Our Ref: IPART/14/8

14 August 2024

Mr Matthew Tsikrikas
Independent Pricing and Regulatory Tribunal I NSW
PO Box K35
Haymarket Post Shop
NSW 1240

Also sent by email to: [redacted]

Dear Mr Tsikrikas

DRAFT REPORT
REVIEW OF RENTS FOR COMUNICATIONS SITES ON CERTAIN LANDS OF THE CROWN
JULY 2024

Thank you for providing Indara the opportunity to comment on the Independent Pricing and Regulatory Tribunal (IPART) review of the rents for communications sites on lands administered under the *Crown Land Management Act 2016*, the *National Parks and Wildlife Act 1974* and the *Forestry Act 2012*.

The purpose of this submission is to act as a supplementary commentary to the Indara submission of March 2024 and follows the public hearing held online with IPART and various industry stakeholders on 30 July 2024.

Introduction to Indara

Indara was formed in 2022 through the integration of Axicom and Australian Tower Network (ATN).

We are a leading owner and operator of digital infrastructure. Our core business is in owning, building, operating, and managing an increasingly diverse network of critical physical and digital infrastructure. Our portfolio consists of approximately 4,650 sites across Australia (with 1800 located in NSW and 120 specifically located on Crown lands in NSW) to support our customers and meet the evolving requirements of our digital society.

Our customers include all major Mobile Network Operators (MNOs) (Vodafone/TPG, Optus and Telstra), NBN Co., various state and federal government entities including emergency service

providers and wireless broadband data service providers across a variety of asset types: towers/monopoles, rooftops, smart poles and small cells.

We encourage wireless operators to co-locate on our existing sites, helping to minimise the environmental impact of network expansion while offering Australia-wide coverage, faster deployment and lower total costs of ownership compared with building duplicate sites.

Community, government, and all areas of the telecommunications industry (both locally and globally) have long recognised the growing dependence on the critical services which telecommunications provide and there is a growing demand for ease of access to these services.

The increased importance of access to and dependence on the telecommunications industry was highlighted throughout the Australian bushfire crisis of 2019 – 2020 and the Covid-19 pandemic of 2020 – 2021 when connectivity proved essential to support the emergency services and the unprecedented number of Australians who were forced to work from home due to mandatory lock downs issued by the state and federal governments.

Key events since IPART 2013

The last adopted IPART review was in 2013, that approach to rental arrangements for communications towers on Crown lands is outdated and does not reflect the change in market conditions that have occurred over the last 11 years.

Telstra Corporation – v – Queensland [2016]

Since 2013, there has been the crucial decision of the Federal Court in the case of *Telstra Corporation v Queensland* [2016] FCA 1213 (**Telstra Case**)[1]. In that case the Federal Court examined how rents were determined under the *Land Regulation 2009* (Qld) (**Land Regulation**) for communication sites in comparison to rents paid by other commercial users of Crown land and how section 44 of Schedule 3 of the Telecommunications Act 1997 (Cth) (**Telco Act**) operated in relation to this.

Section 44 of Schedule 3 of the Telecommunications Act (section 44 of the Telco Act) specifies that:

"*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*;"

The Telstra Case addressed the application of section 44 of the Telco Act specifically in response to the rental regime of the Queensland government. The Federal Court found that the Land Regulation did discriminate against licensed telecommunications carriers (**Carriers**) in breach of section 44 as carriers were paying more than other users of Crown land and so the State law was of no effect. The

[1] Refer to Appendix B for a full copy of the transcript.
[2] Telstra Corporation v Queensland [2016] FCA 1273 [l47]

Federal Court made it clear that 'price gouging'[2] by the State government was precisely the type of conduct that section 44 of the Telco Act was designed to prevent.

Specifically, the Court determined that clause 44 "*provides protection for carriers against the effects of discriminatory laws, including protection against the imposition of discriminatory taxes, rents and charges*."[1]

Since the conclusion of the Telstra case, the Queensland government has adjusted the rents for both carriers and infrastructure providers, such as Indara, to remove the rental regime which caused both direct and indirect discrimination, in breach of section 44 of the Telco Act. We note the terms of reference (TOR) for the 2024 IPART review issued by the Minister for Lands and Property omits an overt reference to have regard to section 44 of the Telco Act, but sets out in item (c) of the TOR, that the Tribunal is to have regard to "*requirements and objectives under relevant state and federal legislation, and under any relevant state strategic plans and policies*"

It follows then that this review cannot be undertaken by IPART without reference to both:

(a) the unequivocal precedent set by the Telstra Case; and

(b) the provisions and application of section 44 of the Telco Act (as handed down in the Telstra Case).

On this basis, IPART must consider whether the rents paid on communication sites on Crown lands in NSW are higher than the rents paid by other users of Crown lands and, if they are, then IPART can have no other option but to determine that the whole of the current regime is discriminatory and in breach of section 44 of the Telco Act. This was evidenced in the 2019 IPART review. The Tribunal presented findings that rents were too high and recommended that rates be lowered, which was then rejected by the Minister, contrary to the point of instructing an independent review.

It is Indara's view that the regulatory regime currently in place in NSW for communication sites is highly discriminatory and a breach of section 44 of the Telco Act.

Currently there are different methods for determining rents for different users of Crown lands. This is evident from the rents section of the Department of Planning, Housing, and Industry (DPHI) website at www.crownland.nsw.gov.au. This page sets out the fact that there are different methodologies in place for determining rent on Crown lands, depending on the user of the land. The minimum annual rent is specified on that page as $590.00 from 31 January 2024. Whilst this is a minimum rent, Indara believes that if Crown Land Management Agencies (LMA's) were asked to provide evidence of rents paid by other commercial users of Crown lands, this would confirm that, based on the area occupied, the rents charged to communications site users are well in excess of rents charged to other commercial users. The rent in the 'low' category for standard communication sites are almost 16x more than the minimum rent specified by the DPHI on their website and the rent

[1] *Telstra Corporation v Queensland [2016] FCA I2I3 [141]*

in the 'high' category for standard communication sites is almost 60x more. Given the minimum rents specified by the DPHI, it is hard to imagine that comparable rates are being paid by other commercial users on Crown land.

Most tenure arrangements on Crown land in NSW are subject to market rent reviews with the principles for those rent determinations clearly set out in the *Crown Land Management Act 2016* (NSW) (**CLMA**). Any improvements that those tenants make to the land are disregarded. This same provision has carried through from, and mirrors, the preceding (now repealed) *Crown Lands Act 1989.* As IPART would be aware, the CLMA is the result of a four-year consultation process which saw several Acts amalgamated into the new CLMA. The regulated approach to the valuation of land, disregarding any tenant improvements, was clearly considered critical for inclusion in the CLMA. However, the principles for rent determinations set out in the CLMA (and its predecessor) have been and continue to be ignored for communications sites and a separate regime has been set out depending on which entity is using the land.

Tenants on communications sites in NSW are being discriminated against as they are:

- paying an unnaturally high rent per square metre. For example, at Seaforth, Indara is paying the Land Management Agency a rent in approximately of $1000/m^2$pa for vacant land. This rate is more representative of a rental achieved for Sydney CBD premium grade A office space, clearly proving the "beyond excessive" nature of rental charged to communications users of Crown lands;

- penalised when compared with other commercial users of Crown land as the communications infrastructure (in which the telecommunications carriers and infrastructure providers have invested hundreds of millions of dollars), is being considered when determining market rents in contravention of the CLMA, the Australian Property Institute and International Valuation standards; and

- paying 'twice' for the site through the co-user fee arrangements which are not present in any other market.

The review by IPART offers the State Government the opportunity to correct the existing discriminatory regime and introduce a new, appropriate, and fair regime. The precedent set by the Telstra Case and the ensuing regime put in place in Queensland, have clearly provided evidence for a market based, commercial return for the Land Management Agencies (**LMAs**) whilst also being fair, transparent, and easy to administer.

Australian Bush Fires 2019 – 2020

In times of emergency, it is imperative that people have access to mobile networks and remain connected. Not just for emergency services personnel to communicate effectively with each other but also for members of the public to be able to keep in contact with emergency broadcasts, make and receive calls and ensure the safety of as many lives as possible and help guarantee that people are accounted for.

Eastern Australia Floods 2022

Per comments above, the unprecedented floods of 2022 highlighted the importance of keeping people connected.

Covid-19 Pandemic 2020 - 2021

Another unprecedented event, Covid-19 really brought to the fore the importance of connectivity during a crisis. With the temporary shift in working practices, students being forced to learn online and state-wide mandatory lock downs, the resulting surge in demand and strain on mobile networks meant that there were increased costs associated with keeping networks up and running and sites upgraded to support demand in urban areas. Discriminatory pricing regimes negatively affect the efficiency of Carriers being able to support and upgrade infrastructure.

2019 IPART Review and Recommendations

The review and rental rate recommendations put forth by the Tribunal in the 2019 review were a marked improvement on the current rates, but these rates have been in place since 2013 and are therefore outdated and not representative of where Indara has found the current market to be.

In our experience, rental rates and annual escalation rates have been decreasing. Rates have had to decrease as financial pressures on infrastructure providers has intensified over recent years with increased capex spend on upgrading sites and strengthening towers to support the evolution of the telecommunications industry and the roll out of 5G technology. This in addition to an aged network of sites where leasing costs had no vision of the future financial impacts where site numbers trumped sensible equitable leases. 25 years of high rentals accompanied with 5%+ yearly escalators have resulted in unsustainable networks forcing a market correction downwards.

It was disappointing therefore for the Minister to reject IPART's recommendations in totality in 2020. We are hopeful that the current review continues to reassess the approach to rental rates on a fair market basis.

We cover the decrease in yearly rentals that we have witnessed in more detail in point 2 below with example sites.

International Comparison

In the UK we have seen a clear indication of the response by the industry, the government and the public to the need to ensure and promote the efficient rollout of telecommunications. There can be no denying that telecommunications are critical infrastructure and that its timely and cost-effective roll-out is essential.

This has occurred in tandem with the new European Electronic Communications Code which was adopted by the European Council in November 2018. The new European rules recognise the necessity to stimulate investment in and take up of very high-capacity networks and has enforced

issues such as the rights to install new telecommunications equipment and the use of spectrum. Under the European rules, the member states were expected to implement their own national versions by 2021.

In the UK, the Digital Economy Act 2017 has already been updated to set out a new Electronic Communications Code (ECC) designed to update regulation to support the timely and cost-effective rollout of critical telecommunications infrastructure. The ECC was designed to strike a balance between the competing interests of relevant stakeholders, namely landowners, operators, and the broader public.

One of the key mandates of the ECC is the fundamental change to the compensation or consideration principles. Under the old regime, any consideration to which a landowner would be entitled was based on the amount that would have 'been fair and reasonable if the agreement had been given willingly'.

Under the new Code:

1. landowners will no longer be able to either:
    a. charge premium prices for the use of their land; or
    b. charge additional fees for upgrading of equipment or sharing with other operators; and

2. consideration will be purely based on the underlying market value of the land without cognisance of the use to which the operator is putting the land. In other words, it will disregard the fact that the site has a telecommunications use.

Schedule 1 of the Digital Economy Act 2017 sets out the ECC and specifies at clause 24(3)(a):

> 'The market value must be assessed on these assumptions …that the right that the transaction relates to does not relate to the provision or use of an electronic communications network.'

This principle and methodology are entirely in keeping with established land valuation principles and will result in a significant decrease in the amount of consideration payable to landowners. It is a direct reaction to the exorbitant pricing to which operators have been subject over very small parcels of land. The new Code is a clear reaction to the fact that:

(a) operators should not be subject to ransom demands by landowners for the use of their land; and

(b) the provision of high-quality communications services to the public is of paramount importance, greater in fact than the individual interests of landowners.

In addition, this edict under the ECC will apply to both private and **public** landowners (in bold, for emphasis). Both government and private entities alike will be subject to this fundamental principle.

It is abundantly clear that the practice of the existing regime in NSW is contrary in all respects to the practice espoused in other jurisdictions (both internationally and locally – the Queensland government being one such local example). We have seen that in the UK, the government has

codified the necessary aspects of the industry and has put in place legislative measures to enforce the principle of fairness and the necessity of critical infrastructure.

The Telstra Case has had the effect of creating certainty around the legislative provisions of section 44 of the Telco Act in a similar way to the codification of the UK principles around the consideration applicable to small parcels of land. There can be no justification for either higher rents for communications use of Crown land or for co-user fees, both of which limit investment in communications and are in direct conflict with government mandates regarding the accessibility and proliferation of critical infrastructure.

Indara's responses to the specific issues raised in the IPART Issues Paper dated 26 February 2024

1. Whether there are any additional sources of data on rental prices for private land. For example, we previously relied upon data from NSW Land Registry Services (NLR)

Indara are willing to provide examples of transactions that have been finalised in NSW for as many different site types, landlords and locations as possible to demonstrate a willingness to be transparent with the Tribunal and to support our statement that rents are declining. Lease examples (redacted) can be provided upon request as part of ongoing consultation.

2. Details of current rental arrangements for communications sites on private land.

Appendix A illustrates several rental agreements that Indara has entered into on private land in the past 12 months. Rent, escalator, and structure type are shown with pre and post renewal figures. These show high level that rents continue to reduce (on average by 18% in the past year alone), as well as the average escalation reducing from 4% to 3%).

We are aware that the TOR requests a minimum sample size of 500, and therefore Indara can provide a more detailed list of existing sites (upon request) with the 'current' rental rates of a range of aged leases – as part of the 2024 consultation process.

However, we do not consider that it is appropriate for IPART to compare commercial rents charged by private landowners with the rents that the State is permitted to charge under a regulatory regime.

Section 44 of the Telco Act is specifically designed to protect against disadvantageous or discriminatory treatment by a State or government. Indara does not propose that the provisions of the Telecommunications Act are intended to ensure consistency of approach between private and public land use. The resulting dichotomous nature of these markets means that using private commercial land rents as comparisons to determine rents for public or Crown land is inappropriate and erroneous. Public land is for public use and telecommunications services are in the public interest for the reasons mentioned above and Carriers provide greater connectivity and access to the latest technologies to the community. NSW LMAs should not profit from this as it stifles investment and development in the modern digital economy. It is also contrary to the initiatives that the Federal government has, such as the 'black spots programs' aimed at improving access to modern telecommunications services and technologies for all, in low revenue/return areas. As it becomes more costly to roll out infrastructure, companies like Indara will be unable to continue to invest in these markets.

This key issue was considered in the Telstra Case where the Federal Court considered whether section 44 of the Telco Act allows the State to treat carriers adversely by imposing higher rents on them than other commercial users on the basis that market rents for leases held by carriers over private land were higher than for other businesses.

The Federal Court considered this and concluded that:

(a) the Telecommunications Act allows individuals and corporations to discriminate against carriers as their behaviour is not restricted by the Act; but

(b) in contrast, section 44 of the Telco Act expressly prohibits discrimination against carriers under State legislation.

The Federal Court specifically determined that:

[146] "If State or Territory governments were intended to be free to charge carriers different rents on the basis that carriers are charged more rent in the private market, the exception would have been directly expressed [in the Telecommunications Act]."

[147] - "the purpose of cl 44(1), namely, to promote and protect the long-term interests of end-users of carriage services and to promote accessible and affordable carriage services, is inconsistent with the submission that State and territory governments are permitted to charge carriers higher rents on the basis that carriers are charged more rent in the private market. In fact, price-gouging of this type by State and Territory governments seems precisely the type of conduct that cl 44(1) is designed to prevent".

This determination is a clear decision by the Federal Court on this issue. Even if IPART did not have the benefit of the Telstra Case decision to aid its review, the comparison between private and public land user rents would still be incorrect and inappropriate for the following reasons:

(a) it would create (and has, in fact, created) a distorted result with inordinately high rents attributable to very small parcels of land;

(b) the LMAs have no real alternate use for these very small parcels of land;

(c) whilst communications sites may be relocated, the nature of the typically large swathes of Crown land mean that the LMAs may be monopolistic which means a fair market rent is not possible. The 'captive' nature of communications sites on Crown lands therefore means that private rents are not appropriate comparators for Crown land rents; and

(d) neither current market rent, nor fair market rent principles would apply because of the 'captive' nature of communications sites on Crown lands.

The Telstra Case and the application of that case in respect of Crown land in Queensland has made it clear that the only appropriate comparison, which is in line with the TOR, is to consider the rents paid in other jurisdictions for the use of Crown Land. Consequently, Indara recommends the adoption of the Queensland methodology as this does not result in discriminatory pricing. This Federal Court case will necessarily set a benchmark and precedent for any future disputes of this kind.

3. Whether rooftop communications sites should be treated differently to other Crown land sites.

Rooftops are quite different compared to stand alone monopole or tower sites sited on vacant Crown land. They can have specific ongoing access, maintenance and CAPEX costs associated with their unique structural challenges and locations; however, rooftops are generally cheaper installations than towers. The additional complexities associated with maintaining rooftop sites though suggest they should be treated differently to other Crown lands sites such as parks, reserves, forests, and national parks. Rooftops generally house plant such as air conditioning units (we have noted an increase in landlords utilising rooftops for solar panels).

Other than 'improvements' that a tenant such as Indara adds to a rooftop (i.e. telecommunications infrastructure), these spaces are generally void/redundant areas with no intrinsic value attributed to them in their own right.

It is Indara's position that rooftops be treated in the same way as other Crown land sites, referencing again section 44 of the Telco Act with regard to avoiding discriminatory pricing models as suggested already - rental figures should be determined at 6% of the unimproved land value for all sites.

4. Whether recent changes in ownership arrangements for mobile network towers has influenced rents.

Whilst the telecommunications landscape has changed dramatically in the past few years due to each MNO effectively entering a sale and lease back agreement of their assets, Indara has not seen this influence rents. Sites continue to be built, and leases continue to be entered into and renewed - at mostly fair and equitable rates – as confirmed above our experience has been that rental rates and escalations continue to drop.

