



TELSTRA CORPORATION LIMITED

Review of the Cultural Heritage Acts

Public submission

9 August 2019



01 Introduction

Telstra Corporation Limited (**Telstra**) appreciates the opportunity to make a submission to the Department of Aboriginal and Torres Strait Islander Partnerships (**the Department**) regarding the Department's review of the Aboriginal Cultural Heritage Act 2003 (Qld) and the Torres Strait Islander Cultural Heritage Act 2003 (Qld) (**the Cultural Heritage Acts**). Telstra welcomes the Department's proposal to review the Cultural Heritage Acts with the objective to ensure the appropriate balance between protecting and conserving cultural heritage and facilitating the business and development activity that is vital to the state of Queensland.

Telstra strongly supports the recognition of Aboriginal and Torres Strait Islanders as Australia's first nations, their special connection with country, and the protection of their cultural heritage from harm. This is reflected in Telstra's [Reconciliation Action Plan](#). For this reason, Telstra supports legislation which is directed at the protection of Aboriginal and Torres Strait Islander cultural heritage and the careful management of activities that may impact on such heritage. As a major Australian telecommunications infrastructure provider with unique obligations as the [universal service provider](#), Telstra makes the submissions below.

Telstra recognises the importance of Aboriginal and Torres Strait Islander peoples being centrally involved in the decision-making processes related to the management of their cultural heritage. Any reforms to the Cultural Heritage Acts should ensure they continue to provide clear and effective protections for Aboriginal and Torres Strait Islander cultural heritage. While the Cultural Heritage Acts and associated Duty of Care Guidelines (**the Guidelines**) currently offer a number of pathways for managing the impacts of land-use activities on cultural heritage, the regime does not necessarily provide practical clarity regarding compliance with statutory obligations for proponents in terms of engagement, responsiveness and costs in respect of the deployment of telecommunications infrastructure.

Achieving such clarity is already identified as an objective of the Cultural Heritage Acts, which lists the principles underlying the main purpose of the Acts. In particular, section 5(e) provides that 'there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage'. Achieving this balance between the effective protection of cultural heritage and the establishment of timely, cost effective and efficient processes and guidelines is fundamental to ensuring protection of cultural heritage while also ensuring that the planning and implementation of different types of land use activities in the State can proceed (where applicable) with a degree of certainty.

Telstra has (in some instances) been unable to reach agreement with Aboriginal/Torres Strait Islander parties which ultimately led to our inability to proceed with construction of a telecommunications facility in a small number of locations.

Telstra considers the Queensland framework to be one of the most effective in the country. This submission contains some suggestions for incremental improvements which we believe could be made without detracting from the rights of Aboriginal/Torres Strait Islander peoples to protect their cultural heritage. They would also improve clarity and the ability for proponents to complete projects for the benefit of the whole community in a timely and cost-effective manner.

Telstra is committed to providing services to communities throughout urban, rural and remote Australia. Access to, and protection of, Telstra's infrastructure and our ability to develop new infrastructure is fundamental to ensuring Telstra can continue to bring new telecommunications services and technologies to regional and remote communities.



02 Response to issues raised by the consultation paper

Issue	Questions from the Consultation Paper	Telstra's Submission
Ownership and Defining Cultural Heritage	Is there a need to revisit the definitions of cultural heritage – if yes, what definitions should be considered?	<p>Telstra supports the clarification of the definitions of significant Aboriginal/Torres Strait Islander objects and areas, as well as the addition of a definition for “intangible heritage” to the Cultural Heritage Acts.</p> <p>Telstra supports the definition of “intangible cultural heritage” provided in the 2003 UNESCO <i>Convention for the Safeguarding of the Intangible Cultural Heritage</i> (as outlined in the Consultation Paper). Although the current definitions of cultural heritage already encompass this concept to some degree through the definitions of ‘significant Aboriginal areas’ and ‘significant Aboriginal objects’ with reference to tradition and history, the intangible aspects of these definitions are essentially implied. Telstra considers there would be some merit in the Cultural Heritage Acts expressly providing for the concept of intangible heritage.</p> <p>Telstra submits that if a new definition for intangible cultural heritage was to be introduced, the new provisions would need to be clear and unambiguous about what is covered and how it is to be protected (including any system of registration).</p> <p>While the definition of ‘significant Aboriginal object’ is clear, the definition of ‘significant Aboriginal area’ could be further clarified, particularly having regard to the differing implications that may arise for compliance. The diagram on page 7 of the Consultation Paper divides significant areas into two types – areas with particular physical characteristics and areas without any indicators of their significance (called ‘areas without markings’). Amending the Cultural Heritage Acts to distinguish between these types of heritage would be useful for reforming other parts of the legislation. For example, the Guidelines currently give some detail about certain topographical features that are potentially of cultural heritage significance, and so extra care should be taken with such areas. Given such features are evident in the landscape, proponents can take appropriate measures if they are present in a proposed project area. It is not possible to make the same assessment for areas without any patent physical characteristics or markings. As discussed below, there would be some merit in requiring significant sites without markings to be registered to attract duty of care protection.</p>
	What additional assessment and	Telstra submits that while all cultural heritage is defined as being significant, the Cultural Heritage Acts should be



