30 May 2018

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Dear Mr Gammie,

Consultation Phase One: Telstra submission on the Review of the *Aboriginal Heritage Act 1972* (WA)

Thank you for the opportunity to make a submission regarding the Review of the *Aboriginal Heritage Act 1972* (WA) (**Act**).

Telstra Corporation Limited (**Telstra**) welcomes the Western Australian Government's proposal to review the Act in a way that is respectful of Aboriginal people and their heritage, and to ensure that our Aboriginal heritage is recognised, protected and celebrated by all Australians today and for generations to come. Telstra recognises the Act needs to be modernised to accord Aboriginal People with respect for their culture and heritage and of their unique place in our history.

There is also a need to ensure this happens in a manner that also enables effective and efficient land use decisions and Telstra welcomes the opportunity to provide feedback that may assist to identify proposals for amending the Act that recognise the needs of all stakeholders.

Telstra has identified some mechanisms that could effectively and efficiently support a greater role for Aboriginal people, whilst recognising Telstra's need to obtain land use decisions efficiently and effectively. They include:

- Giving Aboriginal people a greater role in maintaining a new register of Aboriginal heritage values, that could include information about heritage values (irrespective of whether they meet the significance test for protection under the Act) and about the types of activities that may or may not significantly impact upon heritage values. The register would guide (not determine) land use decisions by proponents and government.
- Telstra is firm in its view that land use decisions should be made by the Minister (with broad discretion) or a government department because those decisions involve evaluation of a number of competing interests and an assessment of what is in the best interests of the State. Telstra supports a statutory mechanism for Aboriginal people to be heard in those processes.

- Land use decisions should consider the significance of heritage values and the likely impact of the proposed land use on those values, guided by (not determined by) the information on the register.
- Telstra supports identifying areas of outstanding heritage value as 'protected areas of outstanding heritage value' and giving Aboriginal people a greater role in land use decisions in those areas. However, decisions to confer that status should be made by the Minister and should take into account the views of all those who have a right, interest or existing infrastructure on the land (including Telstra).
- Telstra also supports the retention of the existing defence and creating a new due diligence defence - of not reasonably knowing that using land for a purpose would have a significant impact upon heritage values protected under the Act.

These suggestions are described in more detail below.

Section 1 provides some background about Telstra.

Section 2 describes the proposals Telstra considers worthy of further consideration.

Section 3 responds to the questions raised in the consultation paper.

1 Background

Telstra's purpose is to create a brilliant connected future for everyone. We are committed to providing communications services to a whole range of communities throughout urban, rural and remote Australia. Access to and protecting Telstra's rights and interests in its infrastructure and its ability to develop new infrastructure is important to ensure Telstra can continue to provide these services.

From 1 December 1901 to 30 June 1975, Telstra operated under the auspices of the Commonwealth Post-Master General's Department. During this period, Telstra established a significant amount of its telecommunications infrastructure under statutory powers granted by the former *Post Telegraph Act 1901* (Cth).

On 1 July 1975, Telstra became the Australian Telecommunications Commission (trading as Telecom) via the enactment of the *Telecommunications Act 1975* (Cth). This Act was the first to introduce Telstra's Universal Service Obligation (USO), requiring it to make its telecommunications services available throughout Australia for all who reasonably require them. The USO, which continues today, resulted in an unprecedented expansion of Telstra's infrastructure throughout urban and regional Australia during this period. Between 1992 and 1993, Telstra underwent further changes, becoming the Australian and Overseas Telecommunications Corporation and then finally, on 13 April 1993, Telstra Corporation Limited.

This history together with the linear nature of Telstra's infrastructure make it unique in the extent and nature of its land holdings in Australia. Telstra is particularly active in native title claims resolution and in relation to the management of Aboriginal cultural heritage across all Australian jurisdictions.