5. What effect the phasing out of the 3G network may have on rental arrangements.

The phasing out of 3G has not affected rental arrangements (other than aged historical agreements which may have been technology specific). The telecommunications industry is constantly evolving; after 3G, came 4G, after 4G came 5G. Generally, 5G means an increase in the bulk and scale of the amount of equipment located on a tower or a rooftop. Additional space may trigger a surrender and regrant of an existing leasing arrangement, meaning a renegotiation may be required. A renegotiation may mean increased rental expectations by a landlord due to perceived increase in area being taken by a tenant.

The phasing out of 3G on its own has not resulted in any noticeable changes to Indara's rental arrangements based on 3G equipment being removed from a site. A telecommunications site remains in situ, for which a landlord receives valuable consideration for.

6. **How best to incorporate the social, cultural, and environmental value of national park land in recommending rents for communication towers in national parks. Currently National Parks sets the price of their sites one category higher than other land agencies. The National Parks and Wildlife Act 1974 states that the national park land cannot be used for communication facilities if there is a feasible alternative site available.**

Indara agrees with the MCF submission from 2019 to the previous IPART review:

"noting that the NP&WS only developed the category step increase in rentals after the previous IPART review in 2013. In the industry's view this was a strategy to claw back revenue reductions and has nothing to do with the promoted social, cultural, and environmental values of the land… The maintenance of the category step increase (not recommended by IPART in the last Review) is indicative of the land agencies' willingness to manipulate the IPART recommendations and the IPART's continued support of such manipulation of its 2013 recommendations is further evidence of discriminatory conduct by the Crown.

The rental should be determined at 6% of the unimproved land value for all sites".

The community expect telecommunications services to work in all locations including National Parks and providing access to build infrastructure is essential. When national disasters occur such as floods and bushfires, emergency services rely on telecommunications infrastructure. Indara agrees that there should be strict guidelines how telecommunications infrastructure in sensitive locations such as National Parks are established and operated - but these guidelines and policies must take a balanced and fair approach to ensure that any investment in connectivity and safety is not stifled by discriminatory pricing and improper co-user charges.

7. **The market approach to setting rents and fees for co-users and small cell technology on communication sites on private land.**

Rent should be based on market for access to public land. Indara recommends that IPART compare the rents paid on communication sites under the NSW regime with other States. A comparison with private land access is neither appropriate nor correct for the reasons set out in response to point 2 above.

The most appropriate jurisdiction to use as a comparison is Queensland, where the methodology for determining the rent for communication sites is 6% of the unimproved land value. This methodology delivers simplicity, transparency and is cost effective to administer as the land valuation process by the Valuer General already exists and is already used by the DPHI to determine rents for waterfront tenancies on Crown lands.

Adopting this rental arrangement in NSW for communications towers on Crown lands would perfectly comply with the relevant TOR in that it:

(a) has regard to **recent market rentals agreed for similar purposes and sites**. The large body of comparable evidence in Queensland (exceeding 500 sites) is for identical purposes and sites, is with a substantially identical landowner, and represents recent market evidence having been confirmed in 2016 (and since the 2013 and 2019 IPART reviews of communications tower rentals);

(b) has regard to **relevant land valuations** by tying rents directly to the value of the underlying land, disregarding improvements made by the tenant;

(c) achieves a **fair market based commercial return** on the land of 6%;

(d) is **simple, transparent, and cost reflective** and is reflective of the location of the land, thereby negating the need for different location categories and the unnecessary "high value" sites; and importantly;

(e) ensures that the State of NSW does not breach section 44 of the Telco Act.

IPART is obliged to consider section 44 of the Telco Act when determining its methodology and the Federal Court's decision in the Telstra Case confirmed that the clear legislative purpose of section 44(1)(a) is to protect carriers and end consumers of carriage services from opportunistic State charges which take undue advantage of the needs of carriers to operate from multiple locations in order to operate their networks.[1]

The outcome for the Queensland Government following the Federal Court case is that all commercial users of Crown Land are now aligned in their rent payments, and they pay a percentage of the unimproved land value. This is the most appropriate method for determining rent and IPART should consider the comment made by the Wolfe Committee in 1990 when they conducted a review of land regulation in Queensland. The Committee said:

"*The use of unimproved value as a factor in determining rents for Crown leaseholds is soundly based as it measures the value of Crown Land, and disregards the improvements and development works either owned by the lease holder or for which he may claim compensation. A rental percentage applied to the unimproved value is a fair way of determining a rent for the use of Crown land. Once a percentage rental is established the rent is then directly related to the unimproved value of and will change as the unimproved value changes."*[2]

[1] *Telstra Corporation v Queensland [2016] FCA 1213 [130] - [148] and in particular, [147].*
[2] *Telstra Corporation v Queensland [2016] FCA 1213 [39]*

We believe that IPART is fundamentally wrong in that the only relevant determinant for market rent is the land value. The rental regime in Queensland has been set up on this basis, without the need to determine a market value from the surrounding land, as it is the **unimproved** land value which should be used (in bold, for emphasis). This is clearly set out in Division 6.3, Section 6.5 of the CLMA.

Co-User Fees

IPART should consider whether additional rents of this nature are imposed in comparable jurisdictions. They are not imposed by the Queensland Government for similar sites, and this is appropriate market evidence.

It is Indara's view that co-user fees do not correlate with market practice and should be removed entirely. It is a clear demonstration of seeking to gain a return on a Carrier's infrastructure and improvements in the land – land that is otherwise not monetisable or monetised. In other words, a co-locator may not be interested in occupying a site, if not for the communications tower existing on that particular site. The implementation of co-user fees is also contrary to the Valuer General's view that valuations are based on the 'unimproved capital value of the freehold land'.

This regime of charging co-user fees has had a broad and negative impact on the industry. Utility companies and local Councils are also now looking to implement co-user fees, further stifling investment by the Carriers and infrastructure providers and driving up costs ultimately, for the residents of NSW.

It is market practice for a landowner to lease a parcel of land to a tenant for a permitted use. As long as that tenant uses the site for the permitted use, the landowner is not in the habit of charging additional rent to 'sub-tenants'. This is the case in the private market as well as in Queensland.

The LMA's practice of charging additional rents to subtenants has resulted in unnaturally high rents for small parcels of land. LMA's practice has arisen from their desire to seek a return from a particular user of the land, and their investment in infrastructure on that land, as opposed to a return for the actual use of the land. This practice is discriminatory.

A clear example of this is when a carrier sells a tower to an infrastructure provider. In these circumstances, the Land Management Agency's rent increases from 100% (payable by the primary user) to 150% (100% by the infrastructure provider and 50% by the carrier-co-user) even though there has been no change in the land use, the land area, or the land value.

In addition, co-user fees discourage the practice of co-location on existing infrastructure – which is contrary to the Federal government's mandate to prevent the proliferation of towers on the Australian landscape. Use of existing infrastructure is an overriding principle in federal telecommunications legislation and this practice has negative consequences for the wider industry. For example, smaller providers wishing to access Indara's sites have been prevented from doing so because of the additional fees payable on Crown land sites.

Technology is continually evolving and will continue to transform Australian business and society at an increasing pace. Speed, efficiency, and reliability of telecommunications networks are critical to

keeping Australia competitive globally. It is essential that any pricing regime for communications uses on government owned land promotes investment rather than discouraging investment via co - user fees, infrastructure owner penalties, and excessive discriminatory pricing.
As mentioned in response to earlier questions, rent should only be charged on the unimproved land value and should not be payable based on the user of the land. This would remove the need for co-user fees altogether.

Indara is happy to provide a sample of leases (upon request) that confirms view that co-user fees are not commonplace in the current private market.

It is not uncommon that a telecommunications facility is deployed by a carrier and the tower later sold to an infrastructure owner in a "sale and leaseback" style transaction. In this situation the carrier is charged a primary user rate, being 100% of the applicable rate. However, with no change to the land use, land area or land value, the rent increases to 150% of the rate merely due to a partial change in ownership of the tenant's improvements.

The Australia and New Zealand Valuation and Property Standards and Section 6.5 of the CLMA dictate that the value of a tenant's improvements is to be disregarded in any rental valuation. It clearly follows that ownership of those improvements (or any change to ownership) ought not to affect value.

To comply with the TOR, and to avoid breaching section 44 of the Telco Act, all communications tower users (infrastructure owners and carriers) should be charged according to the unimproved value of the land occupied.

8. The practical implications of using remoteness categories in the ABS' Australian Statistical Geography Standard to set location categories for fees for communications sites on Crown land.

Indara do not have enough information on the proposed use of the ASGS with reference to determining rental arrangements.

We invite the Tribunal to provide further details in this regard. Reviewing the ABS' page[1] offers no insights into what the practical implementation might be, but it does appear overly complicated with too many variables and categories.

We reiterate that Indara generally supports an IPART Review in line with the TOR issued by the State Government on 12 December 2023. The Issues Paper, prepared by IPART, encompasses several considerations which, for the reasons set out in this response, go beyond the TOR and should not be applicable. Indara supports a review that relies on recent market evidence for similar purposes and sites, takes into account relevant land valuations, achieves a fair market-based commercial return, and does not result in direct or indirect discrimination against carriers or a particular class of carrier.

[1] *https://www.abs.gov.au/statistics/standards/australian-statistical-geography-standard-asgs-edition-3/jul2021-jun2026/using-asgs*

As mentioned at point 2 above, it is not appropriate to compare the rent paid to private landowners for communications sites as they are not prevented from discriminating against carriers under the Telecommunications Act.

As a result, the current market evidence from a comparable jurisdiction supports a location-based methodology but based on land values for those locations and not the artificial categories provided by IPART under the existing regime in NSW.

The existing categories are manifestly unfair because they cover very wide areas and do not consider natural discrepancies between location-based valuations – would the ASGS approach address this?

A land valuation methodology would be fairest in the circumstances for the following reasons:

(a) it is reflective of market practices, particularly with respect to comparable rents for Crown lands in other jurisdictions;

(b) it does not 'tax' a user's investment in a site; and

(c) it takes into account the unimproved value of the underlying land which is essentially how Crown Lands would be able to determine an alternative use or 'next best use'.

If a percentage of unimproved land value was adopted as a methodology, then a location category would not be required at all. The rating authority in NSW will generally determine a valuation of land calculation to determine a rate payer's liability to pay rates or land tax, and so this mechanism is already in existence.

The benefits of removing the categories are:

(a) a more appropriate return on the use of public land;

(b) the easing or lessening of administrative processes; and

(c) a more fair and equitable treatment of users without the current discriminatory practices.

Indara expects a review in line with the TOR will result in significantly lower rental rates than those set out in the Tribunal's 2013 review which are currently in place 10 years after adoption. A review in line with the TOR will bring an end to the existing discriminatory regime which results in the LMA's obtaining a profit rent at the expense of the communications industry.

We believe IPART should invite the LMAs to provide information of the rents they charge to other commercial users on a per square metre basis. The interpretation of the Telstra Case and the application of section 44 of the Telco Act make it abundantly clear that charging a higher rent for communications sites than other commercial uses is discriminatory and a clear breach of section 44 of the Telco Act.

Although Indara contends, as outlined elsewhere in this document, that rents on Crown lands must be based on unimproved land values, evidence in the private market also confirm that LMA's are achieving profit rents from carriers.

Under the current regime, our experience is that the LMA's achieve significantly higher rental premiums when compared with private landowners - where negotiations are completed in an open market situation (we see rentals and escalations reducing) and this still occurs where private landowners are not prevented from discriminating against carriers under the Telecommunications Act.

Furthermore, the leases we have with private landowners are on significantly more favourable terms and warrant further adjustment (downwards) to be directly comparable with the conditions imposed by the LMA's. For example, no co-user fees are payable in the event that colocation occurs. This has the effect of magnifying the profit rent achieved by the LMA's.

Indara's response following the issuing of the Draft Report and Public Hearing in July 2024

Further to the release of the draft report and public hearing, Indara has a number of further comments and observations to present to IPART whilst addressing the 8 recommendations in the draft.

Australia's telecommunications industry continues to evolve at pace. As recently as July 2024, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) issued draft Policy outlining the Australian Government's goals and objectives to enable urban areas to be liveable, equitable, productive, sustainable and resilient. The Department has made it clear in this Policy that it considers access to telecommunications of vital importance.

Mobile connectivity has become so important that it is now considered an essential utility. The Federal Government has recently updated its Telecommunications in New Developments (TIND)[1] policy to recognise mobile connectivity as an essential service; it is now expected that developers consider mobile connectivity as important as other utilities like water, electricity and sewage.1

Governments at all levels have tended to give mobile connectivity little consideration when planning for population growth. Connectivity is often missed in policy making; where connectivity has been recognised, it has historically been given little focus. Often, there has been an assumption that the private sector will simply deliver the necessary infrastructure to service a particular area, but with little thought to the challenges in doing so – such as whether a suitable location is available – and how these could be addressed in policy. Similarly, little thought has been given to enabling, encouraging and incentivising proactive mobile infrastructure deployment through policy. We are pleased to note that this is changing at a federal level; the federal government has recently recognised the importance of proactive forward planning in its updated Telecommunications in New Developments policy, released 17 February 2024. Amongst other requirements, the TIND requires developers to consider connectivity, and to engage with providers, when planning new developments.

We are pleased to note that this is changing at a federal level; the federal government has recently recognised the importance of proactive forward planning in its updated Telecommunications in New Developments policy, released 17 February 2024. Amongst other requirements, the TIND requires developers to consider connectivity, and to engage with providers, when planning new developments.

Indara strongly supports the TIND and a more proactive approach to mobile deployment. However, we note that the TIND principles should be implemented across all levels of government as well as to developers and mobile providers. We encourage a coordinated approach, by all levels of government, to recognise mobile connectivity as an essential service and establish planning policies that consider connectivity as early as possible.

[1] *https://www.infrastructure.gov.au/department/media/publications/telecommunications-new-developments*

To deploy a mobile telecommunications facility, the mobile provider must secure tenure with a landowner willing to accommodate the site. Where private land is unavailable, mobile providers must often rely on use of council or Crown land to deploy new telecommunications facilities. Securing tenure (via a lease or licence) can be challenging.

Use of Crown Land is subject to lengthy, complex and expensive application processes that can often take years to complete. Crown rental expectations can often be unreasonable; there are also barriers to use of Crown Land, such as co-user fees which disincentivise deployment of shared, 'neutral host' facilities. Telecommunications facilities often appear to be regarded less as a public good, and more an opportunity to secure a windfall for the relevant state government.

To achieve the objectives of the National Urban Policy, we therefore highlight the importance of being able to secure tenure; we suggest all levels of government should encourage the use of public land, where appropriate and subject to reasonable terms, for telecommunications infrastructure.

Part 4 of the Policy has specific objectives that are relevant in the current IPART review, of particular note:

- Objective 1: No-one and no place left behind
- Objective 3: Our urban areas are safe
- Objective 6: Our urban areas promote productivity

The federal government's TIND policy, and the newly released National Principles (whilst focussing in the first instance on urban areas), provide a strong federal framework for mobile connectivity; it is vitally important that these policies are now recognised in state and local policy.

Indara's responses to the specific *draft* recommendations in the IPART Draft Report dated July 2024

1. The existing density classifications continue to be used to minimise the costs of implementing the updated fee schedule

If the density classifications are to remain, Indara supports the 2019 recommendation to introduce the Remote and Very Remote classifications, which would also be more aligned with the unimproved land value methodology (multiplied by 6%) that Indara and our peers have previously lobbied for.

Indara does not agree with IPART's or the LMA's view that implementing the 6% of the unimproved land value as set by the Valuer General would result in additional costs to the LMA's or that it would be difficult to implement. The Valuer General sets the unimproved value for land already, which is recorded as part of the state's land tax regime. Indara submits that this would actually be easier for the LMA's to administer as the Valuer General completes this exercise already and the exercise would simply be applying 6% against the unimproved land value for each site. In any event, the mere administrative 'difficulty' of implementing a change in the calculating process should not serve as a deterrent for rectifying what is essentially a malfeasant and discriminatory regime that has far-reaching implications for the sustainability of the communications industry.

2. That National Parks and Wildlife Service's approach of setting rental fees one category higher should continue

There is no basis for this additional charge, and we note that the draft report nor the public hearing addressed how the additional charge had been arrived at using established valuation principles.

We only deploy in national parks if there is both a genuine community need to do so (particularly on safety grounds) and because there is absolutely no alternative. The process to get planning consent for a site in a national park is lengthy and complex – and because carrier powers under the *Telecommunications (Low Impact Facilities) Determination 2018* do not apply in national parks, the future upgradability of the site is also an issue. A site on freehold private land will always be chosen in preference to a national park site, if one is available, and sites within national parks are always a last resort.

Furthermore, the development approval (DA) process to build towers within National Parks is already very costly and often entails strict conditions being imposed under the DA - such as the requirement to pay for and include specialist reports that must be provided to NPWS and formal approval received from NPWS prior to any construction works proceeding.

An example is one of Indara's last national park DA's, to replace a tower at Thredbo, in Kosciusko National Park. The planning authority was the NSW Minister for Planning C/- Alpine Resorts

Team. Indara had to provide a large amount of information including:

- Purpose and benefits of the project.
- Detailed assessment against federal *Environmental Protection and Biodiversity.*
- *Conservation Act 1999* and Matters of National Environmental Significance.
- Detailed assessment against state planning requirements.
- Assessment against *Biodiversity Conservation Act 2016* requirements, including detailed environmental study ("Biodiversity Development Assessment Report"), methodology for flora and fauna protection, and environmental management report.
- Detailed visual impact assessment.
- Detailed aboriginal heritage assessment.
- Detailed heritage assessment.

Our project would not have been approved without demonstrating that the social, cultural and environmental impacts were acceptable.

We suggest that the existing application costs and costs of obtaining associated reports already cover the requirement to minimise and perceived detriment and that the higher categorisation appears to be little more than a convenient ploy to extort a higher rent.

At the public hearing we heard that there are increased costs associated with installing telecommunications towers in national parks, which is why NPWS believe a higher fee (one category higher) is warranted.
At the public hearing NPWS remained silent when asked to quantify the increased costs, therefore we invite them to provide evidence to substantiate the claims made in their final submission. Indara remains of the view that the higher categorisation is not warranted because under the terms of NPWS' licences, these costs are all passed on to the carriers and/or the infrastructure providers. The carriers and infrastructure providers are forced to accept these terms if they wish to establish a site – often to meet the communication needs of the local area and/or to provide a solution under the Federal government's black spots program.

