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9 August 2024

Matthew Tsikrikas
IPART Principal Analyst
By email: [redacted]

Dear Matthew,

RE: IPART Draft report - Review of rents for communication sites on certain Crown land - July 2024

Optus welcomes the publication of the draft report and the opportunity IPART provided for industry participants to attend the public hearing held on Tuesday 30 July 2024, We also welcome the opportunity to make this submission to enable further review and discussion of the issues that have been raised in the draft report and public hearing.

From the outset Optus wishes to stress that as a provider of essential telecommunications infrastructure we are committed to working with all levels of government to provide communications services that the community demands. However, we are firmly of the view that such co-operation must take into account communications industry stakeholder input, especially in areas where IPART and Crown land management stakeholders may not be subject matter experts, particularly when it comes to an approach or policy position that is proven not to align with the private market or accepted industry practice.

In addition to making its draft recommendations IPART has sought comment on 4 key issues summarised on page 5 of the draft report, Optus submission will provide comment on those issues and then provide further commentary on concerns we have with valuation methodology that IPART has adopted in making its draft recommendations.

<u>Seek Comment 1</u>
Should the current density classifications be updated to reflect changes in the ABS' Australian Geography Standard? Can stakeholders provide further evidence of the costs and benefits of this change?

Optus does not believe enough information has been provided around this proposal for us to form a view let alone provide "evidence of the costs and benefits of this change". Whilst it is likely that having existing density classifications meets the stated objective of having a fee schedule that is simple and easy to administer for government land management agencies, it must be noted that ABS or any other population density statistics are not how rents are determined in the private

market, which the IPART Terms of Reference has made bench marking against a key objective of its review.

Seek Comment 2 –
To what extent do communication sites on lands reserved for conservation, including in national parks, create higher environmental costs? For example, do they cause greater mitigation and conservation costs?

The IPART draft report and nature of this question seeking comment on supposed environmental and conservation costs amount to little more than broad sweeping statements to that effect but lack any evidence whatsoever to substantiate these claims or that the costs even exist.

At the top of page 23 in the draft report the claims are made that it is possible communications sites on those lands may:

1. **Degrade the visual amenity of National Parks** – one can argue that communications sites by their very nature degrade the amenity of any land or building they are placed on and that is one of the reasons we pay rent for them. No evidence has been provided on how they degrade visual amenity any more than on land leased in the private market. More importantly, whatever the environmental effects, irrespective of the location, those effects and the mitigations needed to address them are dealt with through the DA process. Indeed, one could argue that due to the sheer scale of National Parks compared to smaller land holdings a communications site will have less visual impact as it may be less prominent than on a smaller parcel of land. Further a communications site located on National Park land, rather than be in remote pristine bushland areas, is more likely to be located in fringe areas adjoining roads or National Park offices, visitor carparks and camping grounds etc where they are providing essential telecommunications services to Park workers and visitors alike. Alternatively, they are more likely to be located to adjacent to Resort type developments such as those in the Kosciusko National Park, or isolated pockets of residential development such as Bundeena and Cottage Point, again providing essential telecommunications services.

2. **Damage the ecosystems of National Parks or other environmentally sensitive land** – again no evidence has been provided to support these claims, the same comments made at point 1 above apply here.

3. **Be located on higher ground with the ability to project signals to greater distances or are situated in places where network coverage is poor** – the logic of this point is unclear, but the same comment can be made about a communications site on any land regardless of ownership or land use. In any event, in rental terms the number of potential customers served, or the distance the coverage extends is irrelevant. We are occupying land and the

rent we pay should reflect the value of that land. Indeed, if the rent was to be determined by the number of customers serviced, on many remote sites we would pay virtually no rent.

The report then goes on to claim that "These outcomes may then require adjustments to any proposed rental schedule including higher fees." Yet there is no commentary to support why this may be the case nor any market evidence provided to substantiate such a claim, let alone justify or quantify what that premium may be.

