



TELSTRA CORPORATION LIMITED

Statutory Review of the *Aboriginal Heritage Act 1975* (Tas)

Public submission

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INTRODUCTION

Thank you for the opportunity to make a submission regarding proposed reforms of the *Aboriginal Heritage Act 1975* (Tas) (**the Act**).

Telstra Corporation Limited (**Telstra**) welcomes the proposal of the Department of Primary Industries, Parks, Water and Environment (**the Department**) to reform the Act. Telstra considers it important that this process and its outcomes to be respectful of Aboriginal people and their heritage. It is important that an appropriate balance is struck between protecting and conserving Aboriginal cultural heritage and facilitating business and development activity in the State that is vital to Tasmania's economic and social wellbeing.

Telstra strongly supports the recognition of Aboriginal people 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 heritage and the careful management of activities that may impact on such heritage. Telstra makes this submission as Australia's premier telecommunications infrastructure provider with unique obligations as the [universal service provider](#).

Telstra recognises the importance of Aboriginal people being centrally involved in the decision-making processes related to the management of their cultural heritage, and the statutory reform process must proceed with this as a central tenet. Any reforms to the statutory regime should ensure the Act continues to provide clear and effective protections for Aboriginal cultural heritage, while also ensuring processes for identifying and managing Aboriginal cultural heritage for proponents of infrastructure and other projects are clear, efficient, transparent and can be completed in a timely manner.

Telstra supports amendments to the Act that recognise Aboriginal people as the traditional custodians of their heritage. Telstra supports the proposal to change the use of outdated terminology such as 'relic', and the proposal to recognise Aboriginal cultural heritage as a living thing and not frozen at a particular point in time. Telstra also supports the recognition of intangible cultural heritage and the introduction of special provisions for the management of such heritage given its special character.

While Telstra considers many aspects of the current regime work well, including the processes under the Aboriginal Heritage Standards and Procedures, Telstra considers there is room for improvement. In particular, Telstra considers a more flexible due diligence code that prescribes different processes and obligations for projects of different scales would be beneficial for all participants in the process. From Telstra's perspective, this is fundamental for ensuring that crucial community infrastructure (including telecommunications infrastructure) can continue to be rolled out at a reasonable cost and in a timely and efficient manner. A due diligence code will operate to ensure a balance between engaging Aboriginal people will remain at the core of the decision-making process whilst having a prescribed process which contains mechanisms to minimise costs and delays that may ultimately jeopardise the viability of projects.



01 What is the *Aboriginal Heritage Act 1975* trying to achieve?

1.1. How clear is the Act regarding what it is trying to achieve?

Telstra considers the Act's objectives are clear in some areas, but in other areas it could be more clearly expressed by setting out the objectives within the provisions of the Act. Although an understanding of the Act's objectives can be ascertained from the content and subject-matter of the provisions in the Act, the lack of an express provision that sets out the Act's objectives means that a person not familiar with the Act may find it difficult to understand what the Act is seeking to achieve.

1.2. Could this be improved, and if so, how?

Objectives are a common feature of most legislation enacted by parliaments around Australia and it is an important tool for interpreting the provisions of the Act. Telstra therefore submits that it would be appropriate to develop a set of principals or objectives that summarise the purpose of the Act as part of the review.

02 What is Aboriginal heritage?

2.1. How well does the Act define Aboriginal heritage?

Telstra supports clarification of the Act's definition of Aboriginal heritage so that it explicitly includes both tangible and intangible heritage and agrees with the views of the Tasmanian Aboriginal community that the use of the term 'relic' is outdated and should be amended.

2.2. Could this be improved, and how?

Telstra supports adding a definition for 'intangible' Aboriginal heritage that is consistent with the definition for this term in the 2003 UNESCO *Convention for the Safeguarding of the Intangible Cultural Heritage* (which includes oral traditions, performing arts, rituals, festivals and traditional crafts). The definition of 'Aboriginal intangible heritage' in section 79B of the *Aboriginal Heritage Act 2006* (Vic) provides an example of how this concept has been treated in heritage laws in other jurisdictions.