To be clear, it is the infrastructure providers and carriers that are the ones investing large sums of money already to provide coverage to ensure connectivity in very remote areas which benefits the public, emergency services and NPWS employees working in these areas. Infrastructure providers generally bring power to the sites, add access tracks (which NPWS often benefit from too) and establish Asset Protection Zones all at their own costs. NPWS do not actually providing anything under than the very small ground space on which these sites are established and so should not be in a position to unilaterally change the categorisation of these sites based on their presently vague and unsubstantiated 'increased costs' argument.

Indara also does not agree with IPART nor NPWS's claims that new co-users on established infrastructure results in '*increased intensity of land* usage'. We respectfully remind both IPART and NPWS that:

- in terms of the area occupied, this does not change as generally, additional co-users usually install their equipment within the existing demised area. From the ground – visually, what exists on site with one co-user or with three co-users is the same.

- in terms of access by the users of the site – this oversimplistic argument ignores the fact that as tenants/licensees, a carrier or tower owner would only attend a site 1-2 times a year. Additional users would only increase the frequency of attendance by no more than 5-6 times a year. Therefore, to call it an 'increase in intensity' would be an overstatement of the matter. A common-sense regard to the actual and practical reality of the matter must be had in considering the merits of such an argument; and

- communications infrastructure operations are largely passive in nature, in much the same way electric substations and water tanks operate passively. The presence of co-users on our sites do not change the passive nature of the operations on the sites.

Further to our March 2024 submission, Indara aligns with the MCF submission 2019 IPART review:

"noting that the NP&WS only developed the category step increase in rentals after the previous IPART review in 2013. In the industry's view this was a strategy to claw back revenue reductions and has nothing to do with the promoted social, cultural, and environmental values of the land… The maintenance of the category step increase (not recommended by IPART in the last Review) is indicative of the land agencies' willingness to manipulate the IPART recommendations and the IPART's continued support of such manipulation of its 2013 recommendations is further evidence of discriminatory conduct by the Crown.

The rental should be determined at 6% of the unimproved land value for all sites".

NSW residents expect telecommunications services to work in all locations including National Parks and providing access to build infrastructure to enable this is essential. When national disasters occur such as floods and bushfires, our state's emergency services rely on telecommunications infrastructure – any failure or absence of this critical infrastructure can become a matter of life and death. The importance and value of being connected when these incidents occur must not and should not be underestimated. Indara reiterates that it agrees that there should be strict guidelines on how telecommunications infrastructure in sensitive locations such as National Parks are built - but these guidelines and policies must take a balanced and fair approach to ensure that any investment in connectivity and safety is not stifled by discriminatory pricing and improper co-user chargers.

3. Co-users continue to pay a co-user fee that is set at 50% of the primary users' rental fee

The proposed co-user fee schedule is a significant change since the last review; Indara is supportive of the 2019 report that additional fees should only be due when additional land is required to support a co-user's occupation at the site.

We refute IPARTs and the LMA's views that there is increased intensity of land use for reasons mentioned in point 2 above of this supplementary submission.

In the case of Indara (and similarly our peers Amplitel and Waveconn) Indara purchased a number of Optus towers with Optus remaining as anchor tenant. The co-user regime results in a 'double dip' of fees for the LMA's. A primary user fee being 100% of the relevant density classification and a further 50% for the co-user. However, there has been no material change at the site, no additional equipment, no additional space taken - it is exactly the same infrastructure and equipment as previously. How can this 50% uplift in rent be justified? It is unsustainable and in our collective view, actionable.

Indara is aligned with our peers (neutral host providers and MNO's) that we reject the IPART recommendation for co-user fees regime to remain. Co-user fees should be abolished because they stifle progress and goes against providing regional communities access to the most modern telecommunications technologies. IPART and the LMAs should not engage in practices that ultimately perpetuate economic inequities in these affected communities. Such practices would be in direct conflict with IPART's own stated aims to "help NSW residents get safe and reliable services at a fair price".

Federal legislation (such as Telecommunications Act 1997 (Cth) and Telecommunications Code of Practice 2018 coerce carriers to collocate where possible, however the ongoing stance by Crown Lands to administer co-user fees inhibits colocation by rendering some Crown Land sites economically unfeasible.

IPART makes the point that co-user fees received by LMA's reflect the intensity of use. This argument does not stand up to scrutiny for reasons already addressed in point 2 above in this supplementary commentary from Indara. AMTA's commentary in the public hearing is supported and paraphrased *'even if co-users are taken into account - the additional equipment resulting from colocation does not add up to a 50% increase in space taken'.* So, how has the 50% been determined? Generally, co-users collocate in compound so there has been no material change – the compound size has not increased, the space the tower takes up has not changed. Where is the evidence of the greater impact?

We request that IPART provide a substantiated rationale (using established valuation principles and reasoning by a qualified valuer) for this baseless charge, that does not even meet Category A of the hierarchy of evidence. Indara will reserve its rights in this regard.

We submit that IPART appear to be picking and choosing elements of the sample lease agreements it has used in its data sample. Rents make up only one part of a lease agreement; the full lease terms and conditions also need to be examined to understand *how* the lease has been

entered into. We advise that the majority of our telecommunications agreements have full subletting rights – leases provide for one transaction for a telecommunications site whether there is no carrier, one carrier located on site or four.

Neutral host providers and carriers have very little incentive to co-locate on Crown lands now that neutral tower infrastructure operators are the main drivers of communications infrastructure deployment. To reiterate, the imposition of co-user fees cripples' investment and does not reflect a fair market as telecommunications leases in the private market also have full subletting rights. In this regard IPART has stated they are using the private market for the purposes of setting rents but appears to be wilfully ignoring the blanket subletting rights that are contained in the majority of our telecommunications leases.

At the public hearing we heard a very important example from Optus of how co-user fees can stifle investment. Indara will paraphrase the 'Cottage Point" example put forward by Optus:

- *"Rent was $10,000 per annum for an existing tower*
- *The tower was upgraded to support provision of modern technologies - under extreme pressure from the local community*
- *Amplitel as the neutral host provider are responsible for CAPEX and ongoing maintenance*
- *Optus and Telstra collocate*
- *The $10,000 site is now an $80,000 per annum site, made up as follows*
    - *Amplitel $40,000*
    - *Telstra $20,000*
    - *Optus $20,000*
- *Amplitel and the carriers bowed to public pressure but may not do so again. $10,000 to $80,000 is nonsensical when the industry is providing essential services to communities"*.

Cottage Point is a great example of how unsustainable the existing co-user fee system is in practice and exceedingly dangerous, if one were to consider the human cost that was involved in the Cottage Point.

Indara has over half a dozen sites that it would like to progress with Crown Lands in NSW, but the projects are currently on hold as they are uneconomical due to the primary user rent, co-user fee and our customers reluctance to enter into a separate access license.

Action must be taken if this outdated regime continues.

It was interesting that IPART thought the Cottage Point example above was extreme enough to for them to ask for it to be included in final industry submissions, only to be advised that a number of industry members had already included this example in their March 2024 submissions. This leads us to believe that IPART is not reviewing submissions properly, which we submit is negligent due to the far-reaching consequences the 2024 IPART report will have across the telecommunications industry.

Indara also suggest that should IPART continue to recommend co-user fees, that consideration should be given to providing a discount for 'Not For Profit' (NFP) colocation users, such as local

community radio, or those who do not have the capability of deploying under the co-user fee regime which it does not encourage competition for these smaller operators.

Finally on co-user fees, if IPART is truly concerned about keeping things simple and lowering administrative costs of the LMAs, they should be recommending 'as of right' licensing and subletting – which would move the burden to infrastructure providers and MNOs so that they can manage the process themselves, as we do with 99% of our portfolio.

4. Co-user fee be extended to primary users deploying small cell and similar technology in recognition of their similar land use

No tangible market evidence has been provided by IPART to support this proposal.

In Indara's experience, small cell installations usually attract a very low co-location fee (often hundreds of dollars, rather than thousands of dollars), and we ask IPART to provide evidence to support the proposed fee structure.

Small cells are predominantly documented by way of licence agreements under a master licence rather than by a lease and is therefore not afforded the same protections a registered lease is entitled to. Master licences are usually commercially sensitive with all parties bound by non-disclosure agreements (NDA's) and so we ask again how IPART has arrived at its recommendation for the treatment of small cell fees with little public evidence and whether an independent professional valuer has endorsed this proposal.

5. Communications sites located on a rooftop are to pay $3,821 in addition to the fee

Indara maintains from our previous submission that rents for rooftops should be treated the same as macro tower sites and this supports the TOR to follow a simple approach and also addresses the LMA's concerns over administering new processes and systems.

From a valuation point of view, where is the market evidence for the standardised charge of $3,821, which appears to have been arbitrarily and incorrectly applied across all density classification categories? It is a very specific figure; the draft report provides no viable rationale for this. Has IPART used a suitably qualified valuer to support this, if so, please make reference in the final report so that it is recorded in the public domain.

Using IPARTs own classification categories, a rooftop in the CBD should be charged differently to a low (rural) rooftop. IPARTs own admission that they were able to distinguish between urban and more remote or low-density areas, does not align with its own recommendation of using density classifications to differentiate between higher cost sites in urban areas versus lower value sites in rural locations.

We submit that this charge is arbitrary and flawed and it is hard to imagine a qualified professional valuer would use such a specific figure across all density classifications. Indara does agree that

rooftops *can* attract a higher rent, but the underlying land value differs depending on the location (urban vs remote).

6. The following primary user fees be adopted for communication sites in each density classification

Sydney	High	Medium	Low
$36,340	$30,156	17,012	$8,545

Firstly, Indara remains of the view that the most sensible, economical and administratively simple basis on which rents are set is by aligning with the state of Queensland where rents for the majority of Crown Lands are based on 6% of the unimproved land value set by the Valuer General.

Our concerns regarding the proposed fees and valuation methodology follows below.

Valuation Methodology

Indara has concerns that IPART has not followed established valuation principles in arriving at a number of its recommendations, particularly:

- Rental fees in general
- Rooftop additional rental fee
- Co-user fee regime
- Co-user fee regime extension to small cells
- National Parks and Wildlife Service setting rental fees one category higher

It is evident from the draft report and from the public hearing that IPART has mainly used the information it has received from the NLR in arriving at the recommendations presented. It has also relied heavily on historical lease information, options and sequential leases which is contrary to basic valuation principles.

Institutions such as the Australian Property Institute (API) and The Royal Institute of Chartered Surveyors (RICS) uses a 'hierarchy of evidence framework'[1] for valuations, which includes three categories:

- *"**Category A** – direct comparables This category relates to all types of relevant transactional comparable evidence including: • contemporary, completed transactions of near-identical properties for which full and accurate information is available; this may include data from the subject property itself • contemporary, completed transactions of other, similar real estate*

[1] *RICS 'Comparable evidence in real estate valuation 1st edition, October 2019'*

assets for which full and accurate information is available • contemporary, completed transactions of similar real estate for which full data may not be available, but for which enough reliable data can be obtained to use as evidence • similar real estate being marketed where offers may have been made but a binding contract has not been completed and • asking prices (see 4.1.4 above).

- ***Category B** – general market data This category relates to data that can provide guidance rather than a direct indication of value including: • information from published sources or commercial databases; its relative importance will depend on relevance, authority and verifiability • other indirect evidence (e.g. indices) • historic evidence and • demand/supply data for rent, owner-occupation or investment.*

- ***Category C** – other sources There is also a wide range of data that might provide broad indications of value including: • transactional evidence from other real estate types and locations, and • other background data (e.g. interest rates, stock market movements and returns which can give an indication for real estate yields)".*

In relation to IPART's independent review of rental arrangements, the hierarchy should be as follows:

- Category A: leases for new sites. Transactions finalised in the last 3 years would meet this category as they are up to date and comprehensive. This evidence should be obtained direct from the lessee and / or the land registry.

- Category B: lease renewals on existing sites, direct from the lessee or from land registry. These must be current term only and must not include options or sequential leases. Using option terms in the future will skew the 'average' results.

- Category C: other historical information, regression analysis and interpolation.

IPART does not appear to take into account the general lease terms on *how* leases have been entered into (i.e. the general provisions, focussing only the rent. This is in contradiction to Category A in the hierarchy of evidence framework.

We wish to make it clear that the vast majority of Indara's tenure agreements have full rights to sub-lease and/or licence to our customers.

Further, the LMA's offer licences only and not leases, which are a lesser form of tenure as a licence does not afford the licensee an exclusive proprietary interest and does not run with the land unlike the protection and security a registered lease would provide. As such, rents charged by the LMAs under their licences should be lowered accordingly.

Sample Data

It is underwhelming to read in the draft report that IPART has *"considered the data provided by the communications companies. However, given that the data provided represents only around 10% of their sites that we identified and also given that our analysis indicates that the rents are not consistent with our market data, our draft decision is not to include these submitted prices in our benchmark price analysis'.*

As confirmed by IPART in the draft report and the public hearing; we note that majority of its sample included aged data, options and consecutive leases – which should not form part of this analysis as the information is neither recent nor is it representative of the current market. Indara could identify only 6 of its approximately 40 new leases (that is leases for new sites agreed between 2021 and 2024) in a data set of over 600 that IPART provided in the draft report and so we question how relevant the evidence is.

Based on the hierarchy of evidence framework, Indara submits updated lease information for IPARTs further review (see appendix XXXX); in order of the weighting that should be applied:

- Contemporary deals (2022 – 2024) - primary
- New/Greenfield leases - primary
- Lease renewals - secondary

Lease renewals should be secondary as the rent has matured over 20 years (with likely high initial rents and yearly escalations). It is now over 20 years since the initial rollout of mobile networks in Australia when there were 5 MNOs in competition with each other who were routinely entering into high rental sites with high escalations in order to gain a competitive advantage in network reach. The consequence of this is that negotiations commence with an already overly anxious/unwilling landlord (who may perceive that they are losing out when Indara and its peers try to reset market rates to sustainable levels).

The Land Acquisitions Act 1989 (Cth) (**LAA**) defines Market Value as *'the amount that would have been paid for your interest by a willing seller to a willing buyer."* There is already an element of unwillingness, and our negotiating position is diminished on existing sites which may be expired/in holdover or have an upcoming expiry.

Furthermore, when undertaking negotiations on expired leases in holdover the landlord is in a superior negotiating position who understands that the lessee' has very little leverage as a 'captive' tenant, which often results in higher rents which skews the results and supports our earlier claim.

IPART should look again at the data set through a new lens based on the hierarchy of evidence framework focussing on new (contemporary) leases rather than old data or future lease options or consecutive leases.

Indara are also keen to understand which professional valuer IPART has used to carry out their valuation exercise or who endorses it, and IPART should include this detail in its final report to ensure it is officially on record.

7. The published fee schedule is to be independently reviewed every 5 years to ensure it continues to reflect market conditions

This review to date does not appear to have been conducted in an independent and impartial fashion – can IPART confirm in the final report whether it has employed a qualified valuer to sign off on the proposed recommendations? Or can IPART confirm it is acting as a self-appointed valuer and it has not consulted or employed a qualified Valuer. If the latter is the case, then this is not a proper independent review, nor does it follow established valuation principles already mentioned.

Basic valuation fundamentals must be followed in the initial price setting so as not to diminish or undermine the value of the whole process.

IPART must also articulate what the methodology of the independent review will be. It is usual practice to document how this will be carried out; for example, via an independent RICS accredited valuer, with options to object and ability to escalate to an adjudicator for final determination based on real market evidence provided by the relevant parties.

8. The rental fees set out in draft recommendation 6 are to be escalated by 3% per year in line with the current private market practice.

Indara's own evidence (see Appendix C) concurs that over the last few years, average escalations have decreased from an average of 5% per annum, to 3% per annum. Indara would agree with this recommendation, however we believe that escalation rates must also be included as part of the independent review in recommendation 7 above, not just rent.

9. **How best to incorporate the social, cultural, and environmental value of national park land in recommending rents for communication towers in national parks. Currently National Parks sets the price of their sites one category higher than other land agencies. The National Parks and Wildlife Act 1974 states that the national park land cannot be used for communication facilities if there is a feasible alternative site available.**

Indara's view is that our towers do not present any adverse impact to the perceived social, cultural and environmental value of national park lands. On the contrary, the installation of communications infrastructure aligns with the notion that our national parks should be safe and connected spaces for the enjoyment of and appreciation by the residents of NSW. IPART should be reminded to consider what it would cost to the state to find a missing hiker if that hiker had no means of connecting with the outside world should they become lost or injured.

NPWS already have very exacting requirements in their licences to ensure that carriers and infrastructure providers adhere to and are responsible for the care and preservation of the areas they occupy including the immediate surrounding areas.

NPWS' response that they want the most return for public use land – takes into account money only. It has not considered the initial and ongoing investment by infrastructure providers and mobile carriers to install towers in these remote locations. Generally, these areas are very low traffic areas, generating little to no income, but the value they provide to the public, NPWS workers, and emergency services outweigh the purported increased intensity of land use and environmental impact. To build any infrastructure in National Parks requires a DA with very strict requirements on minimising disturbance to flora, fauna and wildlife.

A number of expensive reports are required to achieve a DA in these locations with further costs incurred on an ongoing basis to maintain and keep the sites compliant with the corresponding DA conditions. Therefore, Indara's view is that there has already been a stringent (and costly) process involved in the first place to minimise detriment to these areas so there should be no further value attributed to sites located in National Parks.

Reiterating our earlier point (detailed in recommendation 2 above) *'The community expect telecommunications services to work in all locations including National Parks and providing access to build infrastructure is essential. When national disasters occur such as floods and bushfires, emergency services rely on telecommunications infrastructure. Indara agrees that there should be strict guidelines how telecommunications infrastructure in sensitive locations such as National Parks are established and operated - but should not preclude the ability to locate there if there is no other viable alternative, nor should the cost to site there be in any way discriminatory'.*

Summary

Indara's position is that the current review, albeit still in draft form, is a major step backwards. The landscape has changed significantly since the last review in 2019, with the move to a neutral host model for mobile deployment.