Telstra strongly supports the recognition of Aboriginal and Torres Strait Islanders as Australia's First Nations and their special connection with country, and the protection of Aboriginal cultural heritage from harm. This is reflected in Telstra's Reconciliation Action Plan.

Telstra undertakes a range of activities on land to provide important telecommunications infrastructure for the benefit of all Australians. Many of those activities are low impact, and there is often some flexibility to locate the facilities in areas that will have an equivalent low impact on Aboriginal heritage. For example, installing and maintaining telecommunications towers, cabling and associated infrastructure such as access routes. This is often done on land that has already been disturbed.

Telstra's interest is to ensure it can efficiently know how best to site its infrastructure and use land in a manner that will have no or a low impact on Aboriginal heritage values, whilst efficiently providing essential telecommunications infrastructure for the benefit of all Australians.

Telstra supports changes to the Act which will modernise the legislation in a way that protects Aboriginal heritage and also improves efficiency and transparency for everyone involved.

2 Overview of Submission

Set out below is an overview of some mechanisms Telstra considers are worthy of further consideration to achieve the objectives described above.

2.1 A New Register

Telstra supports giving Aboriginal people a greater role in maintaining a new register of Aboriginal heritage values. The extent to which values included on this new register may or may not be 'protected under the Act' would be determined in land use decisions and when determining if there has been a breach of the Act. The register would be a source of information for guiding those decisions, but is not determinative.

There is a need to ensure more information about heritage value, and guidance about activities that may or may not affect that value, is transparent, while still respecting cultural sensitivities. Giving Aboriginal people a greater role in maintaining a new register of information about heritage value and providing guidance on land uses that do not have a significant impact on those heritage values may assist to achieve that delicate balance.

The Victorian approach which enables those proposing to use land to receive information about potential heritage value and risks/land use that could (not) affect that value, without disclosing sensitive information, is worth considering. Such an approach is also under consideration in New South Wales. This may lead to a better source of information, from which better land use decisions could be made efficiently.

2.2 Land Use Decisions

Land use decisions involve an evaluation of a number of competing interests and need to be made in the best interests of the State and all Western Australians. For that reason, Telstra has a firm view that land use decisions should always remain with the Minister or a government department.

Telstra considers that there is an opportunity for Aboriginal people to have greater involvement in those decisions by:

- the caretaking of and contributing to the new register (as described above); and
- a statutory opportunity for all interested Aboriginal people to be heard within reasonable, defined, timeframes before land use decisions are made under the Act.

Telstra also supports amendments to the Act which create a 'tiered approach' to land use consents based on the 'significance' of the area or heritage value and of the significance of the impact likely to arise when using the land for a purpose. For example, a tiered approach could operate to facilitate the issue of permits or consents in respect of purposes where the Minister is satisfied, taking into account information available on the register, the proposed purpose would not destroy or significantly damage or alter significant heritage values on the land, and there was no significant risk that the purpose would adversely affect the importance and significance of any Aboriginal heritage values on the land. This approach is similar to reforms proposed in the *Aboriginal Heritage Amendment Bill* 2014.[1]

2.3 Due diligence and Low Impact Uses

Telstra supports retention of the existing defence in s62 of the Act and also suggests an additional defence – using land for a purpose which a person did not know, and could not reasonably be expected to have known, would have a significant impact on heritage values that are protected under the Act.

A mechanism to permit low impact uses to occur in and around areas protected under the Act without infringing the offence provisions (except 'Protected Areas of Outstanding Heritage Value' – see below) should be included in any reforms. 'Low impact' uses should include:

- *Uses causing no ground disturbance.* For example, inspecting and surveying an area to assess suitability for the installation of telecommunications infrastructure, such as geotechnical survey work, vegetation surveys and line of site surveys.
- *Uses causing no additional ground disturbance.* For example maintenance of existing infrastructure, safety inspections and subsidence controls.
- *Use on an area previously developed or subject to significant ground disturbance.* For example, replacement of existing infrastructure like tower replacements involving the deployment of a temporary facility to maintain telecommunications services while an existing pole or tower is removed and replaced.
- *Use unlikely to cause any additional harm to heritage than what has already occurred.*
- *Uses identified as low impact on the register*

Further examples could be obtained from the due diligence guidelines issued by the Department of Premier and Cabinet and DPLH, the Noongar Standard Heritage Agreement and Queensland's 'Cultural Heritage Duty of Care Guidelines'.

