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7 February 2007

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Attention: Ms Ann OConnell

Dear Secretary,

Inquiry into the Native Title Amendment Bill 2006

I am pleased to attach the Submission by Telstra Corporation Limited to the Inquiry into the Native Title Amendment Bill 2006.

I understand arrangements have been made with Ms Ann O'Connell for the acceptance of this Submission at this late point in the Committee's considerations.

Please call me on (08) 8403 1806 if you would to discuss this matter further.

Yours sincerely

M Hall

Mike Hall
Regional Manager WA/SA/NT
Telstra Land Access

SENATE AND LEGAL AFFAIRS COMMITTEE INQUIRY INTO THE NATIVE TITLE AMENDMENT BILL 2006

SUBMISSION BY TELSTRA CORPORATION LIMITED

1. Introduction and summary

Telstra supports the overriding intention of the *Native Title Amendment Bill 2006* (the **Bill**), to improve the performance of the native title system. However, it has serious concerns about the proposed amendments relating to joinder of "minor parties" as respondents to native title claim proceedings and the participation of such "minor parties" in the settlement of native title claims.

Telstra's submission regarding joinder relates to the amendment to section 84(5) of the *Native Title Act 1993*. This will require a Court to be satisfied that the joinder of a respondent after the end of the section 66 notification period is "in the interests of justice". Essentially, Telstra submits that this criterion is:

- unnecessary – under section 84(5), as presently drafted, the Court already has a discretion to refuse joinder even if the person's interests may be affected by a determination of native title and the Court does, in fact, exercise this discretion;
- untargeted – it will not necessarily promote consideration of interests in land which may be affected by, or themselves affect, recognition of native title, in the claim resolution process; and
- overkill - a similarly onerous standard is imposed on applications to vary an approved determination of native title in section 13(5), yet there is simply no equivalence between seriousness of seeking to alter a final determination, and an application to participate in the resolution of a claim mid-stream.

Telstra's submission regarding the participation of "minor parties" in the settlement of native title claims relates to the inclusion of section 87A and paragraph 87(1)(d). Under these, not all parties need consent to a determination of native title with respect to only part of the area covered by an application. Of the range of non-government, non-indigenous respondents, only those holding a "proprietary interest" that is "registered in a public register of interests . . . maintained by the Commonwealth, a State or Territory", are required to consent to the determination of native title.

Because the partial resolution of native title claims is commonplace, Telstra submits that the Bill is effectively introducing a new system of claim resolution where there are two classes of non-government, non-indigenous respondent: those entitled to meaningfully participate in the process, and those who are not. The line has been drawn, arbitrarily, between proprietary interests on a public register and other interests, irrespective of the manner in which they may impacted by a determination of native title. There are a broad range of respondents who will be excluded. These extend well beyond the class of uncooperative minor parties that the Explanatory Memorandum indicates are the target of these amendments.

As the owner of a portfolio of very significant assets many of which occupy land other than on the basis of a proprietary interest, Telstra strongly objects to the proposed section 87A procedure which so narrowly describes the respondents who must approve a determination of native title.

Finally, Telstra submits that the Bill, which purports to be the implementation of recommendations made in the *Native Title Claims Resolution Review* dated 31 March 2006, in fact limits the role of "minor" respondents to a much greater extent than recommended.

2. Telstra's participation in the native title arena

Telstra is a key stakeholder in the resolution of native title claims. Telstra is currently a party to approximately 390 native title determination applications across all States and Territories (except Tasmania and the ACT). It has also been involved in a significant number of finalised claims – it has been a party to 28 consent determinations of native title and 5 litigated determinations. As part of the settlement of these claims Telstra has entered into 14 registered Indigenous Land Use Agreements with native title holders. Several more ILUAs are in the negotiation phase.

Telstra is uniquely exposed to native title claims because of the breadth of its network. Telstra has a Universal Service Obligation under the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) which requires Telstra to provide services to all people in Australia wherever they reside or carry on business. Telstra has thousands of facilities all over Australia. Its facilities in areas subject to native title claims are as varied as its network. They include small buildings, 80 metre guyed masts requiring a site of some hectares, underground cabling, satellite dishes and small and large towers. In remote areas, telecommunications services are more likely to be delivered by radio systems rather than underground cabling with the result that in areas where native title is more likely to exist, Telstra frequently has larger scale facilities than in more closely settled areas. The majority of Telstra's facilities in these areas are not located on freehold land, but on reserves, pastoral leases and Crown land. These factors all combine to make Telstra a key stakeholder in the resolution of native title claims nationally.