The definition for Aboriginal heritage could also be extended to include heritage that is present within the landscape, where the cultural significance of the area is not apparent on its face (for example, rivers, lakes, rocky outcrops, and other such features). This is a characteristic of the Queensland *Aboriginal Cultural Heritage Act 2003* (Qld) (see section 9 and the Cultural Heritage Duty of Care Guidelines).

If the concept of intangible heritage is added to the Act, such definition should be clear and unambiguous to give certainty to Aboriginal people and land users. Further, the Act should also provide clear mechanisms as to how intangible Aboriginal heritage is to be identified and protected. Telstra submits that including details of intangible heritage (including type and location) on the Aboriginal Heritage Register (where the heritage is known) would be appropriate, as it would provide certainty, transparency and accessibility.

A publicly available register or database would be especially helpful for telecommunications carriers, as infrastructure footprints are often updated and redesigned, including the ability to identify and avoid known sites of heritage significance. This would be a useful resource to work in conjunction with a due diligence code (discussed further below).

2.3. Does the definition of a 'relic', adequately capture all elements of Aboriginal heritage that should be protected and managed?

Telstra supports the views of the Tasmanian Aboriginal community that the use of the term 'relic' is outdated and should be replaced with terminology more relevant to the way Tasmania's Aboriginal people view their heritage. Telstra submits there is an opportunity to align with the terminology used in the Aboriginal heritage legislation of other jurisdictions.



2.4. Should use of the term 'relic', and the way Aboriginal heritage is recognised and defined, be changed?

Telstra considers the Act's definition of 'relic' is not sufficiently broad to encompass the entire spectrum of objects and sites that are of significance to Aboriginal people. In particular, 'relic' does not cover intangible heritage.

Legislation in other jurisdictions describes Aboriginal heritage as a 'significant Aboriginal object' or 'significant Aboriginal site/area'. For example, the *Aboriginal Heritage Act 1988* (SA) provides separate definitions for 'Aboriginal object' and 'Aboriginal site'. These definitions of Aboriginal heritage are further characterised by the object or site's significance according to Aboriginal tradition, archaeology, anthropology or history. There are similar definitions in the *Aboriginal Cultural Heritage Act 2003* (Qld).

Telstra submits that it would be beneficial for the definition of Aboriginal heritage in the Act to be amended to align with the definitions in Aboriginal heritage legislation in other jurisdictions. This should also include intangible heritage.

03 Ownership of Aboriginal heritage

3.1. How clearly does the Act describe ownership of Aboriginal heritage?

The Act is reasonably clear regarding ownership of Aboriginal heritage. However, as set out below, the provisions concerning ownership of Aboriginal heritage are outdated and should be revisited.

3.2. Are provisions in the Act providing for ownership reasonable?

Telstra considers the Act's provisions regarding ownership of Aboriginal heritage on privately owned land require clarification. The Act should provide for Aboriginal people to be the custodians of their heritage, regardless of the tenure of the land where the heritage is located. In other words, it should be clear that Traditional Owners for an area are the custodians of the heritage in that area, regardless of whether the tenure of the land is freehold, Crown reserve or leasehold, or other tenure types and regardless of whether the heritage is tangible or intangible.

3.3. Who should own Aboriginal heritage?

Telstra supports any proposed amendments regarding the ownership of Aboriginal heritage to be made in accordance with the views of the Tasmanian Aboriginal community. Telstra submits that it may be appropriate in some circumstances for the State to own Aboriginal heritage. For example, if Aboriginal heritage is found and must be relocated for some reason and the Traditional Owners with custodianship of that heritage cannot be identified, conferring ownership on the State could assist with the protection of the heritage. Any such new provision would of course also need to provide a mechanism for the object to be repatriated to the Traditional Owners if and when they are identified.