	<p>management processes should be considered?</p>	<p>amended to impose higher and lower obligations on proponents depending on the scale of the project (in some senses, similar to the way the Duty of Care Guidelines has differing compliance requirements for different activities and areas subject to varying levels of disturbance). This would allow for Aboriginal cultural heritage to continue to be protected, while also allowing development to proceed, following compliance with obligations that are appropriate for the scale of the project.</p> <p>For example, the installation of optic fibre cabling in a road reserve of a constructed road would have a much lower impact than the construction of a mine. In the former scenario, while the Guidelines might cover such works while they are in the road reserve, if the works traversed an area outside of the constructed road at any point, compliance in accordance with the Guidelines may become far more onerous. While Telstra remains committed to engaging with traditional owners in relation to the management of cultural heritage, Telstra has concerns that where an Aboriginal/Torres Strait Islander party fails or declines to engage with a proponent in a timely manner and at a reasonable cost, this may have serious consequences for the viability of the project. As noted above, this has led to projects in some circumstances becoming unviable and unable to proceed.</p> <p>Telstra is aware that a relatively common provision in cultural heritage agreements and cultural heritage management plans (CHMP), which is commonly supported by both proponents and Aboriginal/Torres Strait Islander parties, is to enable the proponent to continue with works where the Aboriginal/Torres Strait Islander party does not comply with their obligations under the agreement or CHMP. In this regard, the Cultural Heritage Acts would be improved by providing for such a mechanism for activities with negligible or limited impacts or affects. Qualifying activities would of course need to be defined.</p> <p>In addition, it would be beneficial for sites where it is not apparent that significance attaches to them, through lack of physical markings, to be registered to attract duty of care protection. This would inform proponents from the outset areas that would need to be avoided in project design. This is discussed further below.</p> <p>Telstra submits that it would be appropriate for the Cultural Heritage Acts (and not the Guidelines) to contain a tiered approach to duty of care compliance, with greater compliance obligations on higher impact projects. However,</p>
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Identifying Aboriginal and Torres Strait Islander Parties	<p>Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?</p>	<p>Telstra is of the view that the 'last claim standing' provision is inadequate and needs to be revisited. This is particularly important in instances where there is more than one qualifying group within the locality of the proposed work. Where multiple groups are entirely distinct, this has the potential to complicate compliance requirements and make projects untenable, particularly where each group proposes conflicting cultural heritage management measures. This is particularly relevant for Telstra, which has an extensive network of linear infrastructure running across large geographic areas, increasing the likelihood of dealing with multiple groups.</p> <p>Telstra also considers there seems to be an element of unfairness in the last failed claim rule, where the Cultural Heritage Acts do not distinguish between the reasons for the failure of the claim. In other words, the rule treats failed claims that were completely unmeritorious and groundless in the same way as genuine claims that were simply unable to meet the high standards of the <i>Native Title Act 1993</i> (Cth) (the NTA). Given the consequences for claims which are negatively determined the last failed claimant will potentially be the Aboriginal/Torres Strait Islander party in perpetuity (under the current system). Telstra considers an alternative which provides certainty to proponents but that also confers rights on the legitimate people for an area, must be explored.</p>
	<p>Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?</p>	<p>The current provisions of the Cultural Heritage Acts assist with the identification of the Aboriginal and Torres Strait Islander parties. However, given the rigorousness of the processes under the NTA, relying on registered claims and positive determinations to inform the identity of the Aboriginal/Torres Strait Islander party is a logical and reasonable approach to informing the Aboriginal/Torres Strait Islander parties for an area. Where a claim has 'failed' or where there has never been a claim, Telstra submits that the current regime is inadequate (as outlined in response to the question on last claim standing provisions).</p> <p>Telstra supports the suggestion noted in the Consultation Paper for the Minister to be given the discretion to decide who the Aboriginal or Torres Strait Islander party are for an area where there is clear Court evidence about all of the issues that have been in dispute between overlapping claim</p>