In the 5th paragraph on page 23 IPART makes the draft recommendation that NPWS continue to set its rental fees one category higher, which they consider appropriate to reflect the opportunity cost of development occurring on environmentally sensitive land, yet again no market evidence is provided to support this claim nor quantify what that opportunity cost may be, or how it justifies simply applying a higher rent category.

Further at 3.3 on page 25 IPART acknowledges the "absence of sufficient market evidence" yet claim that the "practice of setting rents one level higher balances the unquantified additional costs of their land management against any potential social benefit created by communications sites." If the additional costs of land management are "unquantified" and similarly so are the social benefits of communication sites, it is not clear how setting rents one level higher "balances" these allegedly competing objectives. The very nature of doing so implies the balance is in the favour of the "unquantified additional costs" of land management. For there to be balance one would counter the other, meaning there is no need to arbitrarily increase the rent one level higher, especially given IPART has admitted that there is an absence of market evidence and that the costs and benefits are "unquantified". There is an obvious fundamental flaw in the methodology adopted here.

Given one of the key objectives of the IPART terms of refence was for rents to reflect fair market based commercial returns, as outlined above, in the absence of any supporting arguments or market evidence, it is unclear why IPART's draft report has recommended the continuation of such an arbitrary approach.

Seek Comment 3

Are stakeholders able to provide evidence of the size of these costs and how they directly relate to the communication sites?

As Optus is not a land management agency stakeholder, we are unable to provide any evidence of these costs let alone the size of them. Subject to seeing any evidence to support a contrary view, our view is that this is largely a theoretical exercise not supported by any hard facts, figures or market evidence.

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Seek Comment 4

What is the likely impact of our proposed pricing for small cell technology on the rollout of 5G networks? What evidence can stakeholders provide of this impact?

Optus does not agree with the draft IPART recommendation that the "Co-user fee be extended to primary users deploying small cell and other similar technology in recognition of their similar land use.". The fact that IPART considers a small cell installation to have a "similar land use" to a co-locating Carrier (or Co-user in IPART terminology) on a macro cell telecommunications site demonstrates a clear lack of understanding around the nature and size of these different telecommunications site types. It also ignores the fact that there is a separate body of market evidence (albeit limited in size) that is indicative of how the market outside of NSW Crown land agencies deals with small cell installations.

Rather than a Lease that is registered on title agreements that cover Optus tenancy for small cell installations are typically in the form of a Licence or a Master Facilities Access Agreement with infrastructure / pole owners to accommodate the small cell antennas. In some cases Optus also has agreements with underlying land owners / managers such as local councils to place small outdoor units, (roadside cabinets), typically on footpaths or road verges where required. Not all small cell deployments require outdoor units be placed on the ground, in the case of Sydney CBD the equipment is contained wholly on the Sydney City Council owned street poles. Similarly Optus small cells in Melbourne CBD are deployed on street furniture owned by that Council.

Agreements or Licences to use land to install equipment are limited. The only agreements we have in the Optus NSW portfolio are with two metropolitan Councils located within the Sydney density category as defined in the IPART Draft Report. [redacted] This clearly demonstrates that the agreed rents in the market are substantially lower than the rents recommended by IPART.

It is also worth highlighting that the rents paid under the agreements [redacted] only apply where the small cell installation includes an outdoor unit, (roadside cabinet), located on Council land. If the outdoor unit, in addition to the antennas etc, is located on an electricity supplier owned distribution and/or lighting pole, then **no** rent is paid to the Council. In such a circumstance, whilst in a legal sense Optus is occupying Council owned land, in a practical sense it is not. The fact that no rent is paid to the Council recognises this practicality. It also recognises the fact that the electricity distributor pays no rent to have its pole on the Council land.

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In other cases low impact small cell equipment is typically deployed via a Land Access and Activity Notice (LAAN) under the Telecommunications Act 1997 (CTH) where no rent is paid.

