



31 May 2019

Assistant Director General  
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Dear Assistant Director General,

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

Thank you for the opportunity to make a submission regarding the Discussion Paper in relation to 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 and to modernise the regime in a way that is respectful of Aboriginal people and their heritage, and which recognises, protects and celebrates Aboriginal heritage by all Western Australians, in a manner that also enables effective and efficient land use decisions.

As an overarching comment, Telstra submits that any new regime for the protection and management of Aboriginal cultural heritage must be relevant to various types of land uses.

In some respects, the features proposed in the Discussion Paper appear to be directed at Aboriginal cultural heritage compliance by land users such as mining, where the land use can be widespread geographically, high impact, and exclusionary of third parties with rights and interests in the land. These features are not representative of land uses applicable to telecommunications and other utilities, which are generally low impact with minimal footprints and can more easily co-exist with other interests. We believe the proposed regime should specifically take into consideration the diverse characteristics applicable to telecommunications service provision.

Telstra supports a proposed regime which applies to a diverse range of land uses and will offer additional Aboriginal cultural heritage protection, and we would welcome the opportunity to further highlight the land uses required by telecommunications providers in order to provide services to the Australian community. It is currently unclear if this Discussion Paper fully considers a regime which offers the diversity required for telecommunications services to be provided without additional time and cost burden to the community while still providing for additional Aboriginal cultural heritage protection.

It is Telstra's concern that some of the proposals in the Discussion Paper would significantly increase the obligations on proponents which would have a disproportionate impact on the time and cost of delivering development and maintenance of telecommunications services compared to any perceived benefit to the protection of Aboriginal cultural heritage. In some cases, the additional time and cost impacts may render projects, that may have significant



public benefit unviable. Telstra is therefore concerned to ensure the compliance burden is proportionate while still achieving the primary objectives of this Discussion Paper.

As an example, Telstra’s low impact cabling activities would pose a low risk to Aboriginal cultural heritage. Telstra would need to assess each installation on a case-by-case basis to determine whether the cabling should proceed given the additional time and cost. Depending on the triggers imbedded within the proposed tiered structure, the outcome may provide unintended consequences to high volume, but minor, telecommunications activities (including residential customer connection activities). This could impact Telstra’s ability to deliver services to regional communities, including in meeting its universal service obligations.

Several State Government departments have developed due diligence assessment tools, which provide Telstra with a level of comfort that our activities will not impact on Aboriginal Cultural Heritage. The Aboriginal Heritage Planning Tool developed by Aboriginal Victoria is a clear assessment tool which calls out specific land use triggers which can be linked to telecommunications. The use of Aboriginal Cultural Heritage Duty of Care Guidelines in Queensland also clearly highlights specific triggers and thresholds which are able to be practically applied to various land use activities.

Telstra considers the March 2019 Discussion Paper raises many issues which will need to be the subject of comprehensive and meaningful consultation during Phase Three of the Review. There is clearly a significant degree of greater detail that will be needed to develop the Draft Exposure Bill, and Telstra would like to contribute to the development of that detail.

There are a number of aspects of the Discussion Paper that we take a keen interest in, but will reserve comment until the greater detail is available in Phase Three. For this reason, neither support nor opposition from Telstra should be inferred from any lack of comment in this submission on any aspect of the Discussion Paper.

Set out below are Telstra’s comments in relation to matters that Telstra raised in Phase One, having regard to how such matters have been dealt with or omitted from the Discussion Paper.

Issue	Telstra Phase One submission	Telstra comment on Discussion Paper
Heritage Protected	Telstra supported protection of significant heritage values.	Telstra considers the heritage values to be protected should have a threshold for significance. The concept of “particular significance” is well established in other State cultural heritage regimes and in Commonwealth environmental legislation.
Register	Telstra supported a register maintained with input from Aboriginal people, and suggested that it also include information about acceptable land uses or information to guide land	The proposed register is only directed at information about heritage values. Telstra considers the utility of the register could be improved by



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	use decisions (by land users when deciding whether or not approvals are needed, and by those deciding on approvals).	incorporating guidance around land uses.
Approval processes	Telstra submitted that a balance between an increased role for Aboriginal People and effective approval processes was important.	<p>The Discussion Paper does not provide for the balance in effective approval processes that Telstra submitted is important.</p> <p>Although the Proposal is for land use decisions to be tiered, most land use decisions will be made by the new Aboriginal Heritage Council (<b>AHC</b>). The criteria for decision making is unclear at this stage and Telstra would welcome the opportunity to further participate in the process for allocating criteria for tiered decision making.</p> <p>The Proposal does not identify mechanisms to provide comfort that land use decisions will be made efficiently, particularly having regard to the nature of the impacts of the relevant activity.</p> <p>The Proposal includes an accreditation mechanism for a 'Local Aboriginal Heritage Service' in relevant areas, who are to ensure the right people speak for country.</p> <p>Telstra seeks further clarity in the Phase Three consultation process regarding how the person(s) to be consulted with will be identified in each instance, who can be heard, who can include information on the heritage register, whether consultation already done is sufficient, or ensure they efficiently carry out their role.</p> <p>Mechanisms also need to be included to deal with disputes regarding who has the right to speak about particular areas, to ensure activities are not</p>