The Federal Court's decision in the Telstra case is another fundamental shift in the industry. It is absolutely essential therefore that IPART gives due weight to the TOR issued by the State Government and must consider section 44 of the Telco Act.

This is IPART's opportunity to re-evaluate the rents paid on communication sites in comparison to rents paid by other commercial users of Crown Land. It is an opportunity for the State Government to correct the existing discriminatory regime and introduce a new, appropriate and fair regime.

We highlight that the recommendations put forth in the last IPART review in 2019 were not adopted, and the discriminatory practice has continued, and Crown Lands continues to charge excessively high rents and co-user fees despite IPART's recommendations – ultimately making a mockery of the review process. We question the value of completing an independent and time-consuming review process if government agencies are not obliged to comply with the findings and recommendations. This is supposed to be a fair market review, yet IPART has proposed to ignore the data provided by the infrastructure providers and the MNOs and rely on models predicated on skewed aged data instead.

Discriminatory pricing has been in place since the IPART recommendation was first adopted by the State Government in 2005. Indara believes that IPART should consider recommending appropriate refunds of rent by the LMAs.

In the private market space, Indara must negotiate with land holders for a fair and equitable outcome for both parties, using recent comparable evidence and with regards to the underlying land use. Private landlords are not prevented from discriminating against carriers under the Telecommunications Act, yet Indara has witnessed rents and yearly escalations decline.

The precedent set in the Telstra Case by the Federal Court of Australia and the ensuing regime put in place in Queensland, as well as recent examples and evidence provided by Indara show clear evidence for a market based, commercial return for the LMAs whilst also being fair, transparent and simple to administer.

The abovementioned TIND policy is commended by Indara and no doubt, IPART is cognisant of the increased focus that the Department is placing on the telecommunications industry and the vital role it plays nationwide.. The industry is receiving growing attention as the Federal government seeks to overhaul policy and allow ease of deployment and connectivity for all. Our expectation is that IPART's final report is mindfully aligned with the ambitions of our federal government.

Finally, IPART should also be mindful of the fact that our towers have the potential to save lives and facilitate the success of businesses and livelihoods. It is for this fundamental reason that rents on Crown lands and national parks sites cannot become too expensive and economically unviable for the carriers and infrastructure providers to deploy their towers. State government agencies should not be allowed to engage in discriminatory practices and adopt policies that ultimately perpetuate social and economic inequities in the wider NSW community and put its own residents at risk. On this basis, IPART's final recommendation should be made with full cognisance that the reasoning, justification and methodologies employed in this review will withstand Federal scrutiny and not be perceived as negligent or malfeasant.

Indara thanks IPART again for allowing Indara and the telecommunications industry in general, the opportunity to take part in the 2024 review. We trust our final submission will be of assistance and we believe it is vitally important that IPART uses this opportunity to make its mark and deliver final recommendations that benefit the telecommunications industry and the public and avoids discriminatory fees in order to encourage deployment of this essential infrastructure.

If you have any queries or would like further information about the issues raised in this submission, please do not hesitate to contact the undersigned.

Yours sincerely

[redacted]

Lee Gilligan
National Portfolio Manager

DIGITAL INFRASTRUCTURE

Level 1, 110 Pacific Highway, St Leonards, NSW 2065
PO Box 566, St Leonards, NSW 1590
[redacted]

[redacted]
indara.com

Encl:

(a) Appendix A – Lease Schedule, Private Landlords
(b) Appendix B Updated Lease Schedule, All Landlords (New and Renewal Leases 2021 – 2024)

[redacted]

Appendix A – Rental Arrangement with Private Landlords within the past 12 months

Renewal Status	Site	Site Type		Rent at Lease Expiry		Rent at Lease Commencement	% Change	Escalator at Lease Expiry	Escalator at Lease Commencement
Lease Executed	Lugarno	Rooftop	-$	12,838	-$	14,000	-9%	3%	3%
Lease Executed	Bankstown Airport	Tower	-$	53,446	-$	47,500	11%	4%	4%
Lease Executed	East Wetherill Pk	Rooftop	-$	38,067	-$	35,000	8%	3%	3%
Lease Executed	Douglas Park	Tower	-$	45,543	-$	32,000	30%	5%	5%
Lease Executed	Hexham	Tower	-$	26,533	-$	26,100	2%	5%	3%
Lease Executed	Towrang	Tower	-$	21,226	-$	22,000	-4%	5%	3%
Lease Executed	Tumblong	Tower	-$	10,613	-$	13,500	-27%	5%	3%
Lease Executed	Wollongong CBD	Rooftop	-$	26,753	-$	25,000	7%	5%	3%
Lease Executed	Palm Beach	Rooftop	-$	139,378	-$	22,500	84%	8%	3%
Lease Executed	South Sydney Leagues	Rooftop	-$	51,973	-$	55,000	-6%	5%	3%
Lease Executed	Paddington North	Rooftop	-$	63,174	-$	57,300	9%	5%	3%
Lease Executed	Bexley West	Rooftop	-$	25,286	-$	23,000	9%	3%	3%
Lease Executed	Wongarbon	Tower	-$	15,338	-$	16,000	-4%	4%	3%
Lease Executed	Pendle Hill	Tower	-$	86,191	-$	70,000	19%	5%	3%
Lease Executed	Padstow	Tower	-$	30,235	-$	34,000	-12%	3%	4%
Lease Executed	Wynyard West New	Rooftop	-$	83,636	-$	60,000	28%	4%	4%
Lease Executed	Castlereagh St	Rooftop	-$	52,340	-$	52,340	0%	5%	4%
Lease Executed	Illawong East	Rooftop	-$	20,877	-$	25,428	-22%	3%	3%
Lease Executed	Seven Hills VF	Tower	-$	41,205	-$	43,849	-6%	5%	3%
Lease Executed	Guthega	Rooftop	-$	7,392	-$	7,613	-3%	3%	3%
Lease Executed	Town Hall	Rooftop	-$	79,808	-$	65,000	19%	3%	3%
Lease Executed	Mulgoa South	Tower	-$	21,911	-$	21,068	4%	4%	3%
Lease Executed	Mowbray Rd East	Rooftop	-$	45,840	-$	42,000	8%	5%	3%
Lease Executed	Chatswood	Rooftop	-$	30,747	-$	33,000	-7%	3%	3%
Lease Executed	Campbelltown CBD	Rooftop	-$	34,796	-$	32,000	8%	4%	4%
		SUM	**$**	**1,065,145**	**$**	**875,198**	**18%**	**-**	**-**
		AVERAGE	**$**	**42,606**	**$**	**35,008**	**18%**	**4%**	**3%**

Appendix A

FEDERAL COURT OF AUSTRALIA

Telstra Corporation Ltd v State of Queensland [2016] FCA 1213

File number:	QUD 202 of 2012
Judge:	**RANGIAH J**
Date of judgment:	14 October 2016
Catchwords:	**TELECOMMUNICATIONS** – whether *Land Regulation 2009* (Qld) impermissibly discriminates against carriers by imposing higher rents on carriers than on other businesses for State leases – whether *Land Regulation 2009* (Qld) discriminates by denying carriers a right to appeal against rents – construction of cl 44 of Sch 3 to the *Telecommunications Act 1997* (Cth) to determine whether market rent is a relevant, appropriate or permissible distinction
Legislation:	*Australian and Overseas Telecommunications Act 1991* (Cth) *Competition and Consumer Act 2010* (Cth) Pts XIB and XIC *Telecommunications Act 1997* (Cth) ss 3, 7, 26, 30, 42, 56, 484, cll 27, 36, 37, 38, 39, 44 of Sch 3 and Divs 2, 3, 4, 5, 7, 8 of Sch 3 *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 12A *Trade Practices Act 1974* (Cth) *Environmental Planning and Assessment Act 1979* (NSW) s 96 *Land Act 1994* (Qld) ss 15, 153, 183 (repealed), 199A, 332, 448, Sch 1B and Pt 1, Chapter 5 (repealed) *Land Regulation 1995* (Qld) ss 12, 15, 19 (repealed) *Land Regulation 2009* (Qld) ss 26A, 27, 30, 33, 37A and Sch 12 *Land and Other Legislation Amendment Act 2014* (Qld) *Land Act and Other Legislation Amendment Regulation (No 1) 2014* (Qld) *Land Valuation Act 2010* (Qld) ss 5, 6, 7, 19, 26, 72, 105, 147, 155 and 172 *Lands Legislation Amendment Act 1991* (Qld) *Local Government Act 1989* (Vic) ss 154 and 155 of Pt 8 *Local Government Act 1993* (NSW) s 611

	Explanatory Notes for the *Land Bill 1994* (Qld)
Cases cited:	*Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 *Development Assessment Commission v 3GIS Pty Ltd* (2007) 212 FLR 123 *Optus Networks Pty Ltd v Rockdale City Council* (2005) 144 FCR 158 *Telstra Corporation Ltd v Hurstville City Council* (2000) 103 FCR 322 *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 *Telstra Corporation Ltd v State of Queensland* [2013] FCA 1296
Date of hearing:	26, 27 and 28 April 2016
Date of last submissions:	28 April 2016
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Category:	Catchwords
Number of paragraphs:	214
Counsel for the Applicant:	Mr JD McKenna QC with Mr DS Piggott
Solicitor for the Applicant:	King & Wood Mallesons
Counsel for the Respondent:	Mr J Horton QC with Ms A Stoker
Solicitor for the Respondent:	Crown Law

ORDERS

QUD 202 of 2012

BETWEEN:	**TELSTRA CORPORATION LTD** Applicant
AND:	**STATE OF QUEENSLAND** Respondent
JUDGE:	**RANGIAH J**
DATE OF ORDER:	**14 OCTOBER 2016**

THE COURT ORDERS THAT:

1. The applicant provide a draft of the orders it seeks to the respondent by 4 pm on 19 October 2016.
2. The respondent provide to the applicant its response to the draft orders by 4 pm on 24 October 2016.
3. The parties are to either provide the Court with agreed draft orders or notify the Court that no agreement has been reached by 4 pm on 27 October 2016.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RANGIAH J:

1 The applicant, Telstra Corporation Limited ("Telstra"), is a "carrier" under the *Telecommunications Act 1997* (Cth). Clause 44(1)(a) of Sch 3 to the *Telecommunications Act* provides that State and Territory laws have no effect to the extent that they discriminate or have the effect of discriminating against carriers.

2 The *Land Regulation 2009* (Qld) prescribes rents, or methods of calculating rents, for leases over State land in Queensland. Telstra holds approximately 488 such leases.

3 Telstra alleges that the *Land Regulation* discriminates against carriers by imposing higher rents on carriers than on other businesses. Telstra seeks declarations that provisions of the *Land Regulation* are invalid and orders for repayment of rent which it claims to have overpaid.

4 The respondent, the State of Queensland, admits that the *Land Regulation* has the effect of impermissibly discriminating against carriers in respect of State leases held by carriers in certain areas of low population density in the west and far north of Queensland ("the conceded areas"), but denies Telstra's allegations in respect of leases in the remainder of Queensland ("the disputed areas"). The State cross-claims for rent which it alleges remains due and payable by Telstra.

5 The central issue is whether provisions of Pt 4, Div 1 of the *Land Regulation* impermissibly discriminate or have the effect of discriminating against carriers by imposing higher rents for State leases held by carriers than for leases held by other businesses in the disputed areas. There is also a secondary issue as to whether the *Land Regulation* discriminates against carriers by denying them a right to appeal against rents for their leases.

6 The State contends that the *Land Regulation* provisions do not discriminate against Telstra and other carriers in respect of State leases in the disputed areas because the rents imposed on carriers approximate the market rents that carriers would be charged for leases of private land; and a distinction based on market rents is a relevant, appropriate or permissible distinction to draw between carriers and other businesses. The State also argues that the comparator which Telstra relies on to establish its case of discrimination is not an appropriate comparator.

7 The resolution of these issues requires detailed consideration of the relevant statutory provisions, as well as valuation evidence called by each party.

FACTS

8 Telstra owns and operates the largest and most comprehensive fixed line and mobile telecommunications network in Australia. It is necessary for Telstra to place infrastructure on land throughout Australia, including on State land, in order to operate its network and provide carriage services.

9 The infrastructure or facilities comprising Telstra's fixed line network includes: exchanges; optic fibre cabling (underground and overhead); copper cabling (underground and overhead); optical fibre regenerators; radio towers; and, in remote areas, digital radio communications systems, high capacity radio concentrators and multiple drop out units.

10 Additional facilities called "base stations" are needed to operate a mobile telephone network. Base stations receive and send radio transmissions to and from mobile telephones. Telstra's base stations comprise Cellular Mobile Telephone Services Base Stations ("CMTS") and microcells.

11 When a call is made on Telstra's fixed line telephone network, a signal is transmitted from the caller's telephone through a network of cables, optical fibre, radio towers and exchanges to the recipient's telephone. When a call is made on a mobile telephone, a signal is transmitted from the telephone to antennae which are linked by cabling or radio-link technology into and through the fixed line telephone network.

12 Until 1991, Telecom was the only provider of telecommunication services in Australia. By the *Australian and Overseas Telecommunications Act 1991* (Cth), the property and operations of Telecom were vested in the company now known as Telstra Corporation Ltd. A suite of legislation, including the *Telecommunications Act*, was also introduced allowing other telecommunications service providers to compete.

13 Telstra is the only carrier with a fixed line telephone network in Queensland. It was unnecessary for competitors to replicate Telstra's fixed line network as Telstra is required to give other carriers reasonable access to its fixed line network. Three carriers, Telstra, Vodafone and Optus, operate retail mobile telephone networks in Queensland. All three have set up mobile telephone infrastructure in populated areas and along some major highways.

However the vast majority of the land area of Queensland is not covered by any mobile telephone service.

14 Telstra's infrastructure is situated in a wide variety of urban and rural locations. When Telstra selects sites for the installation of the infrastructure required to provide fixed line or mobile telephone networks, the factors it considers include its universal service obligation, technical constraints, construction and maintenance costs and co-location of services.

15 Pursuant to s 12A of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth), Telstra is subject to a universal service obligation. That obligation requires Telstra to ensure that all Australians, no matter where they live or conduct business, have reasonable access on an equitable basis to a standard telephone service and payphone service. This means that Telstra must install infrastructure to provide standard telephone services and payphone services in rural and remote areas of Australia, as well as urban areas. The universal service obligation does not apply to mobile telephone services.

16 In rural and remote areas, Telstra uses radio towers to transmit radio signals via microwave link over long distances from exchange to exchange. It is necessary for there to be a clear line of sight between radio towers, typically requiring an elevated site. Such sites require good road access and electricity. Telstra also requires land to install exchanges and other facilities.

17 In selecting a site for a CMTS facility in more urbanised areas where mobile telephone services are provided, it is necessary for the area of the signal from that facility to overlap with the area of signals from other facilities to ensure continuity of coverage (ie no drop-outs) as a user moves between areas.

18 Once infrastructure has been installed, it can be difficult to relocate. For example, the cost of relocating a radio tower can be more than $1 million.

19 Telstra prefers to enter some form of tenure agreement with land owners, rather than relying on statutory rights to enter and occupy land. Telstra's portfolio of leases in Queensland includes leases obtained in the private market, leases of freehold land from government entities, and leases of State land. Telstra also holds licences and permits for installation of facilities on land in Queensland.

20 Telstra holds about 894 leases over private land in Queensland. The vast majority of these leases are over land in south-east Queensland or along the east coast, with only about 62

outside these areas. About 83% of Telstra's private leases are used for CMTS sites in urban areas for its mobile network.

21 Apart from the south-east corner and the eastern coast, the vast majority of land in Queensland consists of State land. Telstra has about 488 State leases in Queensland. Telstra's State leases spread throughout Queensland, although there are relatively few in south-east Queensland.

22 The vast majority of Telstra's State leases are used for radio towers for the fixed line network. Many of these towers are in rural or remote Queensland. Many of the radio tower sites in rural or remote Queensland are in locations where there is no human occupation or alternative use being made of the land.

23 Telstra has installed CMTS mobile telephone facilities on only about 53 of its 488 State lease sites.

24 What emerges from the evidence is that carriers have an imperative need to install infrastructure on many parcels of land across Queensland in order to operate their telephone networks and other carriage services. Telstra's need is particularly acute because of its universal service obligation. Unlike other carriers, Telstra requires the use of land in even remote parts of Queensland. The bulk of the land in rural and remote areas of Queensland is government-owned.

THE STATUTORY PROVISIONS

The Telecommunications Act 1997 (Cth)

25 The *Telecommunications Act* provides a regulatory framework for the provision of carriage services by carriers.

26 Under s 7 of the *Telecommunications Act*, a "carrier" is the holder of a carrier licence granted under s 56 by the Australian Communications and Media Authority ("ACMA"). Telstra holds a carrier licence.

27 Section 42 allows a carrier to use a network unit to supply a carriage service to the public. A "network unit" is defined in ss 26(1) and 30 as a "line link" which connects distinct places in Australia. A "line" is defined in s 7 to include a wire, cable, optical fibre, tube, conduit or other physical medium used as a continuous artificial guide for carrying communications by means of guided electromagnetic energy.

28 Section 7 defines "carriage service" as a service for carrying communications by means of guided and/or unguided electromagnetic energy.

29 The effect of these provisions is that a carrier is permitted to provide carriage services, such as telephone services, to the public. A telephone service can be a fixed line service or a mobile telephone service.

30 Part 24 consists of a single provision, s 484, which states, "Schedule 3 has effect". Schedule 3 of the *Telecommunications Act* has the heading "Carriers' powers and immunities".

31 The powers given to carriers are set out in Divs 2, 3 and 4 of Pt 1, Sch 3. Division 2 allows a carrier to enter on and inspect land. Under Div 3, the power to install a facility may be exercised where, relevantly, the carrier holds a facility installation permit (which may only be issued by the ACMA if the carrier has made reasonable efforts to negotiate in good faith with the relevant proprietors and administrative authorities), or if the facility is a low-impact facility. Division 4 allows a carrier to maintain the facility once installed.