3.4. Is the concept of 'ownership' the right way to think about who is responsible for Aboriginal heritage?

Telstra supports terminology regarding ownership of Aboriginal heritage that aligns with the views of Traditional Owners. In this regard, if the term preferred by Aboriginal Tasmanians is 'custodian', rather than 'owner', that term should be used.

While some other jurisdictions use the term 'custodianship', others have adopted the term 'ownership'. For example, the *Northern Territory Aboriginal Sacred Sites Act 1984* (NT) defines 'custodian' in relation to a sacred site to mean 'an Aboriginal who, by Aboriginal tradition, has responsibility for that site'. Under the *Aboriginal Cultural Heritage Act 2003* (Qld), the term used to identify the relationship of the Aboriginal people with rights of possession of Aboriginal heritage is 'ownership'. The different terms used in different jurisdictions means that there is no objectively correct term – the term adopted in the Act should therefore be consistent with the preferences of the Tasmanian Aboriginal community.

3.5. Should the 'rules' in the Act apply to everyone in every situation?

Telstra submits that the rules of custodianship and ownership of Aboriginal heritage should apply to all land users and tenure types.



Telstra submits the Act should make exceptions regarding possession and interference with Aboriginal heritage by Traditional Owners and the Tasmanian Museum. This is because, without a specific exception, Traditional Owners with ownership/custodianship of Aboriginal heritage would technically be in breach of the Act if they were to possess or interfere with their own heritage. Similarly, given the unique position of the museums in relation to cultural heritage (of all types), the Tasmanian Museum should be exempt from offence provisions. Such exemptions could apply in closely prescribed circumstances to ensure Aboriginal heritage is handled and managed appropriately.

The *Aboriginal Cultural Heritage Act 2003* (Qld) provides that the Queensland Museum may accept custody of Aboriginal cultural heritage at any time (section 22). In addition, under section 19, the Aboriginal people “who have a traditional or familial link” to the Aboriginal cultural heritage are the owners of that heritage, and section 23(3)(b) exempts an owner of Aboriginal cultural heritage from the offence provisions.

3.6. Should land tenure on which Aboriginal heritage exists make any difference to who owns/how the heritage is to be managed?

As noted at 3.2 above, Telstra submits that the Act should not differentiate between the tenure of the land where Aboriginal heritage is located, whether the tenure of the land is freehold, Crown reserve, Crown leasehold, or other tenure types. However, it should also be clear that the rights of the owner or occupier in the land are not affected by the rights of the custodians/owners in any Aboriginal heritage that may be present on their land under the Act. The ownership of Aboriginal heritage by Traditional Owners would not entitle them to enter and access the land – this would still require the permission of the landowner.

The approach taken in the *Aboriginal Cultural Heritage Act 2003* (Qld) regarding land tenure and Aboriginal heritage provides a useful example. Queensland’s legislation allows landowners to carry out activities consistent with the land tenure, provided the activity does not interfere with Aboriginal heritage.

04 Making decisions about what happens to Aboriginal heritage

4.1. Is the way the Act describes who makes decisions, and how decisions must be made, adequate and reasonable?

Telstra submits that the Act in its current form confers too much decision-making power on the Minister. The Act should be amended to provide for a greater role for Traditional Owners and the Aboriginal Heritage Council.

4.2. How can decision making be improved?

As the custodians of their heritage, Telstra recognises the central role Aboriginal people must play in the decision-making processes relating to the management of their heritage (as is a common approach in many other jurisdictions). It may be appropriate to confer decision-making powers on the owners/custodians of Aboriginal heritage for some circumstances, and on the Aboriginal Heritage Council in other circumstances. There may also be some circumstances where it is beneficial for some decision-making powers to remain with the Minister.

Where Traditional Owners and/or the Aboriginal Heritage Council are given a greater role in decision-making, additional procedures and mechanisms should be introduced with timeframes and contingencies in the event the proponent and Traditional Owners are not able to agree on the way a particular site or object should be managed. This is particularly important for proponents who are undertaking projects with fixed or limited funding, and where Traditional Owners do not engage with the proponent (where this is required as part of the decision-making process). Any person or entity with decision-making responsibilities under the Act should also be properly resourced to manage the decision-making process.

