



06 September 2009

[On Telstra Letterhead]
**COMMONWEALTH GOVERNMENT DISCUSSION PAPER ON THE ABORIGINAL AND TORRES STRAIT
ISLANDER HERITAGE PROTECTION ACT 1984 (CTH)
SUBMISSION BY TELSTRA CORPORATION LIMITED (TELSTRA)**

1. INTRODUCTION AND SUMMARY

Telstra supports the overriding intention of the August 2009 Indigenous Heritage Law Reform discussion paper (**Discussion Paper**), to improve the Commonwealth legislative regime for protecting traditional Indigenous areas and objects. Telstra acknowledges the benefit of reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* (**ATSIHP Act**) to establish a nationally consistent approach, and to provide legal certainty for land users by encouraging the management of heritage issues at an early stage of any project.

Telstra's submissions concern two aspects of the proposed Indigenous Heritage Law Reform:

- reforming the declaration process; and
- the need to clarify certain issues with the proposed accreditation of States and Territories under the Commonwealth regime.

Telstra supports the reforms to the declaration process that are proposed in the Discussion Paper. In particular, Telstra supports the Commonwealth's proposal to limit the situations in which it can intervene in a project, particularly where project proponents have complied with the laws of an "accredited" State or Territory, and/or negotiated a registered agreement (such as an Indigenous Land Use Agreement (**ILUA**)) with the traditional owners of the relevant area.

However, Telstra submits that the proposed reforms to the ATSIHP Act should include a clear statement of who will have standing to apply for a protection order (interim or long-term) to stop a project, including where there is a native title applicant party, but no "registered" traditional owners.

Telstra's submission regarding the accreditation of States and Territories relates to the implementation of the proposed Commonwealth accreditation standards at the State and Territory level. Telstra's particular concerns include:

- implementation – ensuring that the standards for accreditation at the Commonwealth level will allow sufficient flexibility for State and Territory legislation drafted in response, to accommodate small-scale, linear projects without imposing a significant regulatory burden, where the risk of harm is small; and
- costs – an awareness that the standards for accreditation will have costs impacts. That is, because the Commonwealth standards for accreditation are likely to influence legislation at a State and Territory level, and those laws will have cost consequences for land users, the Commonwealth should have regard to the cost impacts of the standards it seeks to impose.

2. TELECOMMUNICATIONS AND TELSTRA'S OPERATIONS

2.1 Telstra's construction activity

Telstra's telecommunications network across Australia is very extensive. This is driven by a range of factors, including its historical role as sole telecommunications provider in Australia, its ongoing universal service obligation which requires Telstra to ensure that all people in Australia have reasonable access to a standard telephone service wherever they reside or carry on business, and because the significant population centres are spread across the country. While Telstra's network is mature, the shifts in population distribution and the demands of new technology necessitate the constant rollout of expanded networks. For example, Telstra undertakes many thousands of kilometres of underground cable or duct installations annually across Australia (this excludes maintenance activities). Telstra undertakes significantly more construction work across Australia than other telecommunications carriers.

2.2 Interaction of carriers' land access powers with Indigenous heritage laws

As you may be aware, telecommunications carriers are empowered under the *Telecommunications Act 1997* (Cth) to install "low-impact facilities", as defined in the *Telecommunications (Low Impact Facilities Determination) 1997* (Cth) (**Low Impact Determination**). Towers of more than 5 metres are outside of this definition, while an underground telecommunications cable and duct is generally classed as a "low-impact facility".

The installation of a "low-impact facility" does not require land owner consent. It also carries with it exemption from certain State laws. Specifically, when a carrier installs a "low-impact facility", it is exempt from laws in relation to, amongst other things, town planning, the use of land and the protection of places or items of significance to Australia's natural or cultural heritage (*Telecommunications Act*, s 3, cl 37).

However, the exemptions in the *Telecommunications Act 1997* do not apply in respect of laws for the protection of places or items of significance to the cultural heritage of Aboriginal people (*Telecommunications Act* s3, cl 36(3)). Therefore, despite extensive exemptions from the State planning laws for "low-impact facilities", Telstra must still comply with the various State Indigenous heritage protection schemes.

The definition of "low-impact facility" in the Telecommunications Act scheme, excludes activities which are to take place in an "area of environmental significance" as defined in the Low Impact Determination. This definition includes areas which are entered in a register or are otherwise identified as being of significance to Aboriginal persons or Torres Strait Islanders in accordance with their traditions (s 3.1 and s 2.5 (8)). If a proposed facility ceases to be a "low-impact facility", Telstra no longer has statutory powers of installation and must rely, without any exemptions, on the usual State processes, and must obtain tenure.