32 Division 7 deals with the relationship between Divs 2, 3 and 4 and State and Territory laws. Clause 36(1) provides:

> Divisions 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.

33 Clause 37 applies to activities authorised by Divs 2, 3 and 4. Despite cl 36(1), cl 37(2) provides that a carrier may engage in such activities despite a law of a State or Territory about a number of specified subjects, including town planning, powers and functions of a local government body, the use of land and tenancy.

34 Clause 38 provides:

> **38 Concurrent operation of State and Territory laws**
>
> It is the intention of the Parliament that, if clause 37 entitles a carrier to engage in activities despite particular laws of a State or Territory, nothing in this Division is to affect the operation of any other law of a State or Territory, so far as that other law is capable of operating concurrently with this Act.

35 Clause 39 provides:

> **39 Liability to taxation not affected**
>
> This Division does not affect the liability of a carrier to taxation under a law

of a State or Territory.

36 Although Telstra has the power under Div 3 to compulsorily install facilities on both privately owned and State land (subject to obtaining a facility installation permit where the facility is not a low-impact facility), its policy is to avoid exercising such power, and to instead negotiate leases which allow it to install and maintain such facilities.

37 Clause 44 appears in Div 8, which has the heading "Miscellaneous". Clause 44 provides, relevantly:

> **44 State and Territory laws that discriminate against carriers and users of carriage services**
>
> (1) The following provisions have effect:
>
> (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 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.

38 Clause 44 is the critical provision in this proceeding. The resolution of the proceeding requires consideration of its meaning and effect.

***The Land Act 1994* (Qld)**

39 In 1990, the Wolfe Committee conducted a review of land regulation in Queensland. The Wolfe Committee considered the way rents for State leases should be fixed, concluding that the preferred mechanism was to apply a percentage to the unimproved capital value of land. The Committee said:

> The use of unimproved value as a factor in determining rents for Crown leaseholds is soundly based as it measures the value of Crown land, and disregards the improvements and development works either owned by the lease holder or for which he may claim compensation. A rental percentage applied to the unimproved value is

> a fair way of determining a rent for the use of Crown land. Once a percentage rental is established the rent is then directly related to the unimproved value of and will change as the unimproved value changes.

40 The Committee suggested that the rental percentage should vary within the range of 3% (for residential land) to 6% (for commercial and industrial land).

41 By the *Lands Legislation Amendment Act 1991* (Qld), Parliament gave effect to the Wolfe Committee's recommendations in relation rents for State land. The *Land Act 1994* (Qld) later finalised the implementation of the recommendations of the Wolfe Committee, as explained in the Explanatory Notes for the *Land Bill 1994* (Qld).

42 Section 15(2) of the *Land Act* provides that the Minister may lease unallocated State land for either a term of years or in perpetuity. Section 153 provides that a lease must state the purpose for which it is issued, while s 199A(2) provides that leased land must only be used for the purpose for which the lease was issued.

43 Section 448 and Sch 1B provide that the Governor in Council may make regulations about matters including payment of rent, the calculation or setting of rent payable and categories of leases.

44 Until 1 July 2014, Pt 1, Ch 5 of the *Land Act* provided that rental periods and rents, or methods of calculating rents, were to be determined by regulation. Section 183 provided:

> **183 Rent payable generally**
>
> (1) The rent for a lease, licence or permit is –
>
> (a) if a regulation prescribes an amount for all leases in a category of lease (a prescribed category) – the amount prescribed; or
>
> (b) otherwise – the amount calculated by multiplying the rental valuation prescribed under a regulation by the rate prescribed under a regulation.
>
> ...
>
> (3) The rate may be a single rate applying to all leases, licences or permits, or a series of rates applying to different categories of leases, licences or permits prescribed under the regulations.
>
> (4) The rent for a lease, licence or permit –
>
> (a) must not be less than the minimum prescribed under a regulation, unless the lease is of a prescribed category; and
>
> (b) must be calculated in whole dollars.

45 The *Land and Other Legislation Amendment Act 2014* (Qld) deleted Pt 1, Ch 5 of the *Land Act*, including s 183. The *Land Act and Other Legislation Amendment Regulation (No 1) 2014* (Qld) then enacted provisions in the *Land Regulation* with effect from 1 July 2014 to replace the deleted *Land Act* provisions.

***The Land Regulation 1995* (Qld)**

46 The *Land Regulation 1995* (Qld) gave practical effect to the Wolfe Committee's recommendations concerning the way in which rents for State leases should be calculated.

47 The *Land Regulation 1995* identified 13 categories of leases, licences or permits. The two categories of relevance were categories 4 and 7.

48 Section 12 defined a category 4 lease as a lease used for commercial, industrial or business purposes, which does not fulfil the requirements for another category.

49 Section 15 defined a category 7 lease, relevantly, as a lease used for the provision, relay or transmission of telephonic, television, radio or other electronic communication services for commercial, domestic, emergency or essential services activities. Telstra's leases fell within category 7.

50 Under s 19, the rate of rent prescribed for both category 4 and category 7 leases was 5% of the valuation of the lease for rental purposes.

51 It may be seen that under the *Land Regulation 1995*, the rents to be paid by Telstra and other carriers were calculated on the same basis as the rents for other businesses.

***The Land Regulation 2009* (Qld)**

52 When it commenced on 1 July 2010, s 27 of the *Land Regulation* prescribed nine categories of leases, numbered from 11 to 16. The *Land Regulation* has since been amended a number of times. It is enough for present purposes to refer to the *Land Regulation* in its current form.

53 There are now 13 rental categories prescribed under s 27. Those categories are numbered from 11.1 to 16. The categories can be described as follows:

- Categories 11.1 and 11.2 – primary production;
- Categories 12.1 and 12.2 – residential;
- Category 13 – business and government core business;
- Categories 14.1 and 14.2 – charities and sporting or recreational clubs;

- Categories 15.1, 15.2, 15.3, 15.4 and 15.5 – communication sites;
- Category 16 – divestment.

54 The categories of primary relevance to this case are categories 13, 15.4 and 15.5.

55 Section 30 of the *Land Regulation* deals with category 13 leases. That section provides:

> **30 Category 13 lease**
>
> (1) A lease is a category 13 lease if –
>
> (a) under its conditions the lease may be used for, or it is being used for, a business, commercial or industrial purpose; and
>
> (b) the lease does not meet the requirements for another category.
>
> (2) Also, a lease is a category 13 lease if –
>
> (a) the lessee is a government leasing entity; and
>
> (b) the use of the lease is essential for conducting the lessee's core business.
>
> *Examples of a lessee's core business –*
>
> operating hospitals, police stations, schools, offices and depots
>
> ...

56 Section 33 of the *Land Regulation* deals with category 15 leases. It provides, relevantly:

> (4) A lease is a category 15.4 lease if –
>
> (a) the lease may be used for, or it is being used for, the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity; and
>
> (b) the lease land is in a rural area.
>
> (5) A lease is a category 15.5 lease if –
>
> (a) the lease may be used for, or it is being used for, the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity; and
>
> (b) the lease land is in an urban area.
>
> (6) In this section—
>
> ...
>
> ***non-community service activity*** means an activity relating to the provision of commercial or domestic services...
>
> *Example of commercial or domestic services—*
>
> mobile phone or cable television services
>
> ***rural area*** means a part of the State that is not an urban area.

urban area means a part of the State in the area of a following local government –

- Brisbane City Council
- Gold Coast City Council
- Ipswich City Council
- Logan City Council
- Moreton Bay Regional Council
- Redland City Council
- Sunshine Coast Regional Council.

57 Telstra's leases fall within categories 15.4 and 15.5. It may be seen that the difference between category 15.4 and 15.5 leases is that the former applies to land in rural areas and the latter to land in urban areas.

58 Section 37A of the *Land Regulation* provides, relevantly:

> **37A Rent for leases of particular categories**
>
> (1) The rent for a rental period for the following leases is the amount calculated by multiplying the rental valuation for the particular lease by the following percentage –
>
> ...
>
> (e) for a category 13 lease – 6%;
>
> ...
>
> (2) The rent for a rental period for the following leases is –
>
> ...
>
> (d) for a category 15.4 lease – $12,302;
>
> (e) for a category 15.5 lease – $18,453.

59 The expression "rental valuation" is defined in Sch 12 of the *Land Regulation* as a "Land Act rental valuation" under the *Land Valuation Act 2010* (Qld).

60 A "rental period" for a lease is defined in s 26A of the *Land Regulation* as a period of one year starting on 1 July.

61 When the *Land Regulation* commenced on 1 July 2010, the prescribed rents for category 15.4 and 15.5 leases (then known as category 15.2 and 15.3 leases) were $10,000 and $15,000 respectively. There have been annual increases in the rents for category 15.4 and 15.5 leases

of around 3.5% since then. The rents at the date of trial were $11,886 and $17,829 respectively, but have now been increased to the amounts set out in [58] above.

62 It may be seen that under s 37A of the *Land Regulation*, the annual rent for category 13 leases is calculated at 6% of the rental valuation for the lease, but that a fixed annual rent is imposed for category 15.4 and 15.5 leases. That distinction results in carriers usually paying higher rents than other businesses for a lease of State land. The distinction is at the heart of this proceeding.

***The Land Valuation Act 2010* (Qld)**

63 Under s 5 of the *Land Valuation Act*, the Valuer-General must decide the value of land as provided for under that Act.

64 Section 72 requires the Valuer-General to make annual valuations of all land in a local government area.

65 Section 6(1)(c) provides that one of the purposes of such a valuation is the calculation of rent under the *Land Act*.

66 Section 7 provides that the value of land for non-rural land is its site value. Under s 19(1) if the land is improved, its site value is its expected realisation under a bona fide sale assuming all non-site improvements for the land had not been made.

67 Section 7 provides that the value of land for rural land is its unimproved value. Under s 26(1) if the land is improved, its unimproved value is its expected realisation under a bona fide sale assuming all site improvements and non-site improvements on the land had not been made.

68 Section 105(1) allows an owner to object to the valuation of the owner's land. An "owner" is defined in the Schedule to the *Land Valuation Act* to include a lessee of land held from the State where the lessee must pay *Land Act* rental for the land.

69 Section 147 requires the Valuer-General to consider and decide a properly made objection. Under s 155, an objector may appeal to the Land Court against an objection decision, and has, under s 172, a right to a further appeal to the Land Appeal Court.

70 The significance of these provisions is that a business which leases category 13 land has a right to object to and appeal from the land valuation and thereby challenge the annual rent. On the other hand, a carrier which leases category 15.4 or 15.5 land has no such rights.

THE AUTHORITIES

71 There are three cases that have construed and applied cl 44 of Sch 3 to the *Telecommunications Act*. I will discuss each of these cases in turn.

Bayside City Council v Telstra Corporation Ltd

72 In *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595, the High Court considered the validity of s 611 of the *Local Government Act 1993* (NSW) ("the NSW Act") and Pt 8 of the *Local Government Act 1989* (Vic) ("the Victorian Act").

73 Section 611 of the NSW Act conferred power on local Councils to make an annual charge on a person in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place. However, s 611(6) and other legislation exempted a number of bodies from the operation of the power, including the Crown, water supply authorities and railway, electricity network and pipeline operators. However, carriers and gas pipeline providers were not exempt.

74 Sections 154 and 155 in Pt 8 of the Victorian Act declared that all land in Victoria was rateable and empowered Councils to declare rates and charges on such land. Crown land and land used exclusively for public or municipal services land was exempted from such rates and charges, as were electricity companies and gas suppliers. Carriers were not exempt.

75 Telstra and Optus had each installed underground and aerial cables in local government areas. A number of Councils imposed charges or levied rates in respect of the land occupied by the cables. Telstra and Optus brought proceedings against the Councils alleging that s 611 of the NSW Act and Pt 8 of the Victorian Act discriminated, or had the effect of discriminating, against carriers.

76 At first instance, Wilcox J dismissed the proceedings, holding that cl 44(1) of Sch 3 was not a law under s 51(v) of the Constitution upon which s 109 of the Constitution could operate so as to render State laws invalid: see *Telstra Corporation Ltd v Hurstville City Council* (2000) 103 FCR 322. Having reached that conclusion, Wilcox J did not go on to consider whether the NSW and Victorian legislation had a discriminatory effect on carriers.

77 The Full Court of the Federal Court allowed the appeal, holding that cl 44(1) of Sch 3 was a valid exercise of the Commonwealth's legislative power, and that the NSW and Victorian legislation discriminated against carriers to the extent that they authorised local government

authorities to impose rates and charges on carriers: see *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198.

78 By majority, the High Court dismissed an appeal from the judgment of the Full Court. Callinan J, in dissent, would have upheld the appeal on the basis that cl 44 of Sch 3 was beyond the legislative power of the Commonwealth. His Honour did not go on to consider the question of discrimination.

79 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ held that cl 44 was constitutionally valid and that the NSW and Victorian legislation discriminated against carriers. McHugh J gave separate reasons, agreeing in the result.

80 The plurality considered the scope of cl 44, saying:

> 24 There is a question as to the extent of the application of cl 44, and, in particular, cl 44(1)(a)...[I]f a State or Territory law is discriminatory in one of the ways referred to in cl 44, and that discrimination involves adverse treatment that is differential by reference to an appropriate standard of comparison, it will attract the operation of that provision...Similarly...the kind of discrimination against carriers that attracts the potential operation of cl 44 is discrimination against them in their capacity as carriers. Clause 44 is concerned with State or Territory laws which impose discriminatory burdens upon carriers in carrying on activities as carriers authorised by the Telco Act.
>
> (Footnote omitted.)

81 Their Honours then dealt with the application of the law to the facts as follows:

> 40 Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.
>
> 41 In the present case, the basis for the claim of discrimination is in a comparison between, on the one hand, the charges and rates imposed and levied in respect of the Telstra and Optus cables, and, on the other hand, the treatment of facilities, which are installed or operated above, on or under public land, by utilities or other users of such space and are said to be comparable...In the present case, however, Telstra and Optus point to a general pattern of State legislative treatment of facilities to which their cables have been made an exception.
>
> 42 Clause 44 does not, in terms, identify the kind of comparison that is appropriate for the purpose of considering whether a State law discriminates

against carriers generally. (The comparison involved in deciding whether a State law discriminates against a particular carrier, or a particular class of carriers, is more straightforward.)...

43 In relation to aerial cabling, which appears to be what primarily attracted the attention of the local authorities, the facilities installed by electricity authorities constitute an obvious basis of comparison. The fact that they are singled out in the Explanatory Memorandum confirms that the kind of discrimination with which cl 44 is concerned, in its reference to discrimination against carriers generally, is the subjection of carriers, in that capacity, to a burden of a kind to which others in a similar situation are generally not subject, and that a similar situation includes the use of public space for the installation and maintenance of facilities such as cables, pipes, ducts and conduits. In relation to underground facilities, the position is somewhat more complex, but gas pipelines in New South Wales are, apart from the facilities in question in this case, the exception to a general pattern of exemption.

44 ...Here there is a clear general pattern of exemptions, and it is sufficient to say that the existence of one other significant exception to that pattern (gas pipelines in New South Wales) does not negate discrimination. In addition, in the case of aerial cabling, there is an obvious basis of comparison, namely electricity facilities, which enjoy an exemption.

(Footnotes omitted.)

82 Justice McHugh considered what would amount to a reasonable or permissible distinction in the treatment of carriers and others. His Honour said:

68 The Full Court accepted that different treatment amounts to discrimination only if there is no reasonable distinction to justify different treatment. The appellants submitted that the key difference between Telstra and Optus on the one hand and the exempted bodies on the other is that the latter occupy land under statutory authorities granted by the States, while the appellants occupy land under authority granted by the Commonwealth. A State, they submitted, is entitled to prevent councils, which are the custodians of its land, from charging rates to the State's agents.

69 However, the question whether a reasonable distinction exists must be examined in light of the law prohibiting discrimination, not the potentially discriminatory law. As Gaudron J and I said in *Castlemaine Tooheys Ltd v South Australia*, a law "is discriminatory if it operates by reference to a distinction which some *overriding law* decrees to be irrelevant". It is of no present relevance whether or not, in exercising their powers under the applicable Local Government Act, councils are acting reasonably in perceiving a difference between State agencies and bodies authorised to carry out functions under federal law, such as Optus and Telstra. The question is whether the *Telecommunications Act* permits Optus and Telstra to be treated differently from State agencies in respect of rates and charges.

70 It is true, as Wilcox J noted, that cl 44(1) of Sch 3 to the *Telecommunications Act* provides no criteria by which a court may determine what differences are legitimate and what are illegitimate. His Honour observed that in this respect it differs from other federal statutes which prohibit discrimination and which provide such criteria, for example, the *Racial Discrimination Act 1975* (Cth),

the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth).

71 For the purposes of this case, it is unnecessary to determine whether cl 44(1) prohibits *all* differential treatment of carriers. It is sufficient to say that the wide and unconditional language of **cl** 44(1) suggests that the Commonwealth Parliament intended to protect carriers from special burdens without regard to any policy objective of a State or Territory law which imposed that burden. If the Parliament had intended to allow such policy objectives to be relevant, it would have framed cl 44(1) so as to prohibit only *unreasonable* discrimination.

(Footnotes omitted.)

83 His Honour went onto consider the identification of the appropriate comparator:

77 Clause 44(1) prohibits discrimination against a particular carrier, class of carriers or carriers generally. If the discrimination alleged was against a particular carrier, the appropriate comparison would probably be other carriers. Where the discrimination is alleged to be against "carriers generally", however, the issue arises as to the appropriate entity with which "carriers" should be compared. Was the Full Court correct to conclude that the appropriate comparison here was between Optus and Telstra on the one hand and "other bodies which make a similar use of public places" on the other?

78 The appellants were unable to suggest any alternative point of comparison. Instead, they resorted to the suggestion that cl 44(1) is designed to prevent only laws *aimed* at carriers, rather than to ensure that carriers receive equal treatment. Such a narrow interpretation of "discrimination" is incompatible with the breadth of cl 44(1). In particular, the reference to the "direct or indirect" *effect* of a State or Territory law leaves no room for such an argument.