The 'low impact' activities identified in the *Telecommunications Act 1997* (Cth) and the *Telecommunications (Low-impact Facilities) Determination 2018,* and provided for in the *Telecommunications Code of Practice 1997,* should also be recognised. They include, for example, cabling to be laid in an existing trench, or cable location marking post or sign where they occur in residential, commercial, industrial or rural areas.[2]

This compliance mechanism would encourage land users to assess the risks of impacting cultural heritage associated with the proposed activity, and to consider what approaches could

[1] See Aboriginal Heritage Amendment Bill 2014 (WA) cl 9.

[2] *Telecommunications (Low-Impact) Facilities Determination 2018* Schedule Part 4, items2 and 3

be adopted to ensure land uses are carried out in a manner which avoids or minimises harm to significant Aboriginal heritage values.

2.4 Protected Areas of Outstanding Heritage Value

Telstra supports a mechanism for protecting particular areas of outstanding heritage value, and giving the relevant Aboriginal people a greater role in land use decisions in respect of those areas.

Such areas should only be given that status by the Minister, and only after broad consultation with relevant interest holders and considering and protecting all existing rights, interests and infrastructure in the relevant area.

2.5 Aboriginal representation

For Aboriginal people to be given particular roles under the Act, it is important to clearly and transparently identify the relevant organisation(s) to perform those roles to provide certainty, efficiency and reliability. The determination of native title claims sometimes makes this easier, but that it is not always applicable.

Telstra supports an approach that provides statutory recognition of an appropriate entity where objective standards are met (eg the South Australian approach to 'Registered Aboriginal Representative Bodies').

However, there is also a need to ensure land use decisions can be made and proponents can operate efficiently in circumstances where there may be a number of Aboriginal people/groups who can 'speak for' the Aboriginal heritage value of the land. In those circumstances, Telstra suggests an approach where all those who can 'speak for' the land:

- can include information about heritage value on the new register; and
- have an opportunity to be heard in land use decisions.

2.6 Other issues

- Existing s18 and s16 consents should continue to authorise land uses after the amendments commence.
- Decisions that areas are not protected under the existing Act, should not be subject to reassessment under the amended Act, as land use decisions may have been made in reliance on those decisions.
- Existing agreements have been reached based on the current Act. It is preferable to retain the fundamentals of the Act to enable those agreements to continue with limited disruption.

3 Consultation Questions

	Question	Telstra Submission
1	Is the long title an adequate description of what the amended Act should set out to do? If not, what changes should be made?	Telstra agrees with the long title of the Act, but says further that the long title should also describe the objects of the Act as establishing practical and efficient processes for facilitating land