Accordingly, Telstra has no exemption from laws in relation to the protection of Indigenous heritage. Further, the proximity of an activity to a registered Aboriginal place will trigger the loss of all preferential land access rights. Therefore, the content of a reformed ATSIHP Act, together with the reforms to State and Territory Indigenous heritage legislation it may be expected to generate, has the potential to have a significant impact on Telstra's activities.

2.3 Telstra's current practices in relation to Indigenous cultural heritage

Telstra takes a very conservative approach to Indigenous cultural heritage issues. Because of the number of projects it has ongoing at any particular time, Telstra employs staff skilled in land access issues, including people able to identify cultural heritage risk and with a working knowledge of the heritage protection legislation in each State. Where a project appears to constitute a meaningful risk to Indigenous heritage, Telstra's usual practice is to consult with relevant Indigenous stakeholder groups and engage a specialist consultant to undertake a heritage survey. Whilst such surveys are sometimes undertaken in the context of a planning application, in most cases, Telstra commissions surveys in order to minimise risk of harm to Indigenous cultural heritage, not because it is subject to an express obligation to do so.

One of the advantages of telecommunications facilities, over more substantial infrastructure, is that there is some flexibility as to where they can be situated. Rather than seek consent to lawfully disturb Indigenous cultural heritage, if a site is identified in a survey, or in consultation with Indigenous groups, Telstra will simply design around it.

Because Telstra informs itself regarding the risk to Indigenous heritage at an early point in any project, Telstra has avoided both the need to obtain consents to disturb, and the delays that result from the identification of an Indigenous site during the course of construction. This approach places Telstra in a good position to work

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within the boundaries of a new, more consistently regulated, national Indigenous heritage protection framework.

3. TELSTRA'S SUBMISSIONS

3.1 General support for the proposals in the Discussion Paper

Telstra supports the proposed reforms generally and, in particular, supports the Proposals that seek to:

- encourage early consultation with the appropriate Indigenous groups to avoid, as much as possible, the "emergency interventions" that have occurred under the ATSIHP Act, which often occur late in a project's development, and usually result in significant additional costs;
- ensure that the recognised traditional owners of an area are the only people that can apply for intervention, where such connection has been established; and
- remove the current uncertainty about the interaction between State regimes and the Commonwealth legislation.

Two key areas covered in the Discussion Paper that are of particular significance to Telstra's operations are the *declaration process*, including concerns about the ATSIHP Act's current emergency intervention provisions, and the *accreditation process*, implementing the proposed Commonwealth standards into State and Territory legislation.

3.2 The declaration process

Telstra supports the reforms to the declaration process that are proposed in the Discussion Paper. In particular, Telstra supports the Commonwealth's proposal to limit the situations in which it can intervene in a project, especially when project proponents have complied with effective State law, and/or have negotiated a registered agreement (such as an ILUA) to ensure that Indigenous heritage is properly protected.

(a) Emergency declarations

Telstra supports Proposal 3 in the Discussion Paper that seeks to avoid unnecessary and last-minute intervention by the Commonwealth where sufficient protection for Indigenous heritage already exists in the form of an ILUA or under accredited State or Territory legislation.

Telstra considers that this reform will save significant time and resources for all parties. It will also provide certainty for project proponents, and better protection for Indigenous heritage and traditional owners by encouraging early negotiations and more effective consultation.

Telstra also acknowledges and supports Proposal 6 of the Discussion Paper, that where an agreement such as an ILUA has been negotiated and complied with, the Commonwealth should not intervene to protect that Indigenous heritage from the project activities.

However, Telstra submits that additional clarity should be provided about the situations in which the Commonwealth could intervene, for example, where a particular State or Territory is not accredited under the Commonwealth scheme.

Telstra has operations all over Australia and recognises the benefit of having nationally consistent regulation protecting Indigenous heritage. However, Telstra submits that if any State or Territory chose not to amend its legislation, the risk of Commonwealth intervention at a late stage in the project would remain in respect of works in that jurisdiction. Furthermore, if an ILUA cannot, for whatever reason, be reached with the traditional owners of an area, the project proponent may not be in a position to protect itself from late-notice intervention, which has all of the deficiencies of the existing, ATSIHP Act scheme.

TELSTRA SUGGESTS:

The Commonwealth legislation should clarify that where a project proponent has consulted with the traditional owners of an area, the Commonwealth cannot intervene on the basis of an application under the ATSIHP Act after, for example, six months from the date that all necessary State approvals have been obtained.