79 In cases like the present, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). The New South Wales and Victorian Acts confer a power to levy charges or rates on the owners or occupiers of public land, that is, land used for a public purpose. This indicates that the Full Court was correct in comparing the position of carriers with that of other owners or occupiers of public land. In turn, this invites a comparison with electricity suppliers, water suppliers, gas suppliers and other pipeline users. These entities resemble Telstra and Optus in their ownership and/or occupation and use of public land, a use which involves putting wires, cables or pipes over or under the land. Other owners or occupiers of public land, whose use of the land is perhaps less directly comparable with that of Telstra and Optus, include rail authorities, road traffic authorities and public transport authorities. Whether the comparison is made with the first group or the second group, the New South Wales and Victorian Acts exempt all – or in the case of New South Wales, almost all – of these entities from the operation of the legislation. This has the effect that the New South Wales and Victorian Acts authorise charges or rates that discriminate against Telstra and Optus.

(Footnote omitted.)

84 As to the fact that the NSW legislation also imposed charges on gas suppliers, McHugh J said:

> 80 In New South Wales, gas suppliers are the only bodies apart from Telstra and Optus that are subject to the charges...The Full Court assumed, correctly in my opinion, that this liability on the part of gas network operators did not mean that the New South Wales councils did not discriminate against Telstra and Optus. A person may be discriminated against even if some other person is treated equally unfavourably.
>
> 81 If *many* other persons were also treated unfavourably, a question might arise whether the law discriminated against a particular person. This question does not arise in the present case. The great majority of occupiers of public space in New South Wales are exempt from local government charges. That gas suppliers remain subject to these charges does not alter the fact that carriers are treated less favourably than most comparable entities.
>
> (Footnote omitted.)

Development Assessment Commission v 3GIS Pty Ltd

85 In *Development Assessment Commission v 3GIS Pty Ltd* (2007) 212 FLR 123, the respondent, a joint venture company formed by two carriers, applied for a development approval for a telecommunications facility, but the planning authority refused the application.

86 In obiter, Bleby J (within whom Doyle CJ and Sulan J agreed) said:

> 65 In short, the argument is that to the extent that a demand need might be required to be established and measured against its effect on visual amenity, a telecommunications provider is singled out and treated differently from any other applicant for development approval. A carrier would be subject "to a burden of a kind to which others in a similar situation are generally not subject".
>
> 66 The Telecommunications Facilities provisions of the Development Plan apply only to telecommunications carriers licensed under the *Telco Act*. No-one else is authorized to operate a facility. Whether the applicant for development approval is the carrier or a third party as lessor of the facility, it is a facility dedicated to a carriage service. The ability of the carrier to provide the service depends on the installation of the facility. The burden of establishing the relevant demand need will therefore fall on the carrier. Alternatively, it is the carrier and only the carrier who will be adversely affected if the burden is not discharged. No other applicant for development approval, including any other infrastructure provider, is required to prove such a need. The carrier is therefore singled out and treated differently from any other applicant for development approval.
>
> 67 Accordingly, on the information available and if it were necessary to do so, I would hold that the requirements of the Development Plan, insofar as they require proof of demand need in the area covered by the proposed facility, would be invalid by virtue of the operation of clause 44 of Sch 3 as discriminating against carriers generally or at least the class of carriers who are required to obtain development approval for the installation of facilities in

accordance with the requirements of the Development Act.

(Footnote omitted.)

Optus Networks Pty Ltd v Rockdale City Council

87 In *Optus Networks Pty Ltd v Rockdale City Council* (2005) 144 FCR 158, Tamberlin J held that s 96(1A) of the *Environmental Planning and Assessment Act 1979* (NSW) was invalid to the extent that it purported to authorise the Council to delete conditions of development approval requiring the developer to "underground" Optus' television cables. The developer, Meriton, had originally been required to arrange for overhead powerlines belonging to two electricity suppliers and overhead cables owned by Optus to be placed underground. The practical effect of deleting the condition in respect of the television cables was that Optus had to meet the costs of undergrounding the cables instead of the developer. On the other hand, the developer was still required to negotiate the costs of undergrounding the powerlines with the electricity suppliers.

88 Tamberlin J noted the breadth of cl 44, saying:

> 22 The first matter to note is that the language of the clause is broad. It is not limited to the direct effect of the exercise of power under a law. It is not limited to direct or indirect effect. Nor is it limited to the direct or indirect effect of the operation of the law itself but rather it extends to the exercise of a power **under** the law. The expression "under" is extensive and in the context of discriminatory provisions it is appropriate to give it a broad meaning. The provision is not concerned with motive or intent but rather with the consequence or effect of the exercise of authority of power under the law. Sch 3 is expressly concerned with the powers and immunities of carriers and should be interpreted with this in mind. Accordingly, it is not relevant that s 96(1A) is non-discriminatory on its face. The issue is whether the law confers an authority which, if and when it is exercised, leads to discrimination against the carrier. The proper approach is to examine the operational effect or result or outcome of the exercise of the power.

89 His Honour said that in considering the indirect effect of the deletion of the condition, it was useful to consider Optus' position before and after the condition was deleted. His Honour said:

> 27 After the deletion of the requirement affecting Optus, which imposed a condition on Meriton to underground the Optus lines, the result was that Meriton, in practical terms, would need to negotiate the undergrounding with EA and SRA but was no longer required to negotiate with Optus for removal of the Optus cable. The obligation on Meriton to underground the lines carried with it in its practical operation an obligation on Meriton to arrange for this to be permitted by the three authorities. As a result of the deletion of the condition in respect of the Optus cable, there was no obligation to negotiate with Optus because cl 51 of the *Telco Act* operated to require Optus

> to **remove** the cables. This meant that while EA and SRA could demand payment or other terms to carry out the Council conditions in relation to conduits and undergrounding, Optus could not demand terms for removal of its cable. Therefore, the effect of the decision to remove the requirement only as against Optus placed Optus in a disadvantageous position in comparison with the positions of EA and SRA in respect of lines and cables suspended over the same spaces from the same poles.

90 The Council sought to contend that the different treatment of Optus was permissible on the basis that there was no clear class of comparators. Tamberlin J rejected that submission holding that the electricity authorities were relevant comparators as they used the same poles for overhead lines and cables, and because the cables could reasonably be considered to have had similar visual and environmental effects.

91 His Honour also rejected a submission that the differential treatment of Optus was permissible because there was differential treatment by the Council as between the two electricity entities.

ACCOUNTING EVIDENCE

92 Telstra called an accountant, Natalie McKay, to give evidence.

93 Ms McKay has calculated that the total amount of rent payable under the *Land Regulation* by Telstra to the State in the period from 1 July 2010 to 30 June 2016 for Telstra's category 15.4 and 15.5 leases was $32,913,145. In contrast, the rent payable if Telstra's leases instead fell within category 13 would be $3,176,007. That is a difference of $29,737,138.

94 Telstra has stopped paying rent at the rates prescribed for category 15.5 and 15.5 leases and has instead been paying rent at the rate for category 13 leases. Telstra's conduct was the subject of an unsuccessful application for interlocutory relief: *Telstra Corporation Ltd v State of Queensland* [2013] FCA 1296. Ms McKay has calculated that if Telstra has only been required to pay category 13 rent since 1 July 2010, Telstra has overpaid rent to the State in the amount of $7,827,967 in the period to 30 June 2016.

95 Ms McKay was cross-examined as to matters she had and had not taken into account, but not as to the figures she had arrived at. I accept Ms McKay's evidence.

THE SUBMISSIONS

96 Telstra submits that the provisions of the *Land Regulation* which determine the rent payable for State leases are laws that discriminate, or which have the effect (directly or indirectly) of discriminating against carriers. Telstra argues that carriers are treated adversely in

comparison to other businesses which hold State leases because, firstly, carriers pay higher rents and, secondly, carriers have no statutory right to appeal against the rents that are prescribed.

97 Telstra notes that the annual rents for category 13 leases are set at 6% of the land valuation, but the rents for categories 15.4 and 15.5 are fixed amounts, currently $12,302 and $18,453 respectively. Telstra argues that if carriers' rents were calculated in the same way as the rents for other businesses, they would pay much less rent. In aggregate, it is presently required to pay 10 times more than it would be required to pay under category 13. Telstra has not attempted a lease-by-lease comparison of the rent it pays compared to the rent that would be payable under category 13. It also argues that other businesses are treated more favourably than carriers because other businesses effectively have a right to object to and appeal against rents, whereas carriers do not.

98 In its written submissions, the State concedes that the *Land Regulation* does treat carriers detrimentally by charging them more than other leaseholders, and that it does so based on the fact that carriers use the leased areas for communications purposes or their purposes as carriers. However, the State submits that, other than in the conceded areas, such detrimental treatment does not contravene cl 44 of Sch 3.

99 The State's argument starts with the premise that the rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases, except in the conceded areas in the north and western regions of Queensland, approximate the market rents payable by carriers for leases over privately owned land. The State, at least implicitly, accepts that market rents for leases granted to other businesses over privately owned land are lower.

100 However the State argues that that it is entitled to take a "market approach" and to "seek market rates for making available for use" State land. The State submits that the distinction drawn by the *Land Regulation* between carriers and other businesses on a market basis is a "relevant, appropriate or permissible distinction" that the *Telecommunications Act* allows to be made.

101 The State's pleading and written submissions also raise an argument that category 13 leases are not an appropriate comparator to use when deciding whether there is discrimination within cl 44(1) of Sch 3 because Telstra's leases and circumstances are different to those of other businesses; and because the rental calculation used for category 13 leases cannot be

used for category 15.4 and 15.5 leases. That argument seemed somewhat inconsistent with the State's concession that it does treat carriers detrimentally by charging them more than other leaseholders. By the end of the State's oral submissions, I understood the State to no longer pursue that argument and to instead argue that, once it is seen that a distinction on the basis of market rents may lawfully be applied, it is apparent that it is not appropriate to make a comparison between rents payable under category 13 and those payable under category 15. However, the State's initial argument was not expressly abandoned and I will consider it in case my understanding of the State's position is wrong.

102 The State's premise that the rents for category 15.4 and 15.5 leases, except in respect of the conceded areas, approximate the rents payable for leases granted to carriers in the private market relies upon the evidence of a valuer, Rodney Brett. Mr Brett applies a "mass appraisal system", rather than a valuation of market rent on a lease-by-lease basis. Mr Brett's methodology is to start with the *Land Regulation* system under which there is a rural zone (category 15.4) and an urban zone (category 15.5), but then split the rural zone into two zones. He assesses the low population density parts of the rural zone as having a lower market rent than the medium density parts of that zone. Mr Bretts' opinion is that rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases approximate the rents in the private market for the medium density parts of the rural zone and the urban zone respectively, but not the low density parts of the rural zone.

103 Telstra's response to the State's submissions is that the *Telecommunications Act* cannot be construed as allowing State and Territory legislation to treat carriers detrimentally on the basis that the market rents for carriers for leases over private land are higher. Telstra also argues that category 13 lessees are an appropriate comparator.

104 Telstra also relies on the evidence of a valuer, Lawrence John Hamilton, to dispute the factual premise of the State's argument, namely that rents imposed under the *Land Regulation* for category 15.4 and 15.5 leases approximate rents for carriers for private land in areas other than the conceded areas. Mr Hamilton's opinion is that Mr Brett has not applied a mass appraisal process, or has not properly applied such a process.

CONSIDERATION

The issues

105 The State admits that the *Land Regulation* impermissibly discriminates against carriers contrary to cl 44 of Sch 3 to the *Telecommunications Act* by imposing higher rents on carriers than other businesses in respect of State leases in the conceded areas. The conceded areas are described more precisely at [178] of these reasons.

106 That leaves for determination the question of whether the *Land Regulation* impermissibly discriminates against carriers in its operation on leases in the disputed areas, namely the remainder of Queensland. There is also a second question, whether the *Land Regulation* impermissibly discriminates or has the effect of discriminating against carriers by allowing other businesses, but not carriers, to appeal against the rents for leases over State land.

107 The first question requires consideration of two issues. The first is whether the *Telecommunications Act* allows State and Territory governments to treat carriers adversely by imposing higher rents in the disputed areas on the basis that market rents for leases over private land are higher for carriers than for other businesses. The second is whether rents for State leases in the disputed areas in fact approximate the market rents that carriers would be charged by the owners of private land.

108 Before directly addressing the issues in dispute, it is useful to consider some aspects of the parties' submissions concerning the operation of the *Land Regulation.*

109 Section 33 of the *Land Regulation* deals with leases granted for communications purposes. Under that section, a category 15.4 or 15.5 lease "may be used for...the provision, relay or transmission of telephonic, television, radio or other electronic communication services for a non-community service activity." It is not in dispute that the activities of carriers performing functions under the *Telecommunications Act* come within this description.

110 It may be noted that leases held by television and radio providers which are not carriers, also fall within categories 15.4 and 15.5. In *Bayside,* the High Court alluded to an argument that if many businesses are treated unfavourably, a question might arise as to whether the law can be said to discriminate against carriers. No such argument has been raised in this case.

111 The difference between category 15.4 and category 15.5 leases is that the former are over land in "rural areas", while the latter are over land in "urban areas". An "urban area" is defined in s 33(b) of the *Land Regulation* as one within the local government area of the

Brisbane City Council, Gold Coast City Council, Ipswich City Council, Logan City Council, Moreton Bay Regional Council, Redland City Council or Sunshine Coast Regional Council. A "rural area" is any other area in Queensland.

112 The holder of a category 15.4 lease is required to pay an annual rent which is currently $12,302, while the holder of a category 15.5 lease pays $18,453. The rents are fixed under the *Land Regulation*, and there is no provision for any challenge to the amount of rent.

113 Under s 30 of the *Land Regulation*, a lease is a category 13 lease if the lease may be used for a business, commercial or industrial purpose and the lease does not meet the requirements for another category; or if the lessee is a government leasing entity and the use of the lease is essential for conducting the lessee's core business. Telstra's case of discrimination focuses on a comparison of the treatment of carriers with the treatment of businesses with category 13 leases. Telstra does not rely upon any favourable treatment of government leasing entities. Nor does it rely on the favourable treatment of primary producers, charities, sporting or recreational clubs.

114 Under s 37A of the *Land Regulation*, the annual rent payable for category 13 leases is 6% of the rental valuation calculated under the *Land Valuation Act*. The rental valuation is effectively the unimproved value of the particular land that is leased. The rent for category 13 leases is calculated on a lease-by-lease basis; whereas there is a single fixed rent for a category 15.4 lease and a single fixed rent for a category 15.5 lease. A category 13 lessee is entitled to appeal against such a valuation, allowing the lessee to challenge the amount of the annual rent.

115 The State concedes that the *Land Regulation* "*does* treat Telstra and Carriers detrimentally by charging them more than other leaseholders". That blanket concession makes it is unnecessary for Telstra to undertake a lease-by-lease comparison between the rent it pays for its category 15.4 and 15.5 leases and the rent that businesses with category 13 leases would pay.

116 The State also concedes that the *Land Regulation* treats carriers detrimentally "based on a material attribute (i.e. the fact they use leases for communications/carrier purposes)". This amounts to a concession that the detrimental treatment of carriers is in their capacity as carriers.

117 Telstra submits that the provisions of the *Land Regulation* are discriminatory on their face, or, alternatively, that the direct and indirect effects of the provisions are discriminatory. Telstra has not specified precisely what provisions are discriminatory, but presumably refers to at least ss 30, 33 and 37A.

118 Contrary to Telstra's submission, s 37A of the *Land Regulation* does not, on its face, discriminate against carriers. It sets a method for calculating rents for category 13 leases and prescribes fixed rents for category 15.4 and 15.5 leases. That does not mean that the rent for a particular category 15.4 or 15.5 lease will necessarily be higher than for a category 13 lease – it depends on the land valuation for each particular lease. Sections 30 and 33 could have no adverse effect on carriers in the absence of s 37A having such an effect. Therefore, the provisions of the *Land Regulation* are not discriminatory on their face.

119 However, cl 44 of Sch 3 extends to laws that "would have the effect...of discriminating" against carriers. The State's concession that the *Land Regulation* does treat carriers detrimentally by charging them more than other leaseholders amounts to an admission that the *Land Regulation* has a detrimental effect.

Whether market rent is a relevant, appropriate or permissible distinction

120 I will turn to the first of the issues identified earlier, namely whether cl 44 of Sch 3 to the *Telecommunications Act* allows State and Territory governments to treat carriers adversely by imposing higher rents on the basis that market rents for leases held by carriers over private land are higher than for other businesses.

121 The State submits that the provisions of the *Land Regulation* which have the effect of imposing higher rent on carriers than other businesses are not invalid under cl 44 of Sch 3 because a "market approach" is a "relevant, appropriate or permissible distinction". That language is taken from the judgment of the plurality in *Bayside* at [40], which, in turn, seems to be largely drawn from the judgment of Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478, where their Honours said:

> A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction.

122 In *Bayside*, McHugh J explained at [69] that in considering whether a distinction is relevant or permissible, the question is whether the *Telecommunications Act* permits carriers to be treated differently. The State correctly accepts that if applying a market approach is to be regarded as producing a relevant, appropriate or permissible distinction, that must appear as a matter of construction of the *Telecommunications Act.*

123 There are two possible ways of conceiving the State's argument. The first is that the *Telecommunications Act* allows the *Land Regulation* to treat carriers adversely on the basis that the market rent for carriers is different to the market rent for other businesses. The second is that the *Land Regulation* treats carriers and other businesses equally by charging each of them the market rate applicable to their respective leases, with differential but permissible effect. The State's characterisation of its case was inconsistent. The State's concession that it treats carriers detrimentally by charging them more than other leaseholders seems to indicate that it characterises its argument in the first of these ways, but the State's submissions also seemed to rely on the alternative characterisation at times. I will deal with both characterisations of the State's arguments together because both rely upon construction of the *Telecommunications Act.*

124 The State's submission that the distinction drawn by the *Telecommunications Act* between carriers and other businesses on the basis of market rents is made by reference to the objects of that Act, to the fact the regulatory framework incorporates a special regime for regulating anti-competitive conduct and from the objects of the *Land Act.*

125 The objects of the *Telecommunications Act* are set out in s 3. That section provides, relevantly:

> **3 Objects**
>
> (1) The main object of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, is to provide a regulatory framework that promotes:
>
> (a) the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
>
> (b) the efficiency and international competitiveness of the Australian telecommunications industry; and
>
> (c) the availability of accessible and affordable carriage services that enhance the welfare of Australians.
>
> (2) The other objects of this Act, when read together with Parts XIB and XIC of the *Competition and Consumer Act 2010*, are as follows:

(a) to ensure that standard telephone services and payphones are:

(i) reasonably accessible to all people in Australia on an equitable basis, wherever they reside or carry on business; and

(ii) are supplied as efficiently and economically as practicable; and

(iii) are supplied at performance standards that reasonably meet the social, industrial and commercial needs of the Australian community;

...

