
**Submission on Behalf of Telstra Corporation Limited in Response
to the Australian Law Reform Commission Review of the *Native
Title Act 1993 (Cth)***

May 2014

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1. Introduction

Telstra Corporation Limited (**Telstra**) welcomes the Australian Law Reform Commission's (**ALRC**) Review of the *Native Title Act 1993* (Cth) (**NTA**) Issues Paper released on 20 March 2014.

The Issues Paper is a commendable and comprehensive summary of the issues facing connection and joinder under the NTA after 20 years of operation.

Telstra congratulates the ALRC on the work that has been completed to date on this review and welcomes the opportunity to make this submission in advance of the ALRC's Discussion Paper and Final Report.

2. Executive Summary

Telstra is committed to providing services to a whole range of communities throughout urban and rural Australia. A robust and efficient legal framework for protecting Telstra's rights to and interests in its infrastructure is important to ensure Telstra can continue to provide these services to customers.

Telstra submits that:

- a) the current native title process can be slow and resource intensive. Telstra welcomes reform that may reduce the time, costs and resources for the resolution of native title claims;
- b) reform that permits respondent parties to formally limit their involvement in native title claims while questions of connection (as opposed to tenure) are resolved would be a positive outcome (for example, through early agreed recognition and protection of third party interests or through a secondary joinder protocol); and
- c) parties other than the applicants and the Crown should continue to be permitted to be involved in native title proceedings to protect their rights and interests.

3. Background to Telstra's participation in Native Title

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, when considered together with the extent and nature of Telstra's infrastructure and land holdings, means that Telstra's situation is quite unique in Australia.

Telstra participates in a high volume of native title claim applications made under the NTA and considered by the Federal Court of Australia. Telstra's participation is as a respondent party who has rights and interests in the area of the claim that may be affected by a

determination of native title. Telstra participates to protect its rights and not in opposition to or in defence of the claim.

At the date of this submission, Telstra is a party to almost 200 native title claims.

Telstra's participation in native title claims is directed at ensuring that its network and assets in the claim area are appropriately identified and reflected in any determination of a native claim. This is particularly important when the infrastructure is installed under statutory land access powers. In these circumstances the infrastructure and its tenure may not be known to the Crown.

4. Responses to select issues from ALRC Issues Paper

Telstra has identified 6 of the questions raised in the ALRC's Issues Paper as being most directly relevant to Telstra. Each of those questions is addressed below.

4.1 Question 2

The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last 5 years?

Telstra's submission in response to this issue is:

a) **A (generally) slow process for the resolution of native title claims.**

In Telstra's experience, the resolution of native title claims is a relatively slow process. This makes the process resource intensive (cost and personnel). While there has been an observable increase in the speed of resolution of claims in the last 5 years, Telstra suggests in this submission a number of ways in which respondent participation time in claims could be shortened (with a resultant reduction in the cost of doing so).

b) **Evolution of practices as process becomes more predictable.**

As the native title claim resolution process has become more known and familiar, a body of practice has developed.

While the body of practice in relation to the resolution of native title claims varies from State to State, it permits respondent parties to make risk assessments as to when to join and withdraw as a party to native title claims.

Telstra's submissions below is also targeted at 'codifying' and extending these practices to assist in the prompt resolution of native title claims.

4.2 Question 7

If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings? The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

Telstra's submission in response to this issue is:

a) Telstra does not generally take a position on connection in native title claims or participate actively in contested native title claims.

Telstra's participation is on the basis that it has rights and interests in the area of the claim that may be affected by a determination of native title. Telstra participates to protect its rights and not in opposition to or in defence of the claim.

- b) A presumption of continuity for connection is unlikely to change Telstra's approach to contested and consent determinations.

Given Telstra participates in native title claims to protect its rights and interests and not in opposition to or in defence of the claim, a presumption of continuity for connection is unlikely to change Telstra's approach.

Telstra welcomes any reform which may reduce the time, costs and resources for the resolution of a native title claim.

4.3 Questions 31, 32 and 33

Do the party provisions of the NTA—in particular the joinder provision s 84(5) and the dismissal provisions s 84(8) and (9)—impose barriers in relation to access to justice? Who is affected and in what ways?