This will ensure consistency and certainty for national operators, and avoid the costs and delays that make the current ATSIHP Act scheme ineffective.

(b) Limiting the number and scope of declarations

Telstra also supports Proposal 9 of the Discussion Paper, which states that the Minister would not be required to consider redundant, including repetitious or previously decided, or vexatious applications. Telstra submits that the Proposal to set aside redundant applications will allow for a more streamlined and effective regulation of Indigenous heritage protection. That Proposal also represents a far better use of time and resources for the Commonwealth and project proponents.

Telstra also considers that the clarification of the necessary supporting material for an application in Proposal 9 will lead to better outcomes for the traditional owners of an area in which Indigenous heritage is identified, and will ensure that relevant applications are given the weight and scrutiny that they deserve.

Telstra supports Proposal 9 in the Discussion Paper.

(c) Standing to make applications

Telstra supports Proposal 5 in the Discussion Paper, that standing to seek Commonwealth protection should be given first to traditional owners who have statutory responsibility for the relevant area. Telstra supports the Discussion Paper's acknowledgment that the current ATSIHP Act overlooks the recognition of traditional connection that certain Indigenous groups have achieved through grants of native title or ownership under land rights legislation. The current ATSIHP Act also creates difficulties for project proponents, because there is always a risk that an application may be lodged by someone unconnected with the area, even where a registered ILUA has been negotiated with the recognised traditional owners.

However, Telstra submits that in many circumstances, there is no Indigenous group with statutory responsibility for land that is subject to a development proposal. In those circumstances, if a native title determination application or a land rights claim is currently underway, Telstra submits that the Commonwealth legislation should clarify that the current applicant (or applicants) for recognition of traditional ownership will be the appropriate group to apply for protection of Indigenous heritage in that area.

TELSTRA SUGGESTS:

The implementation of a threshold for standing to make an application for Commonwealth intervention, where there is no recognised traditional owner of an area, as follows.

If there is no group recognised by statute as the traditional owners (whether under native title or land rights legislation), the Commonwealth should specify that the appropriate people to bring an application for Commonwealth intervention will be:

- any registered native title claimants or parties engaged in negotiations for a land rights outcome; or, in the absence of the above,
- any Indigenous person or persons with a traditional, historical or familial connection or association with the relevant area or object.

3.3 Accreditation of State and Territory Indigenous heritage legislation

Telstra generally supports the Commonwealth's proposal to accredit States and Territories under the Commonwealth scheme to achieve greater national consistency, and more effective protection of Indigenous heritage. However, Telstra is concerned about the way that the Commonwealth accreditation standards will be translated into State and Territory law, including:

- whether State and Territory legislation will be able to cater for small-scale, linear projects, appropriately; and
- whether Telstra (and other, similar service providers) will be required to obtain individual Indigenous heritage approvals for each separate project that it undertakes on its extensive and national network of infrastructure.

We set out below, Telstra's support for the Proposals in the Discussion Paper relating to accreditation, and Telstra's specific concerns about the implementation of the proposed standards.

(a) Removing uncertainty

Uncertainty is a feature of the current ATSIHP Act scheme, which allows last minute applications for Commonwealth intervention to protect Indigenous heritage, even if a project proponent has complied fully with its obligations under State or Territory legislation. A significant benefit of the proposed accreditation process is removing that uncertainty by establishing clear situations in which the Commonwealth cannot intervene, including where the States or Territories have accredited Indigenous heritage protection legislation, or the project is being undertaken in compliance with a registered agreement.

Telstra supports the implementation of a nationally consistent framework, allowing it to proceed with confidence that the procedures put in place will protect Indigenous heritage, comply with the applicable legislation and, ideally, the expectations of the traditional owners of the area.

Telstra supports Proposal 4 in the Discussion Paper.

(b) Applying the standards – appropriate implementation at State level

Telstra is concerned about the way that the standards for accreditation, as proposed in the Discussion Paper, might be translated into State and Territory legislation. Telstra submits that the way that the Commonwealth identifies the accreditation standards should have regard to their significant impact on experienced, small-scale land-users such as Telstra.

Commonwealth guidance may be necessary to avoid the implementation of State and Territory legislation that does not apply, or that places an inequitable regulatory burden on linear, small-scale operations (including Telstra's network installation and maintenance work) as compared to large-scale, one-off projects.

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In order to avoid a heavy regulatory burden, and to reduce the costs of compliance (discussed in further detail, below), Telstra submits that the Commonwealth standards should be sufficiently flexible to allow the accredited State or Territory legislation to distinguish between small-scale, linear projects undertaken by experienced service providers, and large-scale, one-off works that can be closely, and appropriately regulated for compliance with Indigenous heritage protection legislation.