Telstra occupies land the subject of native title claims in a variety of ways. Generally speaking, Telstra's occupation can be broadly divided into three types:

- formal interests granted under State or Territory laws, such as registered Crown leases or reservations of land vested in Telstra;
- unregistered licences from the Crown in right of the States or Territories, or statutory authorities created under State legislation;
- through the exercise of land access powers conferred on Telstra and its statutory predecessors under Commonwealth telecommunications legislation, such as the *Telecommunications Act 1975* (Cth) and, later, the *Telecommunications Act 1997* (Cth).

Telstra's objectives in relation to native title claims are to:

(a) ensure that any determination of native title recognises and protects its existing telecommunications facilities installed within the determination area and provides certainty about Telstra's future rights of access to the determination area in the performance of its functions; and

(b) be involved in claims only to the extent necessary to achieve the objectives in paragraph (a) (in order to keep its participation efficient and cost effective).

Telstra adopted a policy at the outset of its participation in native title claims that it would not challenge the applicant group's connection evidence or participate in any way in the mediation or litigation of the issues relating to the proof of native title generally. Telstra relies on the State or Territory government to test these issues during the claim resolution process. It does not become actively involved in the claim resolution process until the issues of the effect of non-native title rights and interests on native title and the relationship between the co-existing native title and non-native title rights and interests are addressed.

3. Telstra's submissions

Telstra has serious concerns about the proposed amendments relating to the:

(a) joinder of "minor parties" as respondents to native title claim proceedings; and

(b) participation of "minor parties" in the settlement of native title claims.

A table summarising the current and proposed provisions affecting these 2 issues is attached at **Annexure A**. The reason for Telstra's concerns, and Telstra's suggested solutions, are outlined in sections 4 to 9 below.

The Explanatory Memorandum in relation to the Bill lists the amendments to which Telstra's submission relate under the heading "Schedule 2 – Claims Resolution Review". This is a reference to the independent review of the manner by which native title claims are resolved, by Mr Graham Hiley QC and Dr Ken Levy. The Explanatory Memorandum states that, "*the Government accepted most of the recommendations in the report*". Further stating that:

> Some of the recommendations in the report will be implemented administratively, including by the Court and the NNTT. Schedule 2 allows for those recommendations requiring legislative amendment to be implemented.

The comments in the Explanatory Memorandum give the impression that the amendments proposed in Schedule 2 to the Bill are required to implement the recommendations in the *Claim Resolution Review*. However, as Telstra observes in the context of specific amendments, the changes which are of most concern to Telstra in fact work to limit "minor" party participation to a much greater extent than recommended in the Review.

4. Proposed amendment to Section 84(3)(a)(i) (Bill Schedule 2, Part 1, Paragraph 3)

Telstra supports this amendment.

5. Proposed amendment to Section 84(3)(a)(iii) (Bill Schedule 2, Part 1, Paragraph 3)

Telstra supports the amendment which would require persons who may joined under section 84(3)(a)(iii) to have an "interest in relation to land or waters".

6. Proposed amendment to Section 84(5) of the NTA (Bill Schedule 2, Part 1, Paragraph 5)

6.1 Telstra's concerns

The Bill proposes to add an additional element to the criteria that must be met before a person may become a party to a native title claim proceeding after the expiration of the 3 month notification period for "as of right" joinder to native title claims. The additional element is the requirement that it must be "in the interests of justice" that the person be joined. The proposed amendment will read as follows:

> The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so.

This amendment is not one of the recommendations in the *Claims Resolution Review* and is not proposed in either of the Government's Technical Amendments Discussion Papers dated 22 November 2005 and 22 November 2006.

Telstra submits that the proposed amendment to section 84(5) should not be made because it adds an unnecessary, uncertain and arbitrary element to the requirements for joinder to a native title claim proceeding after the notification period in section 66 of the NTA expires.

The proposed amendment is unnecessary because the Federal Court already has a clear discretion about whether or not to join a person as a party to proceedings pursuant to section 84(5) because of the word "may" in the first line of the provision. The Court has recently exercised this discretion against joinder in circumstances where the Court found that the person's interests may, in fact, be affected by a determination in the proceedings (see *Akiba and others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No.1)* [2006] FCA 1102 and *Akiba and others on behalf of the Torres Strait Regional Seas Claim People v State of Queensland (No.2)* [2006] FCA 1173).

