

Submission to the Senate Standing Committee on Environment and Communications

Inquiry into the Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

February 2014

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1. Executive Summary

Telstra welcomes the opportunity to provide this written submission addressing the issues of relevance to Telstra and the Committee on the proposed changes to Schedule 3A of the Telecommunications Act 1997 (*Cth*) contained in the *Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013 (Cth)* (**submarine cable protection regime**).

As well as setting out Telstra's comments in response to the proposed amendments to the submarine cable protection regime (hereafter referred to as 'the regime'), this submission also recommends some additional drafting changes which Telstra believes will improve the process, administration and oversight of the regime.

As the leading telecommunications company in Australia, Telstra invests in submarine cables as part of connecting its millions of customers to the rest of the world. This infrastructure is a vital part of the Telstra network and ensures Australians can do business overseas, keep in contact with friends and family, and enjoy the internet.

Telstra, like any other cable operator (or Carriage Service Provider) in Australia, is legally required to provide various forms of assistance to Australia's law enforcement and national security agencies, for purposes such as enforcing criminal law and safeguarding national security. Telstra is committed to meeting its statutory obligations in this regard, while also protecting the legitimate interests of customers (including privacy) as permitted by law.

Telstra recognises that the key changes to the existing regime proposed under the submarine cable protection regime help address the potential inconsistency between the existing Australian submarine cable protection regime and the United Nations Convention on the Law of the Sea (**UNCLOS**) whilst:

- enabling domestic submarine cables to be covered by the regime (which would be done on a cable by cable basis under regulations);
- providing more clarity about the consultation process between the Australian Communications and Media Authority (ACMA) and the Attorney-General's Department in relation to permit applications;
- streamlining the permit process by removing the requirement to obtain multiple permits, tightening permit application processing timeframes and reducing unnecessary duplication with provisions in the *Environment Protection and Biodiversity Act 1999 (Cth)*; and
- improving the efficiency of the administration of protection zone declaration, revocation and variation processes.

Telstra does not believe that its submarine cables are vulnerable to unlawful interception. However, Telstra recognises that there is a need to ensure that regulation remains relevant and appropriate to support the development and security of this critical infrastructure in a rapidly changing social and technological environment. Any reforms in this area should promote transparency and raise public awareness levels of how and why such systems and information may be lawfully accessed and used for public interest purposes.

Telstra believes that the amendments proposed by the submarine cable protection regime, in conjunction with Telstra's suggested drafting changes and the existing provisions of the

Telecommunications Act 1997, the *Telecommunications (Interception and Access) Act 1979*, provide sufficient reporting and oversight of the protection of submarine cable telecommunications infrastructure in Australia.

2. Previous submissions

In 2010 and 2013, the ACMA consulted on potential amendments to the submarine cable protection regime in Schedule 3A of the *Telecommunications Act 1997 (Cth)*. Telstra provided submissions on both these occasions which addressed the public interest issues and consumer benefits in undertaking such reforms.

3. Security of infrastructure

Telstra does not believe that its submarine cables are more vulnerable to unlawful interception than any other cables, but recognises that there is a need to ensure regulation remains relevant and appropriate to support the development and security of critical infrastructure. Any reforms in this area needs to maintain a balance between the public interest objectives, implementation costs to industry, the need to maintain high levels of network integrity and security, and the legitimate community concerns about the security and privacy of customer information that is carried over these cables.

Australian carriers and Carriage Service Providers are legally required to provide various forms of assistance to Australia's law enforcement and national security agencies, for purposes such as enforcing the criminal law and safeguarding national security. Telstra is committed to meeting its statutory obligations in responding to lawful requests, while also protecting the legitimate interests of its customers as permitted by law.

Telstra supports the proposal to strengthen the security safeguards proposed by the submarine cable protection regime, but also supports the need for consistency and alignment between the Submarine Cable Protection Regime, the *Telecommunications Act 1997* and the *Telecommunications (Interception and Access) Act 1979* in respect to the protection of critical infrastructure, lawful interception and the protection of privacy.

The Telecommunications Security Sector Reforms that have previously been proposed by the Attorney General's Department, and which appear to be partially included in the proposed amendments to the Submarine Cable Protection Regime, will assist to improve the security of telecommunications infrastructure. In this context, it is important that the public interest continues to be broadly defined and that protection measures do not have the effect of impeding the delivery of high quality and innovative services to customers on Telstra's submarine cable networks in a rapidly changing technological environment. Any reforms in this area should promote transparency and raise public awareness levels of how and why such information may be lawfully accessed and used for public interest purposes.

Telstra believes that the amendments proposed by the Submarine Cable Protection Regime, in conjunction with the existing provisions of the *Telecommunications Act 1997*, the *Telecommunications (Interception and Access) Act 1979*, and Telstra's suggested drafting changes provide sufficient reporting and oversight of the protection of telecommunications infrastructure in Australia.

