Our Ref: IPART/24/2

28 March 2024

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

Also sent by email to: [redacted]

Dear Mr Tsikrikas

ISSUES PAPER
REVIEW OF RENTS FOR COMUNICATIONS SITES ON CERTAIN LANDS OF THE CROWN
26 FEBRUARY 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*.

Introduction to Indara

Indara was formed in 2022 through the integration of Indara 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 MNO's (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 huge 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 clause 44 of Schedule 3 of the Telecommunications Act 1997 (Cth) (**Telecommunications Act**) operated in relation to this.

Clause 44 of Schedule 3 of the Telecommunications Act (**clause 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 clause 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 clause 44 as carriers were paying more than other users of Crown land and so the State law was of no effect. The Federal Court made it clear that 'price gouging'[2] by the State government was precisely the type of conduct that clause 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*."[3]

Since the conclusion of the Telstra case, the Queensland government has adjusted the rents for both carriers under the Telecommunications Act and infrastructure providers, such as Indara, in order to remove the rental regime which caused both direct and indirect discrimination and clearly breached clause 44 of the Telco Act.

1 Refer to Appendix B for a full copy of the transcript.
2 Telstra Corporation v Queensland [2016] FCA 1273 [I47]
3 Telstra Corporation v Queensland [2016] FCA I2I3 [141]

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 clause 44 of the Telco Act, but sets out in item (c) of the TOR, that the Tribunal is to have regards to "*requirements and objectives under relevant state and federal legislation, and under any relevant state strategic plans and policies*", Telstra Corporation v Queensland [2016] is relevant.

Therefore, 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 clause 44 of the Telco Act (as handed down in Telstra Corporation v Queensland [2016]).

Considering these two items, 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 clause 44 of the Telco Act. This was evidenced in the 2018/2019 IPART review. The Tribunal presented findings including that rents were too high and even recommended 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 but a breach of clause 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 Managers (**CLM**'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 is almost 16x more than the minimum rent specified by the DPHI on their website and the rent 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, and was clearly considered critical for inclusion in the CLMA. However, the principles for rent determinations set out in the CLMA (and its predecessor) are 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:

(a) 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;

(b) 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

(c) 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 (**LMA’s**) 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 are connected. Be it for emergency services to communicate effectively with each other but also for the public to be able to keep in contact with emergency broadcasts, make and receive calls and ensure the safety of as many people 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 in crisis. With a temporary shift in working practices, large numbers of people were on mandatory lock downs, placing increased demand and strain on mobile networks as we worked from home. There was a cost associated with keeping networks up and running and upgrading sites to support increased demand in urban areas. Discriminatory pricing regimes affect the efficiency of Carriers being able to support and upgrade infrastructure.

2018/2019 IPART Review and Recommendations

The review and rental rate recommendations put forth by the Tribunal in the 2018/2019 review were a marked improvement on the current rates, having 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. 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 IPARTs 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 reaction 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. 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 clause 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

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.

Clause 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, Carriers provide greater connectivity and access to the latest technologies to the community. NSW LMA's should not profit

from this, 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 spot 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 clause 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, clause 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 LMA's 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 LMA's 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 clause 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 m2 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 recompense 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 is sited - 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.

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 DHIP 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 2018/2019 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 clause 44 of the Telco Act.

IPART is obliged to consider clause 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 clause 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]

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. 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 Carrier's infrastructure and improvements in the land. If not for the communications tower existing on a particular site, then the co-locator may not be interested in being sited on the land. It is 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. Water authorities and local Councils are also now looking to implement co-user fees.

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

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. Use of existing infrastructure is an overriding principle in federal telecommunications legislation and 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 ought not to affect value.

To comply with the TOR, and to avoid breaching Clause 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.

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 AGSG 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.

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

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 clause 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 clause 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 confirms that LMA's are achieving profit rents from carriers.

Under the current regime, our experience is that the LMA's achieve huge 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.

Summary

There has been a fundamental shift in the industry since the Federal Court's decision in the Telstra case. It is absolutely essential that IPART give due weight to the TOR issued by the State Government and consider clause 44 of the Telco Act.

This is an opportunity for IPART to undertake a thorough review of 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. However, we highlight that recommendations put forth in the last IPART review in 2018 were not adopted, discriminatory practice has continued, and Crown Lands continues charging high rents and co-user fees despite IPART's recommendations – ultimately making a mockery of the review process. We ask the value of completing an independent and time-consuming review process - if government agencies are not obliged to comply with the findings and recommendations?

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 LMA's.

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 lands 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 have provided clear evidence for a market based, commercial return for the LMA's whilst also being fair, transparent and easy to administer.

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]

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Encl:

(a) Appendix A – Lease Schedule, Private Landlords
(b) Appendix B – Telstra Case