How might late joinder of parties constitute a barrier to access to justice? Who is affected and in what ways?

What principles should guide whether a person may be joined as a party when proceedings are well advanced?

Telstra's submission in response to these issues is:

- a) Native title claims have (typically) two discreet parts
- i. the establishment of connection; and
 - ii. the identification of third party interests within the claim area and their effect on native title (often described as the resolution of tenure matters).

From Telstra's observations, respondent parties are generally less concerned with the establishment of the applicants' connection to the claim area (being item (i) above). This means that connection is a matter often left for agreement between the applicants and the Crown. Respondent parties are generally more interested in extinguishment / tenure (being item (ii) above) as a means of protecting their rights and interests in the claim area.

- b) Telstra's view is that legislative reform that permits respondent parties to formally limit their involvement in native title claims while questions of connection are being resolved would be a positive outcome.

This legislative reform could be by way of either:

- i. early, agreed recognition and protection of third party rights and interests; or
- ii. a secondary joinder portal so that persons are given the option of joining after connection has been resolved.

Each of these concepts is discussed below.

- i. **Early, agreed recognition and protection of third party rights and interests**

It is Telstra's view that the claims process would benefit from a process that allowed early, agreed recognition of third party rights and interests. Once that recognition was resolved, respondent parties could withdraw from the proceedings.

The process might allow:

- a party with an interest in the area being permitted to join as a respondent party during the notification period (as is currently the case); and
- early resolution being reached between the respondent party, the applicants and the Crown as to how that respondent party's rights and

interests may be protected in the event of a determination. That resolution would be acknowledged by the Court and would be binding on the parties. Such a process might be a simplification of the section 87 process.

ii. **A secondary joinder protocol**

It is Telstra's view that the claims process would benefit from a process that provided for a secondary joinder portal following the acceptance/determination of connection and before tenure related matters were addressed. This would allow respondent parties to only join a claim once connection is accepted/agreed.

The principles that should guide whether a person may be joined as a party to the proceedings at any stage could remain the same.

This process might allow respondent parties to elect to:

- join during the notification period (being the first joinder mechanism); or
- give notice that they may wish to join during the second joinder portal (i.e. after connection is accepted by either the Crown by consent or the Court in litigation);
- connection questions can then be considered by the Court, with the involvement of the applicants, the Crown and interested respondent parties;
- once connection is established / determined, the second joinder mechanism is invoked, giving respondent parties the option to elect to be joined at that stage. The threshold for joinder would be as per the first joinder mechanism; and
- respondent parties may then participate in the balance of the claim while extinguishment / tenure questions are dealt with and the claim finalised.

Please refer to the Schedule for a diagram of the proposed secondary joinder protocol.

The benefit of this approach is that it would enable parties to join a claim at an appropriate juncture. This would:

- (1) give respondent parties the option of minimising the time and resources spent being a respondent party to a native title claim where the matters that are being resolved do not directly affect its interests; and
- (2) mean that if connection was not accepted or determined (or the claim withdrawn or dismissed), respondent parties would not have unnecessarily joined as parties – minimising costs for all involved.

4.4 Question 34

In what circumstances should any party other than the applicant for a determination of native title and the Crown:

- (a) be involved in proceedings?***
- (b) play a limited role in proceedings?***

Telstra's submission on this issue is:

- (a) respondent parties play an important part in native title claims, particularly where the Crown is not privy to the entire history of a particular matter (such as may be the case for Telstra);
- (b) late joinder should continue to be permitted as a person may acquire an interest in a

claim area or be granted an interest in a claim area during the claim period (which can be for 10 plus years);

- (c) parties other than the applicant and the Crown should be permitted to be involved in the proceedings to protect their interests; and
- (d) the involvement of parties other than the applicants and the Crown should be permitted to the extent to which a party's interests may be affected by a determination. For example, where the Court may determine that a particular right or interest held by a person other than the Crown is determined to be invalid, parties other than the Crown should be entitled to participate.

5. Conclusion

Telstra appreciates this opportunity to provide comments on the ALRC Issues Paper.

Telstra welcomes the opportunity to further discuss this submission and participate in additional consultation as part of the ALRC's native title reform process.

Schedule

Secondary Joinder Protocol