	Question	Telstra Submission
		use in a way that avoids or minimises harm to cultural heritage values.
2	What do you think are the best ways to ensure the appropriate people are consulted about what Aboriginal heritage places should be protected and how a proposal may impact those places?	To facilitate transparency and decisions based on all the available evidence, Telstra is open to including statutory rights allowing all Aboriginal people to: • contribute to the heritage values noted on a 'new' register (which may include values whether or not 'protected under the Act'); and • be heard in decisions about land use that may have a significant impact on significant Aboriginal heritage values that are 'protected under the Act'. However, it is important that the statutory process should include clear processes and reasonable stated timeframes to ensure decisions can be made efficiently. There should be tiered decision making processes to enable less significant decisions to be made quickly. One of Telstra's biggest challenges is to determine who to consult with to obtain heritage surveys, so as to establish a defence and to demonstrate compliance under the Act. Telstra would support a proposal that enables Telstra to rely on its consultation with an identified group or entity as satisfying its compliance with the Act. There should be an accreditation process and a register that land users like Telstra can rely on for the purposes of complying with the Act. Consideration could be given to the South Australian and Victorian systems for accrediting local representative bodies.
3	To what extent has the provision to appoint honorary wardens been effective and how can it be improved?	Telstra has no comment about the effectiveness of the provision to appoint honorary wardens. Any person appointed under the Act to exercise enforcement powers should be properly trained, resourced and should always be operating on behalf of the government. The exercise of their powers should also be subject to review.
4	Are the roles and functions assigned under the Act sufficiently clear and comprehensive to fulfil the objectives of the legislation to preserve Aboriginal heritage places and objects? If not, what changes in roles and functions do you suggest?	Telstra considers the roles of the ACMC (as an advisory body), the Minister (as decision maker with broad discretion) and Registrar in relation to land use decisions under the Act to be broadly appropriate, especially if Aboriginal people receive a statutory right to be heard in land use decisions. There is scope to include Aboriginal representation on the ACMC, but as an advisory body, the ACMC should include a

	Question	Telstra Submission
		wider range of representatives to reflect the broader factors that are relevant to decisions made under the Act. Telstra's concern is that the Act provides a 'once size fits all' approach to decision making when the situations vary substantially. Telstra suggests that a tiered approach to decision making be considered that enables some decisions to be made by the CEO of DPLH. This will leave the ACMC and the Minister to focus their limited resources on decisions about land uses that are likely to have a significant impact on significant Aboriginal heritage values protected under the Act. Resources may be more efficiently allocated if statutory decisions about whether a heritage value meets the significance tests to be 'protected under the Act' only occur alongside a decision as to whether land can be used for a purpose, and whether there has been a breach of the Act.
5	Does section 5 adequately describe the sorts of places or sites that should be protected under the amended Act? If not how can it be improved?	Telstra is open to the register holding information about heritage values and guidance as to land uses that may or may not have a significant impact on significant heritage values. Telstra has a firm view that the Act should only protect significant heritage values, determined with regard to clear criteria. The Minister should have the ultimate say as to whether a land use that is likely to have a significant effect on significant heritage values can proceed. The Minister is best placed to make that decision in the best interests of the State as a whole and should have a broad discretion.
6	Do section 6 and Part VI adequately describe the sorts of objects that should be protected under the amended Act? If not, how can they be improved?	
7	Is the declaration of a Protected Area under the Act the best way to deal with Aboriginal sites of outstanding importance?	As part of a tiered approach, Telstra supports amendments to the Act which give Aboriginal people a greater role in land use decisions at sites which have been identified by the Minister as having heritage values of outstanding importance. However, before the Minister makes a declaration to protect an area of outstanding value, those with rights, interests and infrastructure located on the land should be heard and those existing interests and future use of that land protected. For instance, Telstra must be able to maintain its infrastructure and access tracks on an ongoing basis.
8	Should the Act provide for the management of Aboriginal Ancestral	Telstra considers that management of Aboriginal Ancestral (Skeletal) Remains are best dealt with on a case by case basis, including via conditions included on land use consents.