(d) to promote the development of an Australian telecommunications industry that is efficient, competitive and responsive to the needs of the Australian community;

...

(g) to promote the equitable distribution of benefits from improvements in the efficiency and effectiveness of:

(i) the provision of telecommunications networks and facilities; and

(ii) the supply of carriage services;

...

126 The State relies on the objects set out in ss 3(2)(a)(ii), (d) and (g), which, it submits, use "market terms". The State argues that these objects show that telecommunications "is not to be a protected industry any longer", and is intended to be a "competitive industry".

127 The State reinforces its submission by pointing to the references in the objects to Pts XIB and XIC of the *Competition and Consumer Act 2010* (Cth). In *Bayside*, the plurality noted that Pts XIB and XIC of what was then the *Trade Practices Act 1974* (Cth) formed part of the regulatory framework for carriers. Part XIB sets up a special regime for regulating anti-competitive conduct in the telecommunications industry and prohibits carriers from engaging in anti-competitive conduct. The object of Pt XIC is to promote the long-term interests of end-users of carriage services or services provided by carriage services.

128 The State also relies on the objects of the *Land Act*, a Queensland statute. Under s 4, those objects include managing land for the benefit of the people of Queensland by having regard to "a market approach in land dealings". The State contends that this object can be taken into account in the construction of the *Telecommunications Act* because of the operation of cl 38 of Sch 3 to the *Telecommunications Act*.

129 I understand the State's overall submission to be that the *Telecommunications Act* does not seek to immunise carriers from the forces operating in a competitive market, and, in fact, deliberately seeks to expose them to such forces. This is said to promote a construction of the *Telecommunications Act* that allows State and Territory legislation to treat carriers adversely, or with adverse effect, by imposing higher rents on the basis that market rents for leases over private land are higher for carriers than for other businesses.

130 It can be accepted that the *Telecommunications Act* does not purport to give carriers complete immunity from the operation of market forces. However, the question is whether cl 44(1) of Sch 3 operates to give carriers some protection from the discriminatory application of such forces under State or Territory legislation, and the extent of that protection. That question must be answered by reference to the language and purpose of cl 44(1) in the context of Pt 1 of Sch 3 and the *Telecommunications Act* as a whole.

131 Schedule 3 to the *Telecommunications Act* deals with the powers and immunities of carriers. Divisions 2, 3 and 4 of Pt 1 describe the powers of carriers to enter and inspect land and install and maintain facilities on that land. Carriers may install facilities on land if, relevantly, they have a facility installation permit, or the facility is a low-impact facility.

132 Division 5 sets out conditions relating to the carrying out of authorised activities. Div 6 deals with applications for facility installation permits.

133 Division 7 and, in part, Division 8 regulate the relationship between carriers' powers and immunities under the *Telecommunications Act* and the operation of State and Territory laws.

134 Division 7 commences with cl 36(1), which provides that Divs 2, 3 and 4 do not operate so as to authorise an activity to the extent that the carrying out of the activity would be inconsistent with the provisions of a law of a State or Territory.

135 Clause 36(1) is subject to cl 37, which provides that a carrier may engage in an activity authorised by Divs 2, 3 or 4 despite laws of a State or Territory about specified matters, including town planning, the powers and functions of a local government body, the use of land and tenancy. Telstra submits that cl 37 applies only to installation and maintenance of low-impact facilities as defined in cl 6(3), but in my view it also applies to, relevantly, the installation of facilities under a facility installation permit.

136 Clause 38 then provides that it is the intention of Parliament that if cl 37 entitles a carrier to engage in activities despite particular laws of the State or Territory, nothing in Div 7 is to

affect the operation of any other law of the State or Territory, so far as such other laws are capable of operating concurrently with the *Telecommunications Act*.

137 Clause 39 provides that Div 7 does not affect the liability of a carrier to taxation under the law of a State or Territory.

138 Clause 44 is then found in Div 8, Pt 1 of Sch 3. Clause 44(1)(a) provides that the 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, a particular class of carriers or against carriers generally. Under cl 44(1)(b) a person must not exercise a power under such a law to the extent to which the law so discriminates; and under cl 44(1)(c) a person is not required to comply with such a law to the extent to which the law discriminates.

139 The purpose of cl 44(1) can be discerned from its context in Pt 1 of Sch 3 and the objects of the *Telecommunications Act*. Section 3(1) provides that the main objects include providing a regulatory framework that promotes the long-term interests of end-users of carriage services and the availability of accessible and affordable carriage services that enhance the welfare of Australians. Under s 3(2) the other objects of the Act include ensuring that standard telephone services and payphones are reasonably accessible to all people in Australia on an equitable basis and supplied as efficiently and economically as practicable.

140 These objects are reflected in the powers and immunities granted to carriers under Pt 1 of Sch 3. The provision of carriage services requires the transmission of electromagnetic energy through a network of infrastructure to connect distant places in Australia. This requires carriers to have access to many parcels of land in a wide range of areas for the installation of infrastructure essential for the network. Telstra's universal service obligation, recognised in cl 27 of Sch 3, means that it requires land throughout Australia, urban, rural and remote. There is a risk that land owners, private or government, will inappropriately or unreasonably resist the installation of infrastructure on their land. This is addressed by Pt 1 giving carriers the power to compulsorily enter land and install a low-impact facility or, by obtaining a facility installation permit, install another facility.

141 There is also a risk that State and Territory governments will jeopardise the availability and affordability of carriage services by taking undue advantage of the particular needs of carriers for the use of government-owned land to the detriment of the wider Australian community.

To address this problem, cl 44(1) provides protection for carriers against the effects of discriminatory laws, including protection against the imposition of discriminatory taxes, rents and charges. Clause 39 confirms the liability of a carrier to taxation under the laws of a State or Territory, but cl 44(1) prevents such laws from discriminating against carriers or having the effect of discriminating against carriers. In *Telstra Corporation Ltd v Hurstville City Council* (2002) 118 FCR 198 at [24], the Full Court described the object of cl 44 as "to prevent State or Territory legislatures from enacting potentially unfairly discriminatory legislation which would burden the activities of a carrier". More specifically, cl 44(1) can be seen as a legislative mechanism to promote and protect the long-term interests of end-users of carriage services and promote accessible and affordable carriage services, including the provision of standard telephone services and payphones to all Australians. This purpose is particularly evident when viewed against Telstra's universal service obligation and the fact that the bulk of rural and remote land, at least in Queensland, is government-owned.

142 Clause 44(1) is cast in broad and absolute terms. It does not, on its face, allow any exception to the prohibition against the law of the State or Territory discriminating against carriers. Nor is any such exception expressly contained in any other provision of the *Telecommunications Act*. If any exception, such as the exception contended for by the State, is to be found, then it must be found by implication from the subject matter, scope and purpose of the *Telecommunications Act*.

143 The objects of the *Telecommunications Act* relied on by the State and Pts XIB and XIC of the *Competition and Consumer Act* appear to be concerned with the promotion of competition *between* carriers within the telecommunications industry and the prevention of anti-competitive conduct *by* carriers for the benefit of end-users. That is consistent with the legislative movement away from a government monopoly towards a competitive industry, and is supported by the references in the objects of the *Telecommunications Act* to the interests of end-users and affordability of carriage services. If, as the State submits, the objects are intended to indicate that carriers as a class are not to be protected *from* competitive market forces, such an intention is not directly expressed.

144 The State's submission that the objects of the *Land Act* can be taken into account in the construction of the *Telecommunications Act* because of the operation of cl 38 of Sch 3 to the *Telecommunications Act* is innovative. The State has not referred to any authority in support of its proposition that the objects of a State Act can be used to construe a Commonwealth

Act. In any event, the effect of cl 38 is no more than that the operation of State and Territory legislation is not affected except to the extent provided in cl 37. It does not purport to import State or Territory legislation such that it can be used in the construction of the *Telecommunications Act*.

145 Even accepting the objects of the *Telecommunications Act* can be construed as not seeking to protect carriers from competitive market forces, or even deliberately seeking to expose them to such forces, such an intention appears at a very broad level. The State's contention is that such an intention implies that carriers may be treated adversely under State or Territory legislation on the basis that the market rent for leases over private land for carriers is higher than for other businesses, or that such legislation may impose upon carriers the market rent for communications leases even if that produces a differential effect.

146 The *Telecommunications Act* allows individuals and corporations to discriminate against carriers. That is apparent from the fact that neither cl 44(1) nor any corresponding provision restricts the behaviour of such individuals or corporations. In contrast, cl 44(1) expressly prohibits discrimination against carriers under State or Territory legislation. It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments. Individuals and corporations are free to charge carriers whatever rent the market commands, just as they are free to charge other businesses whatever rent they are able to extract. Clause 44(1) is quite inconsistent with the submission that State and Territory governments are in the same position. If State and Territory governments were intended to be free to charge carriers different rents on the basis that carriers are charged more rent in the private market, the exception would have been directly expressed. The State relies on the objects of the *Telecommunications Act* to infer such an exception, but those objects, unsupported by any substantive provision, are too imprecise and indefinite to overcome the express and explicit prohibition of discrimination against carriers under State and Territory legislation contained in cl 44(1).

147 In addition, the purpose of cl 44(1), namely to promote and protect the long-term interests of end-users of carriage services and to promote accessible and affordable carriage services, is inconsistent with the submission that State and Territory governments are permitted to charge carriers higher rents on the basis that carriers are charged more rent in the private market. In fact, price-gouging of this type by State and Territory governments seems precisely the type of conduct that cl 44(1) is designed to prevent.

148 I therefore reject the State's submission that the imposition of higher rents on carriers than on other businesses under the *Land Regulation*, on the basis of market rents for communications leases in the private market, is a relevant, appropriate or permissible distinction.

The appropriate comparator

149 Telstra submits that in deciding whether the *Land Regulation* discriminates against carriers contrary to cl 44(1), it is not appropriate to compare the treatment of carriers in category 15 with the treatment of other businesses in category 13. As I have said, I understand the State's ultimate submission to be that such a comparison is not appropriate if the distinction drawn between carriers and other businesses on the basis of rents charged in the private market is a relevant, appropriate or permissible distinction. As I have rejected the State's submission that such a distinction is relevant, appropriate or permissible, the State's argument concerning the comparator falls away.

150 However, in case I have misunderstood the State's ultimate submission, I will consider the argument as it was pleaded and described in the State's written submissions. That submission is that leases held by carriers are too dissimilar to those held by businesses in category 13 to provide an appropriate basis for comparison. The submission continues that as the only comparator Telstra points to are businesses holding category 13 leases, there is no other category of persons or entities to which the treatment of carriers can be compared. It concludes that as there is no appropriate comparator, there can be no finding of discrimination.

151 The State argues that category 13 leaseholders are too dissimilar to provide an appropriate comparator because: such businesses are not bulk leaseholders as Telstra is; the land the subject of category 13 leases varies widely in size, whereas Telstra's leases are more uniformly sized; the uses of category 13 land are diverse, whereas Telstra uses the land it leases for the same main purpose; and carriers are able to derive co-location revenue, whereas category 13 leaseholders are not.

152 Clause 44(1) prohibits discrimination under State and Territory laws against a particular carrier, a class of carrier or against carriers generally. The identification of an appropriate comparator is not likely to be difficult where the discrimination alleged is against a particular carrier or a particular class of carriers, but may be more difficult where, as in this case, the discrimination is alleged to be against carriers generally.

153 However, in this case, as in *Bayside*, the allegedly discriminatory law itself provides the comparator for the purpose of cl 44(1). Only carriers and certain other businesses such as television and radio providers fall into categories 15.4 and 15.5 under s 33 of the *Land Regulation*. The State has not pleaded or argued that such other businesses have any relevance to the question of discrimination under cl 44(1). Therefore the application of categories 15.4 and 15.5 to leases held by such other businesses can be left aside for the purpose of the comparison exercise. Neither has the State contended that leases held by businesses for primary production, which have their own distinct category, have any relevance. They can also be left aside. In these premises, the categorisation of leases held by businesses involves a dichotomy between carriers and other businesses. If State land is leased by a carrier for the purposes of providing carriage services the lease will fall into category 15; if leased by another business, it will fall into category 13. This dichotomy makes it appropriate to compare the treatment of carriers with leases in category 15 with the treatment of other businesses with leases in category 13.

154 The fact that businesses holding category 13 leases may have a differing number of leases, different sized leases and carry out different business activities does not matter for the purpose of selecting an appropriate comparator. All State leases held by carriers are in one category (with two sub-categories), while all such leases held by other relevant businesses are in another. The *Land Regulation* itself selects the appropriate comparator.

155 Under s 332 of the *Land Act*, the holder of any State lease may, with the Minister's approval, sublease the land. It is possible for the holders of category 13 leases to derive income from subleasing. Therefore, the fact that it is possible for carriers to derive co-location revenue does not mean that businesses holding category 13 leases are not an appropriate comparator.

156 The State's pleadings and written submissions also contend that businesses in category 13 are not an appropriate comparator because the method of rental calculation applicable to category 13 leases cannot be used for category 15 leases. This submission is difficult to understand. Until the commencement of the *Land Regulation* on 1 July 2010, the rent for leases held by carriers was ascertained in exactly the same way as it was for other businesses, namely by taking 5% of the unimproved land value. Under s 5 of the *Land Valuation Act*, the Valuer-General must decide the value of all land in Queensland. A purpose of the valuation exercise is the calculation of rent under the *Land Act*. The calculation of rent for category 15

leases has been done in the past, and can be done, in the same way as for category 13 leases. I therefore reject this aspect of the State's argument.

Whether there is discrimination because the Land Regulation imposes more rent on carriers are charged more rent than other businesses

157 Businesses holding leases in category 13 are an appropriate comparator. The State concedes that the *Land Regulation* treats carriers detrimentally by imposing more rent on carriers than other leaseholders. This concession encompasses the treatment of carriers in comparison to businesses holding category 13 leases. The distinction made by the *Land Regulation* is not a relevant, appropriate or permissible distinction.

158 I find that ss 30, 33 and 37A of the *Land Regulation* have the effect of discriminating against carriers, including Telstra, which hold leases over State land in Queensland for the purpose of carrying on activities authorised by the *Telecommunications Act*.

159 Telstra's case is that the *Land Regulation* has had the effect of discriminating against carriers generally since its commencement. The State has not suggested that its concessions are limited to the current position. I also find that ss 30, 33 and 37A of the *Land Regulation* have had the effect of discriminating against carriers which hold leases over State land in Queensland for the purpose of carrying on activities authorised by the *Telecommunications Act* since the commencement of those provisions on 1 July 2010.

160 Clause 44(1)(a) of Sch 3 to the *Telecommunications Act* provides that a law of a State or Territory has no effect "to the extent to which" the law would have the effect of discriminating against carriers generally. Sections 30, 33 and 37A of the *Land Regulation* have the effect of discriminating against carriers generally to the extent that they have the effect of imposing higher rents on carriers which hold leases over State land for the purpose of carrying on activities allowed under the *Telecommunications Act* than for businesses which hold category 13 leases. In other words, those provisions have no effect to the extent that they impose annual rents on such carriers that exceed 6% of the "rental valuation" of the leased land as defined in Sch 12 of the *Land Regulation*.

161 The effect of cl 44(1)(b) is that a person is not entitled to a right, privilege, immunity or benefit, and must not exercise a power, under *Land Regulation* to the extent identified above. Further, the effect of cl 44(1)(c) is that carriers are not required to comply with the *Land Regulation* to the extent identified above.

162 Telstra advanced an argument that where carriers are affected because their subsidiaries or related entities are treated adversely, the subsidiaries or related entities are not required to comply with the *Land Regulation* to that extent. The evidence does not allow me to reach any conclusion on that issue.

163 The State's cross-claim depends upon a finding that the *Land Regulation* does not amount to discrimination against carriers within cl 44 of Sch 3 to the *Telecommunications Act*. As I have found to the contrary, the cross-claim must fail.

Whether there is discrimination because there is no right to appeal against category 15.4 and 15.5 rents

164 Telstra also argues that the *Land Regulation* discriminates against carriers because businesses holding category 13 leases have the right to, in effect, appeal against the rents they are charged, whereas carriers do not have such a right.

165 Under s 37A(1)(e) of the *Land Regulation*, the rent for a category 13 lease is calculated at 6% of the "rental valuation for the particular lease". The expression "rental valuation" is defined in Sch 12 of the *Land Regulation* as a "Land Act rental valuation" under the *Land Valuation Act*.

166 Section 105 of the *Land Valuation Act* allows an owner to object to the valuation of the owner's land. "Owner" is defined in the Schedule to the *Land Valuation Act* to include a lessee of land leased from the State where the lessee must pay *Land Act* rental for the land. Section 155 allows an objector to appeal to the Land Court and s 173 allows a further appeal to the Land Appeal Court.

167 The holder of a category 13 lease is entitled to object to and appeal against the land valuation and, in this way, challenge the annual rent that is imposed under s 37A(1) of the *Land Regulation*. In contrast, there is no mechanism which allows carriers to appeal against the rents fixed under s 37A(2) of the *Land Regulation*.

168 By imposing a method of determining rents for category 13 leaseholders that allows those leaseholders the opportunity to appeal against the rents assessed as payable, s 37A of the *Land Regulation* has the effect of treating category 13 leaseholders more favourably than carriers. This amounts to discrimination within cl 44(1) of Sch 3.