Any contingency mechanism (where agreement is not able to be reached) should be quick and inexpensive.

4.3. Who should make decisions under the Act?

See 4.2.



4.4. Are there circumstances where different people, or parties, should make decisions about how to manage Aboriginal heritage? How should decisions be made?

In addition to the submission at 4.2, Telstra submits that it would be beneficial to introduce a due diligence code to the Act to provide a 'best practice' and flexible approach for proponents to manage the Aboriginal heritage values in their project site. The due diligence code should contain a tiered approach for decision-making, with greater compliance obligations for projects that may have a greater impact on Aboriginal heritage. In this way, there could be circumstances where proponents would not necessarily need to engage with Traditional Owners about their project, and other circumstances where this may be necessary.

While Telstra employs and has found the existing Aboriginal Heritage Standards and Procedures to be beneficial, these could be improved by further differentiating between different scales of project and where the project site has been subject to prior ground disturbance. The requirements for areas not previously subject to ground disturbance would be greater than areas that have been subject to such disturbance.

05 The Aboriginal Heritage Council – what it is and what it does

5.1. How should members of the Aboriginal Heritage Council be chosen?

Telstra submits that the way Aboriginal Heritage Council members are chosen could be amended to empower the Minister to appoint members in their own right. This approach would be consistent with that undertaken in other jurisdictions, such as in Victoria under the *Aboriginal Heritage Act 2006* (Vic). Additionally, the Minister should also consult with Traditional Owners regarding the appointment of the Council members.

5.2. Should the Act specify criteria for Council memberships, and what criteria should apply?

Telstra submits that the membership criteria for the Victorian Aboriginal Heritage Council in the *Aboriginal Heritage Act 2006* (Vic) could be a useful model for the Tasmanian Aboriginal Heritage Council. Adopting this model would require Tasmanian Aboriginal Heritage Council members to be an Aboriginal person who:

- is a Traditional Owner of an area in Tasmania; and
- is a Tasmanian resident; and
- has relevant experience or knowledge of Aboriginal cultural heritage in Tasmania.

As provided for in the *Aboriginal Heritage Act 2006* (Vic), the Act could be amended to provide for a maximum term of appointment to provide an opportunity for different members of the Tasmanian Aboriginal community to have a term as a member of the Aboriginal Heritage Council. It may also be worthwhile for the Minister to have the power to remove Council members in limited circumstances and to be able to appoint acting and alternative members.

Notwithstanding the above submission, Telstra considers the Tasmanian Aboriginal community to be the appropriate body of people whose views should be paramount with respect to the roles and functions of the Council. Whichever model is adopted, Telstra's primary concern is for the Council's role to be clear, transparent and properly resourced and supported by the community.

5.3. How clearly does the Act describe the role and function of the Aboriginal Heritage Council?

Telstra has no submission.

5.4. Is the role of the Aboriginal Heritage Council adequate and appropriate?

See 5.2 above.



5.5. Could this be improved, and if so, how?

While the Aboriginal Heritage Council is an important entity in administering the Act, Telstra submits that in fulfilling its role, the Aboriginal Heritage Council must support and work closely with Traditional Owner groups in protecting their Aboriginal heritage.

06 Offences under the Act and penalties for doing the wrong thing**6.1. How well does the Act describe and manage offences?**

Telstra considers the current offence provisions under the Act appropriately describe and manage offences arising under the Act.

6.2. Are the penalties adequate?

Telstra considers the current penalties provisions under the Act to be sufficient.