	Question	Telstra Submission
	(Skeletal) Remains? If so, what needs to be considered?	
9	What sort of activities that may affect an Aboriginal site should require consent or authorisation?	**No consent** Land users should not require consent or authorisation to use land for a purpose that is not likely to have a significant impact on significant Aboriginal heritage values. Low impact activities should be allowed to occur in and around areas with heritage value, including areas protected under the Act (except perhaps declared 'Protected Areas of Outstanding Heritage Value'). 'Low impact' uses should include those matters referred to in paragraph 2.3 above. Telstra would prefer that a consistent approach were taken across all Australian jurisdictions as to what land uses are exempt from requiring a land use decision. By aligning the triggers and criteria with those used by other states, change management processes aligned with Environmental Management and Compliance Management systems implemented by Telstra can be simplified and in turn lead to more successful implementation and understanding of revised compliance obligations. **Tiered approach to consents** Where using land for a purpose may have a significant impact on significant Aboriginal heritage values, Telstra strongly supports amendments to the Act which create a 'tiered approach' to land use consents based on the 'significance' of a heritage value and the purposes for which the land user proposes to use the land. Telstra also strongly supports continuation of the concept of receiving consent to 'use land for a purpose', not the more limited and inflexible concept of 'activities'. The existing approach provides much needed flexibility, whilst adequately protecting the relevant significant heritage values. Land use decisions involve an evaluation of a number of competing interests and need to be made in the best interests of the State and all Australians. For that reason, Telstra has a firm view that land use decisions should always remain with the Minister or a government department. Telstra considers that there is an opportunity for Aboriginal people to have greater involvement in those decisions by:

	Question	Telstra Submission
		• the caretaking of and contributing to the new register (as described above); and • a statutory opportunity for all interested Aboriginal people to be heard before land use decisions are made under the Act. Telstra also supports amendments to the Act which create a 'tiered approach' to land use consents based on the 'significance' of the area or heritage value and of the significance of the impact likely to arise when using the land for an approved purpose. For example, a tiered approach could operate to facilitate the issue of permits or consents in respect of purposes where the Minister is satisfied, taking into account information available on the register, that the proposed purpose would not destroy or significantly damage or alter any Aboriginal site on the land, and there was no significant risk that the purpose would adversely affect the importance and significance of any Aboriginal site on the land. This approach is similar to reforms proposed in the *Aboriginal Heritage Amendment Bill 2014*.[3]
10	What should be the criteria against which to evaluate an activity that may affect a site (e.g. a proposal to use or develop land)?	Land users and decision makers would benefit from the introduction of due diligence guidelines in assessing the risk of significantly impacting significant heritage values. There are existing criteria for identifying <u>significant</u> heritage values protected under the Act in ss 5, 6, 39(2) and 39(3). The approach adopted in Queensland through Due Diligence Guidelines provides an example for identifying when a land use may have a significant impact on those significant heritage values. This is through a process of elimination of what otherwise qualifies as low impact land uses, having regard to the type of use and the extent of pre-existing development or disturbance. In WA, the criteria could be using land for a purpose that is inconsistent with previous land use; and land use that is not 'low impact' in previously undisturbed areas.
11	How can 'impact' arising from proposals for land use on sacred sites that do not have physical cultural heritage elements be assessed?	Telstra supports the development of an improved register, maintained with input from Aboriginal people, that provides better information to guide land use decisions (by land users when deciding whether or not to seek a consent and government decision makers when granting consents).

[3] See Aboriginal Heritage Amendment Bill 2014 (WA) cl 9.

	Question	Telstra Submission
		This should include better information about heritage values, stored, and made public, in a culturally appropriate way, and guidance as to land uses that may or may not have a significant impact on anthropological heritage values. The Victorian approach to cultural heritage mapping is an example worth considering[4], for providing guidance to land use decisions. Telstra also supports amendments which give Aboriginal people a right to be heard as part of a 'tiered approach' in making a land use decisions. Further, the existing criteria as to the significance of heritage values also assists.
12	Who should provide consent or authorisation for proposals that will affect Aboriginal sites?	Telstra is of the firm view that the Minister or a government department should ultimately make land use decisions and the Minister should have a broad discretion to do so.
13	To what extent is the current section 18 application process effective and how can it be improved?	The s18 process is effective because it authorises land use for a purpose, with appropriate conditions. This allows flexibility for both land use and heritage protection based on the particular circumstances. However, the process is problematic because: • it is too time consuming and cumbersome for land uses that have an insignificant impact on heritage values. Scarce ACMC and Ministerial resources should only be applied to more significant decisions; • the process is not transparent; • applications can only be made by 'land owners'; and • the authorisations cannot be transferred. Telstra supports a 'tiered approach' to land use decisions based on the significance of the heritage values and the significance of the impact on those heritage values from the proposed land use. For Telstra, this would mean that the process it must undertake to obtain consent to use land for purposes that are not likely to have a significant impact on significant heritage values would be more efficient and proportionate to the risk presented. Telstra supports 'low impact' land uses not requiring consent.
14	What provisions could be included in an amended Act to ensure the long-	Telstra has no comment.