		<p>groups. Alternatively, this could be a function of a cultural heritage council (discussed below).</p> <p>Telstra submits that giving representative bodies a certification function should be approached with caution. While representative bodies are some of the best placed organisations in the State to assist with the identification of the traditional owners for an area given this is currently their express role under the NTA, Telstra is also aware they have limited resources and conferring an additional role of this nature may not be practical. However, Telstra would support a role for representative bodies in assisting the cultural heritage council to determine the Aboriginal/Torres Strait Islander party for unclaimed and undetermined areas (discussed below).</p>
	<p>Should there be a process for Aboriginal and Torres Strait Islander parties to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?</p>	<p>For areas where there is no registered native title claim or positive determination (for which Telstra considers the current framework is inadequate), there may be some merit in exploring further some elements of the Victorian and South Australian systems.</p> <p>Telstra is cognisant of the fact that there will likely always be at least some contention concerning the identity of the Aboriginal/Torres Strait Islander party for undetermined and unclaimed areas, so it is a matter of finding the approach that is acceptable to most people most of the time. Having a well-resourced cultural heritage council with well-respected traditional owners from across the State as members identifying the legitimate Aboriginal/Torres Strait Islander party, with support of credible advice, may provide the best solution. Decisions of the council could be subject to a process of review of the Minister under the Cultural Heritage Acts (and, ultimately, judicial review as a last resort).</p> <p>The credible grounds upon which such a council could have reference to may be sourced from the anthropologists and historians employed or contracted by the State who are already engaged in the native title process, as well as experts from representative bodies.</p> <p>Telstra considers that, for areas subject to registered claims and positive determinations, the current framework is a valuable means of providing consistency and certainty for proponents. When land-users such as Telstra engage with Aboriginal and Torres Strait Islander peoples for NTA compliance, cultural heritage arrangements will usually be negotiated at the same time. Telstra understands this is a common practice generally for project proponents across the</p>



		<p>country, so there are real benefits in tying the Cultural Heritage Acts to the native title system.</p> <p>In light of the above, Telstra considers it would be worthwhile exploring a hybrid system that combines a registration process via the cultural heritage council to determine the Aboriginal/Torres Strait Islander party (for undetermined and unclaimed areas) with the existing native title reliant model (for areas subject to claims and positive determinations).</p>
Land User Obligations	<p>Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?</p>	<p>In Telstra’s view there are many grey areas and uncertainties in the Guidelines (which were drafted in much less precise language than the Cultural Heritage Acts), which means the effectiveness of self-assessment for avoiding harm to cultural heritage is likely to vary depending on the general attitude of the proponent.</p> <p>Additional tools could be created by the Department to assist land-owners conducting low-impact works to assess if a voluntary CHMP would be beneficial. This approach has been taken by the Victorian State Government by establishing a “Cultural Heritage Management Plan Tool”.</p> <p>Telstra submits it would be worthwhile for the Department to develop a simple template cultural heritage agreement to assist proponents to comply with their statutory obligations relatively easily and without incurring the potentially substantial expense of lawyers or other advisors.</p> <p>The contents of the template could include the usual types of provisions in cultural heritage agreements and CHMPs, such as: surveys or inspections; standard mitigation measures (avoidance or salvage); ability for the proponent to proceed if the Aboriginal/Torres Strait Islander party does not comply with their obligations; a new fines procedure; a range of remuneration rates for the Aboriginal/Torres Strait Islander party; and dispute resolution.</p> <p>If a template agreement were to be developed, a set of guidelines to assist the proponent with negotiations and implementation would also be worthwhile.</p>
	<p>Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters</p>	<p>Telstra’s position regarding any need for dispute resolution assistance for parties negotiating voluntary agreements is addressed in the following section of this submission.</p>