Flexibility could be provided in State and Territory legislation by a variety of means, including by establishing an approved Code of Practice that sets out the relevant standards necessary to protect Indigenous heritage. State and Territory legislation should be implemented in a way that allows ongoing and small-scale works to proceed without regulation on a project-by-project basis.

TELSTRA SUGGESTS:

The Commonwealth legislation should be implemented at the State and Territory level in a way that has sufficient flexibility to deal with the operations of national service providers that undertake small-scale, linear works.

(c) Potential increase in compliance costs

Telstra is concerned about the cost implications of applying the Commonwealth's proposed Indigenous Heritage legislation to small-scale and ongoing linear projects.

The Discussion Paper states that part of the purpose for streamlining and consolidating Indigenous heritage protection relates to an effort to reduce compliance costs. The Discussion Paper (at p.8) specifically states that:

...the proposals are expected to reduce rather than increase costs for business. If state and territory governments adopt the proposed minimum standards, it would reduce duplication, increase certainty and reduce the risk of delays for developments. Consumers are unlikely to notice any price impacts from the reforms.

As discussed above, Telstra generally supports the proposals in the Discussion Paper, and the intention of enhancing protection of Indigenous heritage. However, Telstra is concerned that the implementation of this legislation will result in significantly increased compliance costs for service providers such as Telstra, that are involved in small-scale, linear operations across Australia.

Current compliance with Indigenous heritage legislation constitutes a significant cost to project proponents. Telstra acknowledges that retaining specialist consultants to undertake heritage surveys provides a good understanding of the likelihood of disturbing Indigenous heritage in any particular project. However, there are many situations where the risk of encountering Indigenous heritage is very low, due to the nature of the proposed works and the area itself, such that the project does not require an Indigenous heritage assessment.

The Discussion Paper contemplates enhanced assessment and management processes for proposed projects. For example, Proposal 10 sets out a consultation procedure that includes a conference with all parties, at the outset of an application for a development project, with the possibility of ongoing conferences throughout the project. Given the extent of Telstra's infrastructure networks across Australia, even a small increase in compliance costs for each of its projects will have immense cost ramifications when applied across the whole network.

Telstra submits that a reformed ATSIHP Act must permit States and Territories to take a flexible approach to project applications, including in the extent of consultation, assessment and management of Indigenous heritage issues that is required. Telstra submits that where the extent of the risk of harm to Indigenous heritage is low, the Commonwealth regime should allow States and Territories to limit the application and consultation processes necessary for compliance. Likewise, if the Indigenous heritage that may be affected by a project is of low significance, or is insignificant to the traditional owners of the area, the processes for compliance should be limited accordingly.

This is particularly so, given Telstra's flexibility to avoid potential Indigenous heritage sites in the design of its infrastructure. Where it is possible to completely avoid impacting Indigenous heritage, Telstra submits that a full consultation and assessment process would create an unnecessary compliance burden on project proponents and the assessing State or Territory Government. Furthermore, such a requirement would likely cause difficulties for traditional owners and their representative bodies, which

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should not be expected to fund representation at party conferences about small, linear infrastructure projects that are unlikely to impact on Indigenous heritage.

TELSTRA SUGGESTS:

The Commonwealth's proposed accreditation standards should permit States and Territories to provide a flexible response to heritage management, including by ensuring that the extent of consultation, assessment and management required is determined by the:

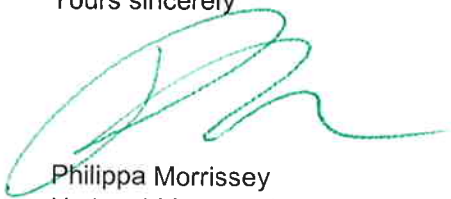
- extent of the potential risk of harm to Indigenous heritage; and
- significance (or otherwise) of the Indigenous heritage that may be affected.

4. FINAL COMMENTS

If the proposed reforms to the ATSIHP Act are implemented, they are likely to have a significant impact on Telstra's operations. Telstra submits that if consideration is given to the implementation of these reforms on small-scale, experienced operators such as Telstra, and if additional clarification is provided on the accreditation of State and Territory legislation, the Commonwealth's proposals are likely to greatly improve the heritage protection processes for project proponents.

Telstra welcomes the opportunity to make this Submission. If it would be of assistance, Telstra would be pleased to discuss this submission further and provide any additional material which may be relevant.

Yours sincerely



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