

19 January 2015

Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email to: nativetitle@alrc.gov.au

Dear Sir / Madam,

Telstra Corporation Limited: Submission in response to ALRC Review of the Native Title Act 1993 (Cth) Discussion Paper

Telstra welcomes the opportunity to make this submission on the work completed to date concerning the Australian Law Reform Commission (ALRC) review of the *Native Title Act 1993 (Cth) Discussion Paper* that was released on 24 October 2014.

Telstra also appreciates the ALRC's consideration of the comments in Telstra's earlier submission to the review process and its willingness to incorporate this thinking into the latest version of the proposed changes.

Telstra is the largest provider of telecommunications services to communities, businesses and government agencies throughout urban and rural Australia. A robust and efficient legal framework for processing native title claims, and for recognising and protecting existing interests in lands and waters which are subject to native title claims, is important for Telstra to be able to provide services which are timely, reliable and deliver a great customer experience.

Telstra, through its experience as a respondent to many native title proceedings, has found the current native title claims resolution process to often be slow and resource intensive. Telstra welcomes reforms that may reduce the time, costs and resources associated with the resolution of native title claims.

In particular, Telstra welcomes the proposed reform to permit non-State respondents (such as Telstra) to formally limit their involvement in native title claims while questions of connection (as opposed to tenure) are being resolved (for example, through early agreed recognition and protection of third party interests or through a secondary joinder protocol).

However, Telstra is very concerned about the proposed change to s 84(3)(a)(iii) of the *Native Title Act 1993 (Cth)* (NTA) which is likely to have the consequence of preventing Telstra from being able to continue to join native title proceedings under this provision. Given the extensive nature of Telstra's infrastructure and the number of claims to which it seeks to be joined as a respondent, Telstra believes it would be unfair and unduly onerous to require Telstra to make applications for joinder

under s 84(5) of the NTA. Consequently, Telstra is strongly of the view that s 84(3)(a)(iii) should either not be changed or alternatively amended in a way which continues to make provision for Telstra (and any other parties with similar interests) to continue to be able to join proceedings as a matter of right. Telstra's position on this matter is explained further in the following paragraphs.

Telstra should have rights under s 84(3)(a)(iii) to join native title proceedings

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 proportion of its current 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. As a result, telecommunications infrastructure was installed on land as part of Telstra's USO without the need to obtain formal land tenure.

Between 1992 and 1993 Telstra underwent further changes, becoming the Australian and Overseas Telecommunications Corporation and then finally, on 13 April 1993, becoming Telstra Corporation Limited.

Telstra's current operations are conducted under the *Telecommunications Act 1997* (Cth) (**Telco Act**). Importantly, Schedule 3 of the Telco Act:

- 'grandfathered' existing telecommunications infrastructure (by providing that laws of trespass do not apply with respect to its ongoing occupation of land); and
- affirmed Telstra's powers to enter onto land in order to maintain existing telecommunications infrastructure.

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

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 title 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 State, and would not be adequately reflected in any consent determination orders if not for Telstra's participation in the native title proceeding.

Telstra has participated as a respondent party to a high proportion of native title claims (approximately 200 claims to date) across Australia. Telstra believes it has acted responsibly and proactively in this capacity. Telstra participates to protect its rights and not in opposition to or in defence of a claim.

If s 84(3) of the NTA is amended in the manner contemplated by the ALRC in Question 11-1, Telstra is unlikely to be eligible to join many future native title proceedings under s 84(3), on the basis that:

- where Telstra's telecommunications facilities within a claim area have been installed pursuant to the historical legislation outlined above, Telstra in many circumstances will not have obtained a formal proprietary interest in the land that would constitute a 'legal or equitable interest' – e.g. a lease, licence, or easement; and
- Telstra in many cases may not be in a position to confirm, and provide evidence of, 'legal or equitable' interests in land within the notification period.

Telstra considers that it would be unfair and unduly onerous to instead require Telstra to apply to the court to be joined as a respondent under s 84(5) of the NTA, particularly in circumstances where there is no question that Telstra has a valid interest in telecommunications infrastructure validly positioned on land within the boundary of native title claims.

For these reasons, Telstra is strongly of the view that s 84(3)(a)(iii) should either not be changed or alternatively amended in a way which continues to make provision for Telstra to join proceedings as a matter of right.

Responses to Questions and Proposals from the ALRC Discussion Paper which are of specific interest and concern to Telstra

Question 11-1: Should s84(3)(a)(iii) of the *Native Title Act 1993* (Cth) be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s84(3) of the *Native Title Act 1993* (Cth)?

- As explained above (and below) Telstra believes that s 84(3)(a)(iii) should either remain unchanged or alternatively amended in a way which makes provision for Telstra (and any other parties with similar interests) to be able to continue to join proceedings as a matter of right.
- Webb and Stephenson, in *Land Law 3rd ed* (2009: LexisNexis Butterworths), define a **legal interest** in land as one that arises where all statutory and common law requirements have been met. It is a right in the land itself and is enforceable against the world. In a Torrens system, all legal interests are on the Register.
- An **equitable interest**, according to Butt in *Land Law 6th ed* (2010: Thomson Reuters), can exist simultaneously with a legal interest and generally arises as the result of an express or constructive trust. An equitable interest may provide a remedy, but does not necessarily constitute an interest in the land *per se*.
- This would exclude interests including permissive rights of occupancy and interests in chattels or infrastructure located on land (which is typically the case for some Telstra infrastructure installed prior to 1997. It is rare for a formal right of occupation, e.g. a lease, licence or easement to have been granted to Telstra with respect to such infrastructure).
- Under the Schedule 3 of the *Telecommunications Act 1997* (Cth) Telstra is granted statutory protection against trespass actions with respect to the ongoing occupation of third parties' land, and its powers to enter onto land in order to, install and maintain infrastructure are confirmed.

- The proposal in Question 11-1 would necessarily exclude parties like Telstra who should be entitled to join as a respondent 'as of right' under s 84(3) to ensure that any determination of native title adequately and appropriately reflects its interests in the determination area, including those interests that are not recognised as "legal or equitable" interests in the land.

Proposal 11-1: The Native Title Act 1993 (Cth) should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

- Telstra appreciates the ALRC incorporating Telstra's original suggestion in the current Discussion Paper, and reaffirms its support for this proposal.
- Telstra suggests that it would be helpful to be provided an explanation about how this proposal could work in practice.
- Telstra has noted that a large number of non-State respondents do not take an active interest in the resolution of connection issues and anticipates that this initiative will be broadly supported by such parties.

Closing comments

Telstra would appreciate the opportunity to engage further with the ALRC before the proposed change to s 84(3)(a)(iii) is settled.

Please contact Anna Ferella, by calling 03 8647 3864 or emailing anna.m.ferella@team.telstra.com, if you have any further questions or comments about the matters in this submission.

Yours sincerely,



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