The proposed amendment is uncertain because the meaning of the phrase "interests of justice" in this context is undefined and unknown. Does it relate to delay in seeking joinder to the native title claim, the effect of the person's joinder on the timing of any proposed settlement of the native title claim and/or the costs to the existing parties of considering the person's interests, the effect of any determination of native title that does not take the person's interests into account, or some other factor? The introduction of this additional criteria adds an element of uncertainty and is likely to result in an increased number of applications for leave to appeal decisions made under this provision. The only thing that does seem clear is that the "in the interests of justice" criterion would require the person seeking joinder to demonstrate more than a likelihood that their interest in relation to land or waters would be affected by a determination that native title exists.

Finally, Telstra submits that the proposed amendment adds an arbitrary element to the requirements for joinder. If a person's interests may be affected by a determination in the

proceedings, that person should prima facie be entitled to join as party to the proceedings in order to ensure that any determination of native title appropriately protects that person's interests. A determination of native title operates *in rem*, is a final disposition of the interests of all persons within the determination area and could result in a finding that the native title holders have exclusive rights and interests (including a right to exclude others) in relation to the very land in which the person has an interest.

It is also important to note that not all applications for joinder under section 84(5) are made at the so called "eleventh hour". The notification period under which certain persons are entitled to automatic joinder under section 84(3) is a mere 3 month period usually commencing shortly after a native title determination application is made and tested for registration. The native title determination application may then take years to be finalised. Why should a person whose interests may be affected by a determination have to satisfy the Court that the interests of justice require the person's joinder in circumstances where, for example, the application under section 84(5) is made only a few months after the notification period has expired? Should a Court be confronted with a joinder application made so late in the claim resolution process that to allow the joinder, would, in the Court's view, work some injustice on the existing parties, it is already open to the Court to exercise the discretion inherent in section 84(5) to refuse the joinder application.

The "interests of justice" criterion is used at one other point in the NTA. An approved determination of native title can be varied in two circumstances:

(a) if "events have taken place since the determination was made that have caused the determination no longer to be correct" (s 13(5)(a) NTA); or

(b) if "the interests of justice require the variation or revocation of the determination" (s 13(5)(b) NTA).

Telstra submits it is appropriate to impose such a difficult to satisfy criterion as "interests of justice" with respect to the variation of an approved determination. Having achieved final disposition of a proceeding, the Court should be most reluctant to vary the terms of an approved determination of native title. If the criterion for the variation of an approved determination is that the "interests of justice" require it, it follows that the criterion applicable to the joinder of parties seeking to have their interests recognised in the course of the resolution of a claim, should be less difficult to satisfy. Telstra submits that the proposed amendment to section 84(5) sets the standard too high and will be counter productive to the orderly resolution of native title claims.

6.2 Telstra's suggested solution

In light of the flexibility of the discretion in section 84(5), Telstra does not recommend that any change to the section be made. Alternatively, given that that the Bill will ensure that the minimum requirement for joinder within the notification period is that a person has an "interest, in relation to land or waters that may be affected by a determination" (see proposed amendment to section 84(3)(a)(iii)) it would be appropriate to reflect this in section 84(5).

7. The proposed new section 87A of the NTA (Bill Schedule 2, Part 1, Paragraph 35)

7.1 Telstra's concerns

The Bill proposes to add an additional method by which part only of a native title claim proceeding may be settled by way of a consent determination. Under proposed new section 87A, certain parties to a native title claim proceeding can reach agreement as to the terms of a determination of native title over part of the native title claim area and file a proposed determination of native title with the Federal Court. The Federal Court may then make a determination of native title consistent with that agreement without holding a hearing.

The impact of section 87A requires close examination because it will become the basis on which most native title claims are settled. This is clear from the way claims progressing toward a consent determination are managed, as well as the priority given to the section in the Bill. Telstra discusses the latter point in section 8 below. With respect to management of claims progressing toward a consent determination, in Telstra's experience it is commonplace for claims to be split into two or even three parts, to ensure that difficult questions over one part of the claim area do not delay a determination of native title in respect of less contentious areas. Examples include the forthcoming determinations in Eastern Guruma WAD6208/98, Ngarla #2 WAD77/05 and Gunditjmara VID6004/98, and approved determinations in Wik QUD6001/98, Karajarri WAD6100/98, Martu WAD6110/98 and Ngaanyatjarra WAD6004/04. Further, many of the Torres Strait determinations covered areas less than in the application area as sites with respect to which no agreement could be reached were simply left out. The inclusion of section 87A will have enormous impact on the manner in which claims are resolved by consent in the future.

Telstra supports the need for a provision improving the mechanisms through which claims are resolved (it made submissions about the flaws in section 87 of the NTA to the *Claims Resolution Review* and in relation to the Government's first Technical Amendments Discussion Paper). The current provision for the part settlement of native title claims (section 87) has limited operation because it requires all parties to a claim to agree to the part-settlement of the claim, even those parties who have no particular interest in the geographical area the subject of the part-settlement.