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		<p>unreasonably constrained purely because of this.</p> <p>Telstra also submits that it would be beneficial and transparent to ensure provision is included to ensure there is a benchmark on fee structures for participation in cultural heritage surveys and reporting. This would assist Telstra in determining if a project was financially feasible prior to investing money in project planning phases.</p>
Decision making / advisory roles	<p>Telstra submitted that there is scope to include Aboriginal representation on an advisory body to the Minister as the person making decisions about land use, but that the advisory body should also include a wider range of representatives to reflect the broader factors relevant to each decision.</p>	<p>The Discussion Paper proposes the AHC play a far more extensive role than advising the Minister. Telstra considers further clarity is required on how the AHC will be effectively constituted to perform a decision making role – particularly for decisions about land use as previously mentioned.</p>
Tiered decision making	<p>Telstra supported a tiered decision making process, on the basis that:</p> <ul style="list-style-type: none"> <li>• consents be to ‘use land for a purpose’, not the more limited and inflexible concept of ‘activities’;</li> <li>• no approval be required for a low impact land use that is not likely to have a significant impact on significant Aboriginal heritage values;</li> <li>• a tiered approach apply to land uses that may have a significant impact on significant heritage values, with decisions made by the Minister or a government department in the best interests of the State, and</li> </ul>	<p>Most of Telstra’s activities will fall into a low impact category. However, on Telstra’s reading of the Discussion Paper, these will still require decisions and consent from the AHC. Telstra therefore considers further detail regarding threshold criteria is required to ensure that low impact activities are considered proportionately to the risk of harm to Aboriginal cultural heritage.</p> <p>Telstra recommends that further work be carried out to assess how duplication with environmental legislation can be avoided, and to ensure that the intent of the applicable land access powers under the <i>Telecommunications (Low-impact Facilities) Determination 2018 (Cth)</i> is not inappropriately diminished having regard to the nature of Telstra’s activities.</p>



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	<ul style="list-style-type: none"> <li>the tiered approach be similar to that proposed in the 2014 amendment bill.</li> </ul>	
Criteria for land use decisions	Telstra submitted that due diligence guidelines would assist in assessing the risk of significantly impacting heritage values, and that the existing criteria in the AHA should continue to apply, including as to the significance of heritage when assessing land use proposals.	<p>As discussed, Telstra considers the Discussion Paper pays insufficient regard to this aspect and submits that criteria for decision making should be developed and provided for in the legislation.</p> <p>Telstra also submits that timeframes for decision making should be incorporated into the legislation, to ensure critical path matters can be managed appropriately.</p>
Defence	Telstra submitted that the 'due diligence' defence be expanded to apply where the proponent has no reasonable knowledge that a land use would have a significant impact on heritage values.	The Discussion Paper proposes to limit the scope of the existing 'due diligence' defence to circumstances where the land use proponent has done everything reasonably practicable to inform themselves about heritage values. Telstra is concerned the defence provision is therefore proposed to be a higher bar, and at the very least considers there ought to be legislative guidance on what constitutes "everything reasonably practicable".
Enforcement	Telstra did not support changes to key enforcement mechanisms.	Telstra is concerned that any provisions for restoration and compensation orders should be supported by appropriate principles for determining quantum of such matters, rather than leaving this open to the Courts in what potentially will be a novel area of jurisprudence.
Protected Areas	Telstra supported the concept of the Minister identifying areas of outstanding heritage value where Aboriginal people may have a greater role in land use decisions. This is on	The Discussion Paper does not deal adequately with the protection of existing interests. Telstra submits that further consideration is required in relation to measures to protect



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	the basis that the Minister protect existing interests before making such a declaration, e.g. to enable Telstra to maintain its infrastructure and access tracks.	existing interests in, or use of land in, preserved protected areas and new protected areas in the future.
Ancestral Remains	Telstra submitted that ancestral remains be dealt with respectfully on a case by case basis, including via conditions on land use consents.	Telstra notes there is very little detail included in the Discussion Paper on what the proposed appropriate procedures for dealing with ancestral remains will be.

### Closing

Telstra is grateful for the opportunity to make a submission in Phase Two of the Review of the Act and we would be happy to be involved in any further consultation with the Department of Planning, Lands and Heritage. If you have any questions about this submission please contact Deanne Caruso (0409 881 945 or [Deanne.Caruso@team.telstra.com](mailto:Deanne.Caruso@team.telstra.com)).

Yours sincerely

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