The IPART proposal of applying a co-user fee at 50% of the primary user fees ranging from $4,272.50 to $18,700 Low to Sydney category is clearly not aligned with the way the rest of the market treats small cell tenancy arrangements.

The impact this will have on the rollout of small cells (which may be transmitting both 4G and 5G technologies) is that they will simply not be viable to deploy. This will limit deployment of networks particularly in built up, environmentally or other sensitive areas where macro cell deployment may not be possible and where small cells would have provided a more sympathetic network deployment when it comes to visual impact.

On page 44 at 5.3.3 of the draft report IPART proposes to recommend that these primary users (of small cell sites) pay the same fee as co-users (of macro cell sites). This is inconsistent with the broader government and private market and fails to recognise the physical differences in these installation types. To then go on to say that "We understand this is the current approach for small cell sites deployed on existing infrastructure and lack sufficient evidence to support an alternative approach", only to then recommend that a situation continues that in IPART's own admission is not based on any market evidence and limited understanding of the subject matter, is completely unacceptable. Optus would be happy to provide further briefings on the differences in technology and equipment types if this is something IPART would be interested in as part of a review of the recommendations on small cells.

<u>General Comments on Methodology</u>

Optus has serious concerns about some of the methodology adopted by IPART and government land management stakeholders. An example of this was displayed by the Crown Lands representative in the public hearing when she made a comment along the lines of the focus of the IPART review being on the quantum of rent amounts rather than the terms of the rental arrangements or tenure agreements. This displays a fundamental lack of understanding of how rents of leasehold tenure are determined. A Certified Valuer, (i.e. professional valuer with recognised qualifications), must have consideration of the terms and conditions of tenure documentation when determining a market rental or licence fee.

Some of the recommendations and commentary provided by IPART also raises concerns regarding a lack of understanding of how the telecommunications market works and how leasehold interests in telecommunications sites should be valued. In response I provide the following commentary.

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i) In analysing and making recommendations on site rentals IPART is effectively taking on the role of the Valuer so it should be remembered that it is the Valuers role to interpret and apply what happens in the market, rather than 'make the market', which is what IPART and government land agencies appear to be doing with regards to rent recommendations on small cells and the concept of co-user fees.

ii) IPART, relies upon a quote h from the NSW Valuer General, Guidance note - Valuation of land leased as a telecommunications site, February 2024, p 5, which notes "that in most leases the outgoings are the responsibility of the lessee". However, this statement is only accurate in relation to government owned land where it is policy that the costs of rates and taxes are passed through to the tenant. In the case of the private market the opposite is true. In most standard telecommunications template leases rents are Gross including outgoings. So when IPART are comparing their rent schedule to the private market they need to consider they are in most cases comparing to a gross rental to a nett rental. Accordingly, IPART rates should be lower than private market rents to reflect that typically government landlords pass these costs on to telecommunications tenants, where those in the private market are more likely not to be able to pass on these costs.

iii) On page 17 – 2.2.2 of the draft report when discussing land valuation approach and noting the industry's concerns, the IPART draft report states that it does "not agree that it is possible to ignore the private market", yet this is precisely what IPART has done when it comes to their own invention of co-user fees, along with applying a co-user fee to small cells when there is a separate body of market evidence to show how the market treats deployment of small cells.

iv) On Page 39 - 5.1 – Paragraph 3 & 4 IPART state "We do not agree that primary user fees always fully compensate land management agencies for the use of their land when there are co-users. A licence to use Crown land is non-exclusive and co-users are unable to sublet from the primary user. As such, co-user fees ensure that the rental received by the land management agencies reflect the intensity of land use by all land users." The co-user regime is something Crown land agencies have created themselves it is not reflected in the tenancy agreements that exist in the private market, so if attempts are made to compare rents to the private market where tenancy agreements have full rights to sublease, then rents Crown Land agencies charge must be discounted to reflect the lesser rights ie: no right to sub-leas at no additional cost.

v) IPART goes on to state "We attempted to estimate the current market discount for co-users using statistical analysis of our data set of private market leases. This effort has not yielded statistically reliable results (as

explained below). We are therefore recommending maintaining the existing 50% discount for co-users". This result is because there is no market evidence to support this analysis let alone produce statistically reliable results. Making a recommendation that something continue in the clear absence of any evidence to support that it exists in private market leases is fundamentally flawed logic, especially in view of the stated goal of the IPART Terms of Reference rents to reflect fair market based commercial returns.