However, Telstra strongly opposes the limitation in proposed section 87A on the respondent parties who must be a party to the agreement in order for the provision to be enlivened. Under proposed new section 87A(1)(c)(v), leaving aside indigenous and government parties, an agreement to settle part of the claim by way of a consent determination of native title only requires the consent of respondent parties who:

> … hold a proprietary interest, in relation to any part of the determination area, at the time the agreement is made, that is registered in a public register of interests in relation to land and waters maintained by the Commonwealth, a State or Territory and who is a party to the proceedings at the time the agreement is made.

Other respondent parties with non-proprietary interests, or proprietary interests that do not appear on a public register of interests, are not required to be involved in any such agreement and do not even have a right to be informed about the negotiation of such an agreement. The first time that they must be informed of the proposal is at the "eleventh hour" when the Federal Court Registrar notifies them of the filing of the proposed determination under proposed new section 87A(3). The right of such respondent parties is

then limited to a right to object to the proposed determination and have that objection taken into account by the Federal Court in deciding whether or not to make the requested determination (see proposed section 87A(5)).

A party objecting at this point will almost inevitably become involved in one or more hearings before the Court to resolve the objection. At such a late stage in the process, the objector is likely to confront applicants, respondents and even a Judge eager to proceed with the consent determination of native title. Advocating the recognition of interests which might, without the amendment, be dealt with as a routine part of the drafting of a consent determination, will be likely to be seen as an obstacle to the resolution of the claim. This will not be because inclusion of the interest is unreasonable, but simply because it has the capacity to delay the resolution of the claim. Further, dealing with additional interests after the terms of an agreed determination have been filed, will inevitably be more costly and time consuming for all involved than if the issue had been aired at an earlier point in the process.

It is useful to explain Telstra's concern about this provision in the context of its network. As noted above, some of Telstra's interests are both proprietary and registered. Many, however, rely on less formal occupancy rights. They have been installed in reliance on licences from, or otherwise with the acquiescence of, the Crown, or pursuant to its current and historical statutory powers and immunities. Telstra may not be regarded as holding a proprietary interest with respect to the land on which these facilities have been constructed (although it does maintain ownership of the facilities themselves under statute). Facilities installed on these bases will not be included in any public register maintained by the Commonwealth, a State or Territory. Yet these sites are no less important than those with more formal tenure. They are no less likely to support critical elements of the national telecommunications network than a site with a registered lease.

Theoretically, native title with respect to some of Telstra's sites has been extinguished through the construction of "public works". In other instances, extinguishment may have occurred under common law principles, rather than as a "previous exclusive possession act". In many other cases, there may be no extinguishment, but native title may nevertheless be wholly suspended over large areas of land.

The effect of the proposed limitation in section 87A(1)(v) is that Telstra would not be a necessary party to the settlement of a native title claim proceeding over land on which it has lawfully constructed such a facility because Telstra does not hold a "*proprietary interest ...that is registered in a public register of interests ...*". The other parties to the proceeding could agree to a determination that exclusive native title rights and interests exist in relation to the site of Telstra's facility, notwithstanding the legal position that native title has been extinguished.

With respect, Telstra submits that the exclusion of parties like it, with non-proprietary interests, is unjust and does not advance the orderly resolution of native title claims. The amendment gives priority to exactly the type of interest (proprietary and publicly registered) that are most likely to have the benefit of the protection of third party interests built in to the NTA. The persons best placed to identify interests in relation to land or waters which do not appear on a public register, are exactly those who are largely excluded from the claim resolution process under section 87A.

In addition to Telstra and other infrastructure providers whose interests in relation to the claimed land are sourced in statutory powers and not proprietary rights, this provision also has the potential to exclude the holders of mining and exploration tenements from section 87A settlement agreements. As far as Telstra is aware, there has been no judicial interpretation of the term "proprietary interest" in the context of the NTA (see its use in section 66(3)(a)(iv)). It may be argued that the term is limited to "property law" type interests (eg leases and licences) rather than statutory interests that do not create a right to exclude others.

An amendment similar to section 87A in some respects was put forward in the Government's first Technical Amendments Discussion Paper in November 2005. On page 9 it is proposed that an application could be split to facilitate resolution. The Paper proposes that in these circumstances, the Federal Court could make an order in relation to part of the claim if it were satisfied that "*all parties whose interests in the claim falls (either partly or solely) within the area proposed to be split off*" would consent to the determination. However, this is a very different proposal to that contained in section 87A, which specifically provides that all parties whose interests are affected need not consent to such a determination.

