair return to the Crown for communication facilities deployed on Crown land sites.

2.6 Infrastructure providers and co-users

(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?

It may be argued that providing a discount for co-users encourages the co-location of facilities and reduces the proliferation of radiocommunications infrastructure, the disincentive of the inequitable costs to Carriers as a result of the current discriminatory pricing scheme notwithstanding. However, if this argument is to be pursued, there should be no differentiation between an infrastructure provider and a primary user.

It may also be argued that the provision of new infrastructure acquired and built by an infrastructure provider or primary user should provide that user with some advantage. However, the necessity to provide a discount to the infrastructure provider or primary user is somewhat moot, given that the infrastructure itself attracts other users for which the primary user receives remuneration under its own arrangements with the co-users. Similarly, the Crown should not be entitled to additional rent, as a consequence of a co-location that occurs because of the investment made by the infrastructure provider or primary user. The Crown has contributed nothing but unimproved land and any increase in the rent received by the Crown should be limited to that arising from the unimproved value of the additional land required, if any.

Again, a rental based on land value of the area occupied at the site is the most equitable basis for establishing charges to all users, and further does not suggest the need for a discounting regime, thereby retaining its simplicity.

Concluding Remarks

The MCF commends this submission to the IPART review of rentals arrangements for communication towers on Crown land. We believe there are strong arguments as to why the current rental regime is inappropriate and discriminatory, and therefore support the urgent need for this review. We look forward to considering its findings when they become available, however, also note that this should not precede the findings and directions arising from Telstra's action against the Queensland Department of Environment and Resource Management (DERM). In summary:

1. The MCF strongly believes that the only equitable scheme of rental rates is one that is based only on the value of the land occupied by the user at the given site. The MCF therefore recommends the IPART adopt a single user category rental regime based on the land value of the parcel occupied, where this is consistent with the directions provided by the FCA in the matter of Telstra v DERM
2. The MCF does not believe there is any argument for defining 'strategic' or 'standard' sites and recommends that this distinction be removed from the rental scheme.
3. Consistent with (1), there is no requirement for user categories, and the distinction between location categories is adequately reflected in the rentals obtained on the basis of underlying land value. Location categories are also therefore not required.

We hope the IPART finds this submission to be a positive contribution to its inquiry. Representatives from the MCF would be pleased to discuss any matters raised in this letter with the IPART inquiry and look forward to participating in the public consultation process.

If you wish to discuss this submission or any of the matters raised within it, or require any additional information, please do not hesitate to contact me on (03) 3980 2291.

Yours sincerely,



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