Number of Site Users

There needs to be further discussion around how IPART defines "users" on a site and how this differs from the private market rental evidence.

The number of users on a site is not relevant to the assessment of market rental values for telecommunications leases as the vast majority of telecommunications leases provide the Lessee with unfettered rights to sub-lease at no additional cost as per the standard provision snipped below.

- **12.4 → Subletting¶**

  The·Lessee·may·sublet,·part·with·or·share·its·right·to·possession·of·the·Premises·upon·written·notice·to·the·Lessor.¶

This principle is consistent with that applied when leasing commercial, industrial or even residential property+ in that the Lessor does not have a right to collect extra rent if a tenant wants to sub-lease some of the leased space.

Furthermore, deployment guidelines encourage, and in some cases require, telecommunications users to co-locate on existing towers and other infrastructure. Without unfettered rights to sub-lease this would not be possible and would encourage proliferation of separate sites which is what the government is trying to avoid.

Co-users v Co-location

The concept of co-users at a site and the way NSW Government Land agencies and IPART has applied this in the past is not consistent with the private market. So called "Co-users" and particularly the currently applied policy that they should pay regardless of whether they are sharing the site under a Joint Venture, are co-located within the Tower owner / Primary users leased area (compound), or separately lease their own adjoining ground lease area, is not the way the broader market operates.

The term more commonly used by participants in the market is Co-location. When mobile telecommunications networks were first established by Carriers it was

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common industry practice that a Carrier wishing to co-locate on another's tower would, where practical to do so, enter their own separate ground lease adjoining the tower owners leased area. In some cases where Carriers shelters were located within the tower owners leased compound area a Sliver lease of a nominal area usually 1 square metre adjoining the compound was entered into principally to give the Carrier rights to 'Step Up' into the tower owners leased area if the tower owner vacated the site. Over time this practice has become less common as Carriers have divested their tower assets and moved to a neutral host model.

The broader market treats Co-locating users at a site in one of two ways:

1. In Compound – when located wholly within the tower owner's leased area as a sub-tenant of the tower owner with the property owner not entitled to any additional fees or rent. This includes any Carriers sharing a site under a Joint Venture arrangement.
2. Adjoining Ground Lease – where the co-locating carrier or user has its ground equipment located outside of the tower owners leased area and enters a direct tenure agreement with the underlying property owner, typically of a smaller leased area than tower lease area with equipment in the adjoining ground lease area being limited to the co-locating parties equipment shelter only and in some cases back up power generator.

By continuing with the current "co-user" classifications where a "user" of a site pays regardless of whether they are site sharing or co-locating as a sub-tenant or co-locating via an adjoining ground lease occupying additional real estate does not reflect the way leases operate in the private market, where typically only co-locating carriers occupying additional real estate pay rent to the property owner.

There is ample market evidence of tower leases with unfettered rights to sub-lease to other users if contained within the tower owners (Primary user) leased area. Likewise there is ample evidence to support a co-locating (co-user) entering into a separate ground lease with the land owner if they are occupying real estate in addition / separate to the tower owners leased area.

Optus maintains a willingness to work with IPART and other stakeholders to achieve the stated aims of the IPART terms of reference and come up with a pricing regime that is fair equitable and works for all parties. Should you require clarification or further information on any of the above please get in contact at your convenience.

Regards,

Graham Barber
Director, Property Strategy & Management | Network Deployment & Infrastructure
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