169 It follows that s 37A of the *Land Regulation* is of no effect to the extent to which it has the effect of denying carriers a right to appeal against the rent they are charged. It is unclear

what this means in practical terms. There was no argument as to whether the words "of no effect" in cl 44(1)(a) give rise to a positive obligation on the part of the State to allow carriers a right to appeal against rents.

Whether the rents imposed for category 15.4 and 15.5 leases approximate the rents charged for private leases held by carriers

170 The State contends that the rents imposed by the *Land Regulation* for category 15.4 and 15.5 leases held by carriers reasonably approximate the market rents carriers are charged for private leases in Queensland. That is the factual premise underlying the State's principal argument that the distinction made by the *Land Regulation* between carriers and other businesses on the basis of market rent is a relevant, appropriate or permissible distinction. In light of my rejection of the State's principal argument, the correctness or otherwise of the factual premise cannot affect the outcome. However, I will proceed to consider the premise in case I am wrong.

171 The State seeks to demonstrate that if State land the subject of Telstra's leases were leased as private land instead of under the *Land Regulation*, the annual rents achieved for those leases would be approximately the same as the rents imposed for category 15.4 and 15.5 leases. The State accepts that it bears the onus of proving that the rents for category 15.4 and 15.5 leases reasonably approximate the market rates for private leases held by carriers.

172 The State contends that a "mass appraisal basis", rather than a lease-by lease valuation, is an appropriate way to conduct the valuation exercise. In support of this contention, it submits the *Land Regulation* itself adopts such an approach by dividing leases held by carriers into two categories, rural land and urban land. The State also relies on the opinion of Mr Brett that the large number and diversity of the leases held by Telstra makes it preferable to adopt a mass appraisal basis.

Mr Brett's evidence

173 Mr Brett states that the principal factor relevant to assessment of the market for communication leases is the rents paid for similar sites throughout the State. Mr Brett was provided with data concerning 894 private leases held by Telstra in Queensland, as well as 75 private leases held by other carriers. He has not taken into account 103 of Telstra's leases where the annual rent is nominal (ie $0 or $1).

174 Mr Brett comments that the homogenous nature of the category 15.4 and 15.5 leases, lessees and uses lends them to a prescribed rent approach under the *Land Regulation* within appropriately defined regions. Mr Brett points out that all the sites are owned by one lessor (the State) and most are leased to a single lessee (Telstra). All are used for the same or substantially the same purpose, on the same terms and conditions, with rent to be assessed annually on the same day. He says that while the sites are geographically diverse, they can reasonably be grouped together in a manner accommodating locational differences.

175 Mr Brett states that land in the seven category 15.5 local government areas in the south-east corner of Queensland, with their high urban and commercial density, attracts significantly higher rents than the rest of the State.

176 Mr Brett's opinion is that it is appropriate to divide the category 15.4 local government areas into two categories, which he describes as medium density areas and low density areas.

177 The medium density areas have been selected on the basis that they contain the State's major provincial towns, a reasonable level of urbanisation and major connecting highways. These areas are local government areas of the Bundaberg Regional Council, Burdekin Shire Council, Cairns Regional Council, Douglas Shire Council, Fraser Coast Regional Council, Gympie Regional Council, Gladstone Regional Council, Lockyer Valley Regional Council, Scenic Rim Regional Council, Southern Downs Regional Council, Mackay Regional Council, Rockhampton Regional Council, Toowoomba Regional Council, Townsville City Council and Whitsunday Regional Council.

178 The low density areas comprise the remainder of the category 15.4 local government areas. These are the areas that I have described as "the conceded areas". They are in the west and far north of Queensland.

179 Mr Brett calculates that the median rent for private leases held by carriers in the seven urban local government areas is $19,547 per annum and the average rent is $19,871 per annum. He considers the market rent for private leases in such urban areas is $20,000 per annum. He notes that this market rent exceeds the amount prescribed under s 37A for category 15.5 leases. On this basis, Mr Brett concludes that the prescribed rent for category 15.5 leases reasonably approximates the market rent for private leases.

180 Mr Brett states that data for the private leases held by Telstra and other carriers in the category 15.4 areas demonstrate that significantly different rents are achieved for the medium

density areas than for the lower density areas. Mr Brett calculates that the average annual rent for private leases in the medium density areas is $10,556, while the median is $9,773. He seems to consider that the market rent for private leases in the medium density local government areas is $10,360 per annum. Mr Brett concludes that the prescribed rent for category 15.4 leases reasonably approximates the market rent for private leases in the medium density areas.

181 Mr Brett calculates that for the low density areas, the average annual rent is $6,187 and the median is $5,732. He further divides the low density areas into eastern and western parts and calculates a weighted average of $4,500 per annum. He concludes that the prescribed rent for category 15.4 leases significantly exceeds the market rent for private leases in the category 15.4 area. That conclusion forms the basis of the State's concession that the *Land Regulation* does discriminate against carriers in respect of the conceded areas.

Mr Hamilton's evidence

182 In response to Mr Brett's evidence, Telstra relies on the evidence of another expert valuer, Mr Hamilton.

183 Mr Hamilton agrees with Mr Brett that given the large number and geographical spread of category 15.4 and 15.5 leases, it is preferable to adopt a mass appraisal process to ascertain the private market rates for leases of land to carriers. Mr Hamilton's evidence seems to be that either Mr Brett has not properly applied a mass appraisal process, or that Mr Brett's method is not a mass appraisal process at all. Mr Hamilton's evidence is unclear in this respect.

184 Mr Hamilton describes the method of valuation performed by the Valuer-General under the *Land Valuation Act* as a form of mass appraisal. He states that it is not feasible to revalue each property in Queensland individually and mass appraisal methodology is an effective and legitimate method for the creation of updated values in an efficient and timely manner. He states that mass appraisal depends upon a valuer being able to identify subgroups of properties whose valuation is likely to move "in step". It first requires identification of a subgroup of properties, known as a sub-market area. A sub-market area is a grouping of properties with either a highest and best usage within an area readily defined by an administrative or geographic boundary, or readily associated with a geographic or topographic feature where the market movement is similar for all properties. The set of properties is definable by common attributes that are perceived to be similarly affected by

common market forces and will therefore likely move in unison. Subsets of properties may be created where the market evidence identifies a subgroup that responds differently and supports a separate factor.

185 Mr Hamilton's opinion is that mass appraisal then requires the identification of typical, or benchmark, properties within a sub-market area that will be inspected and valued in the conventional way against the available sales evidence to test the proposed market changes for that area. A benchmark property is an individual property within a sub-market area that is representative of a larger group of similar properties, based on land value, land use or other property characteristics. Other relevant characteristics may include location, area, zoning and topography.

186 Mr Hamilton states that mass appraisal of individual lots is only valid if the value attached to each property meets the definition of market value, namely the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties each acted knowledgeably, prudently and without compulsion.

187 Mr Hamilton states that the use of a mass appraisal process for the valuation of assessable properties is not an exercise in averaging. He says that aggregating and averaging sales evidence is contrary to good valuation practice because the resulting values do not necessarily reflect market value.

188 Mr Hamilton indicates that he could support one of two mass appraisal techniques to assess the rent for leases that fall into category 15.4 or 15.5 that would be achieved in the private market. The first technique would be to adopt the same approach as for category 13 leases, but to determine the percentage of the individual valuation which represents an appropriate rent. It may be noted that neither Mr Hamilton nor Mr Brett have attempted to apply this method.

189 The second mass appraisal technique which Mr Hamilton could support is a market based approach analysing comparable rentals for properties leased for a similar purpose. Mr Hamilton says that to apply this technique, it would be necessary to carefully define the subcategories of category 15.4 and 15.5 leases, since the type of telecommunication installation varies significantly from site to site. The market rent appears to vary from

location to location even within similar locations and the market places greater value on CMTS installations, compared to installations such as radio towers.

190 Mr Hamilton states that in developing a system of subgroups for mass appraisal purposes, geographical location would plainly be useful, but is not the only determinant of the appropriate subgrouping. He says that this is most clearly demonstrated by the fact that different market rents are paid for CMTS installations compared to other installations in the same locality.

191 Mr Hamilton accepts that a mass appraisal process could be adopted provided that the rent is determined based on market rental evidence, the grouping of leases takes into account the type of installation on the land and there is a sufficient number of subgroupings to reflect the diversity of leases, including the location and type of infrastructure installed.

192 Mr Hamilton disagrees with Mr Brett's view that three sub-market areas are adequate for mass appraisal purposes. He does not consider that it is possible to accurately assess the market rental based on only three geographical sub-regions.

193 Mr Hamilton's written reports are not clear as to precisely what he regards as a "mass appraisal process" and what its function is. In his oral evidence, he seemed to indicate that a mass appraisal process is one that is used to determine the *change* in the value of a basket of properties within a sub-market area. His evidence, as I understand it, was that before such a mass appraisal process can be used, there must be a valuation of each individual property. The change in value of each individual property can be assumed to be the same as the change in the value of a benchmark property within the sub-market area. The effect of Mr Hamilton's oral evidence is that a mass appraisal process is not used to determine the value of an individual property, but merely the change in the value of a property. On this basis, and contrary to some indications in his reports, Mr Hamilton does not seem to accept that Mr Brett is applying a recognised mass appraisal process at all.

194 Mr Hamilton states that Mr Brett's method contains insufficient sub-market areas, given the geographical spread of Queensland and the different types of infrastructure installed on the leased areas. He also says that the comparable evidence has been broadly averaged and very limited direct comparisons have been undertaken. Further, he says that the averaging process, apart from dividing the leased areas into three broad geographical areas, does not take into account other factors that impact on rent including the commencement date of the

leases, the state of the market for Telstra leases, terms and conditions of the leases, rent review provisions and works required by the lessee to prepare for the installation of equipment.

195 Mr Hamilton disagrees with Mr Brett's assessment that Telstra's State leases have a homogenous nature. He notes that Telstra's lease sites vary widely in terms of the infrastructure involved, property location, the services available, vehicular access, land area and topography.

196 Mr Hamilton notes that for approximately 80% of Telstra's State leases, the prescribed rent exceeds the Valuer-General's appraisal of the value of the land itself. This is contrary to what he would expect if the rents reflected market rates.

Mr Brett's response to Mr Hamilton's criticism

197 Mr Brett agrees that it is appropriate to establish sub-market areas, and notes that he has referred to these as categories. He says his method seeks to achieve a reasonable balance between the number of categories and the efficiency and cost effectiveness of rent valuations in each category. He notes that division into additional sub-market areas requires an ever-increasingly detailed examination of lease, location or physical features of each property. He notes that given the State-wide spread of leases with different sub-characteristics, it is not possible to select a single benchmark property that is representative of an identified sub-market.

198 Mr Brett accepts that averaging of rents would be contrary to good practice in circumstances where the value of a single property is assessed by averaging the prices paid for a number of other properties, some of which may be quite dissimilar to the property being valued. However, he says that his intention here is to establish a rent applicable to a number of properties within identifiable sub-markets, some of which will have different characteristics, by reference to a body of rents being paid for a range of other properties within the same sub-market and used for the same or a similar purpose.

Consideration of valuation evidence

199 Mr Brett's opinion is that the rents imposed by the *Land Regulation* for category 15.4 and 15.5 leases reasonably approximate the market rents carriers are charged for private leases in the disputed areas. Mr Hamilton has challenged the methodology applied by Mr Brett in arriving at that opinion, but has not himself expressed an opinion on the issue. It follows that

the issue to be determined is whether Mr Brett's opinion is based upon a sufficiently reliable methodology to allow me to accept his opinion.

200 It is necessary to bear in mind the nature and limits of the exercise that Mr Brett was asked to perform by the State and the relevance of that exercise in the context of the proceeding. The State's case is that the *Land Regulation* sets the rents for category 15.4 and 15.5 leases by reference to the market rents that carriers would pay for private leases, or at least has that effect in the disputed areas. This is consistent with a Regulatory Impact Statement ("RIS") laid before the Legislative Assembly with the new *Land Regulation* on 9 February 2010. The RIS discussed the difficulty involved in ascertaining market rents for telecommunication sites and proposed that rents for such sites be set according to their purpose and location. The RIS continued:

> It is considered that in the current market, appropriate fixed rents would be $10,000 per annum for rural leases and $15,000 per annum for urban uses. These rates are consistent with market rates and rates charged by other government departments for such sites.

201 The figures proposed in the RIS for fixed rents were adopted in the *Land Regulation* and it may be inferred that they were adopted on the basis that they were thought to be consistent with market rates. The Governor in Council's purpose or intention in setting the fixed rents is not relevant to the question of whether there is discrimination against carriers for the purpose of cl 44 of Sch 3 to the *Telecommunications Act*. However, the question presently being considered is a different one, namely whether the rates for category 15.4 and 15.5 leases reasonably approximate market rates. I accept that the Governor in Council's intention was that the prescribed rents should approximate market rents. The issue is whether the State can demonstrate that the Governor in Council achieved that intention.

202 In attempting to impose market rates of rent for category 15.4 and 15.5 leases, s 37A of the *Land Regulation* is a blunt instrument. It takes into account only the purpose of the lease and the classification of the leased land as either rural or urban. It does not take into account other factors that might be relevant to the rental value of such land, such as the precise location, the size of the leased land, zoning, topography and the type of facility installed. The rates for category 15.4 and 15.4 leases attempt to approximate the market rental for private leases, but do not purport to precisely reflect the market. That approach is unsurprising given the legislative function of the *Land Regulation* and its application to every lease of State land in Queensland for communication purposes.

203 The approach taken by the State to the valuation exercise in this case reflects the approach taken under the *Land Regulation*. The State has asked Mr Brett to provide his opinion as to whether the fixed rents for category 15.4 and 15.5 leases reasonably approximate the market rents for private leases. Mr Brett was not asked for his opinion as to whether the fixed rents are in fact market rates for private leases. That exercise would have required individual assessment of each of Telstra's 488 State leases.

204 Mr Hamilton criticises the exercise performed by Mr Brett and says, in effect, that it is too imprecise to allow Mr Brett's opinions to be relied on. Mr Hamilton particularly criticises the averaging exercise performed by Mr Brett and the limited number of sub-market areas he has used. He also notes that there were a number of features of the leases which could affect the rental value which were not considered by Mr Brett.

205 Mr Brett's methodology is to divide Queensland into three zones, namely urban, medium density rural and low density rural, on the basis that the median and average rents for land used for communication purposes within each of these zones is different. The State's case is to the effect that each State lease within a particular zone has approximately the same rental value. Mr Brett's view is that this rental value is approximately the median rent for private leases in each zone. An important feature of Mr Brett's methodology is his reasoning that State leases are sufficiently homogeneous that all communications leases within a particular zone can be taken to have approximately the same rental value.

206 Category 15.4 and 15.5 leases do have a broad level of homogeneity. The State is the lessor for each lease and the lessee in each case is Telstra, or one of only several carriers. The predominant type of facility installed on the leased land is broadly similar, namely radio towers in rural land and CMTS in urban land. The terms and conditions of the leases are the same and rent is payable annually at the same time. I accept Mr Brett's evidence that two major factors affecting the market rent for private telecommunication leases are the purpose for which the land is to be used and the location of the land. Mr Brett's methodology takes into account both factors at a broad level.

207 However, I consider that Mr Brett's methodology is too imprecise to give rise to an opinion that can be accepted. The division of land into only three sub-market areas is not adequate to reflect the diversity of areas and corresponding different market rents for communications leases in Queensland. It does not adequately take into account the nature of the facilities to be installed. For example, rents are generally higher where CTMS facilities are to be

installed. It fails to take into account the timing of lease negotiations. There is evidence that the introduction of competition amongst mobile telephone carriers in 1991 led to a period of anxiety amongst lessees and higher rents, which has abated since 2002/2003. It does not take into account whether the land is occupied or unoccupied as existing infrastructure can be used for CTMS facilities. It does not take into account other market factors such as access to roads and electricity, opportunity cost to the lessor and community perception as to adverse health risks.

208 Mr Brett acknowledges that he has not taken into account all the factors relevant to the rental valuation of category 15.4 and 15.5 land. I am not satisfied that his evidence is reliable in the absence of such factors being taken into account, or in the absence of firm evidence that these factors would not make a significant difference to his opinion as to whether the prescribed category 15.4 and 15.5 rents reasonably approximate the private market.

209 Mr Brett's method produces seemingly incongruous results. For example, his evidence is to the effect that the rental value of land leased by Telstra in the Brisbane City Council area for a radio tower where the underlying land value is $540,000 is the same as for land leased in the Ipswich City Council area for a CMTS facility where the value of the land is $41,500. A factor which demonstrates the likelihood of the proposition that category 15.4 and 15.5 rents reflect private market rents is the observation of Mr Hamilton that over 80% of Telstra's State leases have annual rents that exceed the Valuer-General's valuations of the land itself.

210 I broadly accept Mr Hamilton's criticisms of Mr Brett's methodology, with one qualification. I do not think it matters whether Mr Hamilton considers that Mr Brett's methodology can or cannot be regarded as a mass appraisal approach. If Mr Brett had gone further by using more sub-market areas and taking into account more variables, the methodology he used might well have been adequate to allow a single rental value for each sub-market area to be accepted. While such an exercise would have been time consuming and expensive, the State has conceded that it carries the onus of proof on the issue.

211 I am not satisfied that the methodology used by Mr Brett is sufficiently reliable to allow me to accept his opinion that the approximate annual market rent is $10,360 for category 15.4 leases and $20,000 for category 15.5 leases in the disputed areas.

212 I find that the State has not proved that the rents prescribed for categories 15.4 and 15.5 reasonably approximate the market rents for leases over private land for communication purposes in the disputed areas.

CONCLUSION

213 The findings I have made mean that Telstra's application must succeed and the State's cross-claim must be dismissed.

214 The relief sought by Telstra includes various declarations and orders for the repayment of rent overpaid by Telstra. I indicated in the course of the trial that I would provide my reasons and then hear from the parties as to the precise form of relief that should be granted. I will make orders requiring Telstra to provide draft orders to the State so that the parties can attempt to agree upon a form of orders.

I certify that the preceding two hundred and fourteen (214) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Rangiah.

Associate: [redacted]

Dated: 14 October 2016