	should be put around the process?	
	Is there a need to reconsider the threshold for formal cultural heritage assessments – if yes, what assessment and management processes should be considered?	<p>Telstra believes the current Cultural Heritage Acts processes for formal cultural heritage assessment function reasonably well. Telstra considers the options for proponents to achieve compliance by various means (the Guidelines, voluntary agreement, native title agreement, CHMP) is a well-designed framework, and that the threshold requirement for a mandatory CHMP is appropriate.</p> <p>Although Telstra considers the general approach of the framework is the right one, as noted above, Telstra considers it could be improved by adding a new compliance procedure to the Cultural Heritage Acts, being the template agreement noted above for specified activities that pose negligible or limited impacts or affects. This could have a similar process as required for a CHMP – notice to the Aboriginal/Torres Strait Islander parties and Cultural Heritage Unit; negotiation of the terms; and approval. However, it would be different to a CHMP in the following ways:</p> <ul style="list-style-type: none"> • Notification would be 14 days. • The terms would be prescribed, with only minimal ability for variation. • If the parties are not able to reach agreement within 30 days of the end of the notification period, the agreement could be referred to the Cultural Heritage Unit for approval. • Provided the agreement meets the prescribed requirements, the Cultural Heritage Unit would be required to approve the agreement. <p>While Telstra considers the CHMP Land Court procedure is a useful fall-back if the parties are unable to reach agreement, it will in most circumstances only be useful for large-scale projects, given the time and cost involved. It is for this reason that Telstra considers there would be value in adding a process mirrored on the CHMP procedures, but which is low cost and quick. The process requirements would be proportionate to the scale of the activities that could achieve compliance by this means.</p>
Compliance Mechanisms	Is there a need to bolster the compliance mechanisms	Telstra has no concerns with the current compliance mechanisms in this regard. However, Telstra supports greater awareness raising in the community (including



	<p>designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?</p>	<p>targeted campaigns for known proponents) to ensure they are aware of their statutory obligations.</p>
<p>Recording Cultural Heritage</p>	<p>Is there a need to make improvements to the processes related to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?</p>	<p>Telstra is aware that the Cultural Heritage Register is not necessarily an up-to-date record of the matters that are disclosed on register searches. Telstra submits that the Cultural Heritage Acts should require the Department to ensure that all information on the database and register is up to date to give proponents confidence in the information provided. This would be particularly important if certain classes of cultural heritage are required to be registered to attract duty of care protection.</p> <p>Where the Cultural Heritage Register contains incorrect information and a proponent relies on that information in implementing measures to comply with the statutory requirements, Telstra submits that this should be a defence to an alleged breach of the duty of care.</p> <p>Telstra recognises the need to implement appropriate safeguards to restrict access of the location and nature of significant sites. Telstra understands the reluctance of some traditional owners to register sites. Telstra submits that the Department should explore further registration systems like the one in place in the Northern Territory under the <i>Northern Territory Aboriginal Sacred Sites Act 1984</i> (NT), which seems to balance the need for proponents to have certainty about the location of significant sites with the concern for Aboriginal/Torres Strait Islander parties to restrict access to this knowledge for cultural and security reasons.</p> <p>To minimise the risk of such sites being subjected to vandalism or desecration, access to the register for significant sites could be restricted, with details of such sites provided only where certain requirements are met.</p> <p>Registration of sites would also be particularly useful for Telstra as a carrier under the <i>Telecommunications Act 1997</i> (Cth). This is because certain facilities are classified as 'low-impact facilities' under the <i>Telecommunications (Low-Impact Facilities) Determination 2018</i> (Cth), in which carriers are exempt from complying with certain laws for prescribed low-impact activities. This excludes, however, areas registered on a State/Territory register, or otherwise identified, as significant to Aboriginal/Torres Strait Islander peoples in</p>



		<p>accordance with their traditions. Knowing the location of registered sites during project planning would be of enormous assistance to Telstra, as it would allow Telstra to design the route or footprint of infrastructure to avoid such areas.</p> <p>Telstra also submits areas which have been the subject of cultural heritage studies, surveys and reports should be recorded on the Cultural Heritage Register, and that any cultural heritage identified as a result of such reports should also be recorded. Any cultural heritage recorded on the register from such sources could be identified as such. Full details of studies, surveys or reports need not be disclosed. The availability of this additional information may assist proponents with their duty of care compliance.</p>
<p>Further improvements</p>	<p>Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?</p>	<p>Telstra submits that, depending on what other reforms are made to the Aboriginal party, the CHMP processes would provide substantially greater certainty to all parties if the Aboriginal party for a CHMP is secured once the notification period has ended. Based on recent case law, Telstra understands that the Aboriginal party for a CHMP may change at any time up until the CHMP is lodged for approval. Given the substantial time and resources that can be required to negotiate a CHMP, we believe this is a flaw that needs to be addressed.</p>