The proposal in the first Technical Amendments Discussion Paper was not progressed in the second Technical Amendments Discussion Paper. The second Paper states that the proposed amendment will not be included in the technical amendments to the NTA, as the objectives of the proposed amendment will now be considered in the context of the implementation of Recommendations 18 and 20 of the *Claims Resolution Review*.

However, the proposed new section 87A is not one of the recommendations in the *Claims Resolution Review*. The Review deals specifically with third party respondents (in paragraphs 4.134 to 4.140), and makes 3 recommendations in relation to them. Only Recommendation 20 relates to the participation of third party respondents in the settlement of claims.

Recommendation 20 provides:

> That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.

It cannot be said that proposed new section 87A implements this recommendation because the recommendation proposes only that a party's participation is limited to issues that are relevant to its interests. There is no suggestion anywhere in the Review that a party's participation should be limited in circumstances where its interests are in fact affected.

7.2 Telstra's suggested solution

Telstra submits that:

(a) If there is to be a threshold for the participation of non-government, non-indigenous parties in section 87A(1)(c), consistent with the Recommendation 20 in the *Claims Resolution Review*, it should:

(i) require that the that the party have "an interest, in relation to land or waters" – this adopts the proposed threshold for joinder of claims in the amendments to section 84(3)(a)(iii); and

(ii) that interest must exist in the relevant part of the determination area.

This formulation still has the effect of stopping "*other parties with less significant interests in relation to the overall claim, from blocking resolution of the claim in relation to a separate part of the claim area*", as the problem is described in the Explanatory Memorandum paragraph 4.181. However, the formulation avoids the arbitrary distinction between different types of interests which are equally susceptible to being affected by a determination recognising native title, which section 87A would otherwise introduce.

(b) Parties whose agreement is not required under section 87A(1) should have a right to be informed of the proposed agreement at the earliest possible stage, not after the agreement has been reached and the proposed consent determination filed with the Federal Court (see section 87A(3)). This might be effected by requiring the Applicants or the State to inform all parties to a native title claim proceeding when a section 87A agreement is proposed.

8. The proposed amendment to section 87(1) (Bill Schedule 2, Part 1, Paragraph 34)

8.1 Telstra's concerns

The Bill proposes to insert a new paragraph (d) in section 87(1) making it a precondition to an order under section 87 that such order "cannot" be made under section 87A. If the terms of the Bill were not clear enough, the Explanatory Memorandum states, "*If an order can be made under section 87A, the order should be made under than provision rather than section 87*" (paragraph 4.179).

By prioritising section 87A in this way, the Bill is effectively introducing a new system of claim resolution where there are two classes of non-government, non-indigenous respondent: those entitled to meaningfully participate in the claim resolution process, and those who are not. The line has been drawn between proprietary interests on a public register and other interests. As discussed above, there are broad range of respondents whose interests are in the latter category. These extend well beyond the class of determination blockers which appear to be the intended target of these reforms (see Explanatory Memorandum paragraph 4.181). Telstra does not believe that the effect of section 87A, in conjunction with new section 87(1)(d) is widely understood amongst those affected by native title claims. Government explanations of the amendments to the NTA which heavily reference the *Claim Resolution Review* are misleading for the reasons discussed above.

With respect the operation of section 87(1)(d), Telstra submits that the requirement that the Court must be satisfied that section 87A cannot be used, before making an order under section 87, will result in very close judicial examination of section 87A(1)(b). The likely result of this is that that the classes of claim which are recognised as within the parameters of section 87A will increase. This effect may be exacerbated by uncertainty as to when Court might actually rely on section 87 to make a consent determination. The fear will be

that a wrong call regarding the applicability of section 87A will result in a determination made under section 87 being beyond power.

8.2 Telstra's suggested solution

Telstra submits that, if section 87(1)(d) is necessary at all, it should be changed from "cannot" to "should not". This will give the Federal Court some discretion in regard to the issue and can avoid claims that an order made under section 87 was beyond its power.

9. Final comments

The proposed amendments to the NTA, particularly sections 84, 87 and 87A will, if they come into force, will have a very significant impact on all persons affected by native title claims. For that reason Telstra welcomes the opportunity to make this submission to the Inquiry. Telstra also hopes that this submission will enliven the discussion around Schedule 2 of the Bill.

If you would like to discuss the submissions further, please call Mike Hall, Powers & Immunities Governance Manager SA/NT/WA, (08) 8403-1806 or mike.hall@team.telstra.com.