[4] https://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/heritage-tools.html

	Question	Telstra Submission
	term protection of Aboriginal sites where alternative statutory arrangements do not apply?	
15	Are the enforcement provisions under the Act adequate to protect sites? If not, how can they be improved?	The enforcement provisions are generally adequate. The amendments to the Act are an opportunity to involve Aboriginal people in enforcement mechanisms. For example, Telstra considers there is scope for the government to employ Aboriginal people with appropriate training in an enforcement capacity. This could include rangers, or heritage conservation managers. All people with enforcement powers should be acting on behalf of the government, with adequate training, oversight and review of their decisions.
16	Are the current penalties under the Act adequate? If not, how can they be improved?	The penalty provisions are adequate.
17	Should a defence continue to be provided where the disclosure of information (section 15) is against customary laws/protocols?	Telstra supports such a defence remaining in place. However, if such a defence is to be maintained, it should be recognised that limitations on information provided and available for proponents to have regard to may diminish the potential to mitigate impacts on cultural heritage. Greater balance of these matters may be possible through Aboriginal people having a greater role in the maintenance of the register. This should enable the register to include better, more complete information, for it to be managed in a culturally appropriate way, and for appropriate information to be made public to guide proponents as to whether land use consents are needed. Provision could also be included for culturally sensitive information to be reported and held on the register in a manner that is only available in limited circumstances. For example, such information could be used to guide Ministerial and government land use decisions.
18	Are the criteria for assessing the significance of sites under section 39 (2) and (3) adequate to evaluate whether a site should be added to the Register? If not, what should the criteria be to assess the significance of a site?	Telstra is firmly of the view that there should be clear criteria for assessing the significance of heritage values. Decisions as to the significance of heritage values need only be made in conjunction with land use decisions, and should be made by the Minister or the government department, according to a tiered process for decision making.

	Question	Telstra Submission
19	What should be the steps to report, nominate, assess, enter, amend or remove an entry from the register?	Telstra supports an outcome that encourages greater transparency as to areas where significant heritage values exist, the nature of those values, and land uses that may significantly impact them. More involvement by Aboriginal people in maintaining the register may facilitate this, and enable Aboriginal people to protect culturally sensitive information, whilst ensuring it is available to guide land use decisions under the Act. The register would then provide guidance only, and would not be determinative as to whether an area of land is 'protected under the Act'. Instead of complex decisions as to what should be on the register, government resources can focus on land use decisions, guided by the information available on the register, and taking into account other relevant factors.
20	What do you think is missing from the Act?	Telstra suggests including an additional due diligence defence. This would cover a land user for using land in circumstances where the land user did not know, and could not reasonably have been expected to know, would have a significant impact on significant Aboriginal heritage values. This ensures resources are allocated to the more significant decisions and heritage values, and encourages greater transparency about areas with significant heritage values and land uses likely to significantly affect them.
21	What sections, if any, do you think should be removed from the amended Act, and why?	Telstra has no comment.

4 Closing

Telstra is grateful for the opportunity to make this submission. If you have any questions about our submission, please do not hesitate to contact Deanne Caruso (07 3918 5917 or Deanne.Caruso@team.telstra.com).

Yours sincerely,

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