6.3. Could the offences and penalties provisions in the Act be improved, and if so, how?

Telstra is of the view the current offences and penalties provisions in the Act are sufficient and do not require improvement. However, Telstra submits that amending the Act to provide a mechanism for recording impacts to Aboriginal heritage resulting from interference (whether by Traditional Owners in practicing their culture or others) would be beneficial. This would give greater clarity on sites where Aboriginal heritage has been harmed, modified or affected in some way, to avoid any potential disputes between Traditional Owners and proponents regarding whether any harm to cultural heritage was pre-existing or whether it was caused by the proponent. It would also help to ensure that proponents who have not interfered with or caused any additional harm to cultural heritage are not wrongly prosecuted for breaching the Act.

6.4. Are there circumstances where the 'rules' of the Act should apply differently to different people?

While there may be some merit to the proposal to treat Traditional Owners differently with respect to penalties and offences under the Act, Telstra considers it would not be appropriate to comment on how the Act should treat the practice by Aboriginal people of their culture at cultural sites. Telstra considers the views of the Tasmanian Aboriginal community should be given precedence on this issue.

07 When can Aboriginal heritage be interfered with?**7.1. Are the defence provisions in the Act adequate and reasonable?**

Telstra submits that while the current defence provisions in the Act are adequate and reasonable, they could provide for greater protection to public service proponents carrying out emergency work. Currently, the Act's emergency works defence provides for work conducted in accordance with the *Electricity Supply Industry Act 1995* (Tas) or works that are "necessary and proportionate" to an emergency that threatens life or property.

Telstra submits this defence should be extended to other service providers, such as telecommunication carriers, when conducting emergency work in accordance with Schedule 3 of the *Telecommunications Act 1997* (Cth), for example.

7.2. Could the defence provisions be improved, and if so, how?

See 7.1 above.

7.3. Do the Guidelines provide adequate protection for Aboriginal heritage?

Telstra considers the Guidelines provide adequate protection to Aboriginal heritage as they are currently drafted.

7.4. Could the Guidelines be improved, and if so, how?

Telstra submits the Guidelines could be improved by including specific procedures for telecommunications infrastructure providers.



If the Guidelines were amended to provide specifically for telecommunications providers, the Guidelines could interact with the 'Telecommunications Code of Practice'. For example, by providing notification to the Aboriginal Heritage Council when a telecommunications provider proposes to engage in an activity "at or near an area or thing of particular significance to" Aboriginal people.

08 Enforcement of the legislation

8.1. How well does the Act provide for enforcement of its provisions?

Telstra has no submission.

8.2. Could this be improved if so, how?

Telstra has no submission.

8.3. Should the Act include stop-work provisions?

Telstra has no submission.

8.4. Should the Act include provisions for infringement notices and associated on-the-spot fines?

Telstra has no submission.

8.5. Should offences in the Act be further scaled to distinguish between minor and non-minor offences?

Telstra has no submission.

09 Other ways the legislation protects Aboriginal heritage

9.1. How well does the Act protect and manage Tasmania's Aboriginal heritage?

Telstra has no submission.

9.2. Could this be improved, and if so, how?

Telstra submits that to be in a position to ensure Aboriginal heritage is protected, proponents need to be aware of its location. A requirement for all known Aboriginal heritage sites to be recorded on the Aboriginal Heritage Register would allow for proponents to develop and implement tailored avoidance and mitigation strategies when conducting activities in the vicinity of the heritage sites.

9.3. Are 'protected sites' a useful mechanism for protecting Aboriginal heritage?

Telstra has no submission.

9.4. Is the provision for the making of Regulations useful?

Telstra supports the proposal for the Act to enable regulations to be prescribed for the protection and preservation of Aboriginal heritage. Telstra submits that regulations are a useful mechanism for prescribing in detail specific processes and requirements. Such prescribed processes and requirements can be amended without having to undertake a potentially onerous process through Parliament.

010 Other matters covered by the legislation

10.1. Is there anything else you would like to include in Aboriginal heritage legislation in Tasmania?

Telstra has no submission.

10.2. Are there any other comments that you would like to make with regard to Aboriginal heritage management in Tasmania?

Telstra has no submission.