Telstra has developed physical protection measures based on industry best practice, as set out by the International Cable Protection Committee¹, to protect its critical submarine cable infrastructure including:

- 24/7 physical security of submarine cable landing stations;
- strictly controlled access;
- 24/7 security monitoring;
- confidentiality of site locations and equipment; and
- appropriate arrangements with Australian State and Territory agencies to prioritise responses to emergencies involving the infrastructure.

Cable operators have, over a long period of time, made significant investments in developing systems practices and processes to protect their cable assets and information systems. Telstra believes that any plans to make changes to the regulatory framework should recognise these arrangements and seek to minimise the disruption to them.

Telstra notes that the privacy and network protections provided by the *Telecommunications Act 1997* and *Telecommunications (Interception and Access) Act 1979* are designed to ensure that customer's communications remain private and are protected by cable operators from unlawful access. In order for this legislative framework to be applied effectively in the rapidly changing telecommunications technology environment, Telstra believes it is important for industry and government to continue working closely together on these matters.

4. Compliance monitoring

Telstra continues to hold the view that it is essential for an active compliance monitoring scheme to be implemented in a cost effective and practical manner for the ongoing security of submarine cable infrastructure. For this reason, Telstra supports the idea (proposed by the group of Australian Submarine Cable operators) of conducting a study in partnership with the Federal Government to determine what compliance monitoring could be undertaken by all participants. Telstra recommends that the study consider the following opportunities:

- The use of the Automatic Identification System (AIS), which is a mandatory requirement of the International Maritime Organisation (IMO) and is fitted aboard all vessels of greater than 300 Gross tons, to monitor the movement of vessels in the vicinity of protection zones. Additional AIS receiving stations could be placed at the protection zone sites at relatively low cost, and the received data could be made available to cable operators.
- Allow cable operators to access the Vessel Monitoring System (VMS) data. All fishing boats are required to have working VMS equipment. However cable operators experience difficulties in accessing this data which is held by the Australian Fisheries Management Authority (AFMA). This data is essential in assisting cable operators to rapidly respond to and locate faults on submarine cables within the protection zones.

¹ <http://www.iscpc.org/>

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- Further development of infrastructure security education and awareness programs for all stakeholders who operate within the vicinity of critical submarine cable infrastructure.

Access to the AIS and/or VMS information by cable operators would improve the security of the telecommunications infrastructure by providing cable operators with real time information which can be used to assess and proactively manage any potential risks of damage to their submarine cables. It will also assist operators to more quickly identify the possible cause and location of any damage and take appropriate remedial action. British Telecom (BT) actively monitors shipping near their cables to make sure these ships do not drop anchors and snare BT's submarine cables.

5. Additional suggested drafting changes

Telstra also suggests that the Committee consider adopting the following drafting changes to Schedule 3A of the *Telecommunications Act 1997 (Cth)*.

a. Declaration of new protection zones

Telstra submits that, when declaring protection zones, the ACMA should be required to canvass industry intentions to install new cables, and have regard to the likelihood that those future cables will be laid in the same zone and both the existing and future cables need to be protected from the risk of damage. This could be given effect by adding a new clause 20(1)(h) as follows:

20(1)(h) Matters the ACMA must have regard to

- (1) In deciding whether to declare a protection zone in relation to one or more submarine cables, the ACMA must have regard to:
- (a) the recommendations or statement of opinions of the advisory committee that considered the proposal for the protection zone; and
 - (b) any submissions received from the public about the proposal for the protection zone; and
 - (c) the objective of facilitating the supply of efficient, modern and cost-effective carriage services to the public; and
 - (d) if the proposed protection zone relates to a submarine cable that is not yet installed—the impact of the installation on the environment; and
 - (e) if the proposed protection zone relates to a submarine cable that is not yet installed—any relevant technical and economic aspects of the installation; and
 - (f) if the proposed protection zone relates to a submarine cable that is not yet installed—whether the submarine cable is to be co-located with an existing submarine cable or cables; and
 - (g) if the proposed protection zone relates to a submarine cable that is not yet installed—the economic and social benefits that are likely to result from the installation of the cable; and
 - (h) the likelihood that additional submarine cables will be installed in the area near the proposed protection zone; and
 - (i) any other matters that the ACMA considers relevant.
- (2) For the purposes of subclause 20(1)(h), the ACMA must seek comment on the likelihood that additional submarine cables will be installed in the area near the proposed protection zone when inviting public submissions on the proposal to declare the protection zone under subclause 17(2)(b).

Similar changes should be reflected in item 34 (relating to the revocation or variation of protection zones).

b. PZAC (Protection Zone Advisory Committee) processes

Telstra believes that PZAC and consultation arrangements should be extended to require the ACMA to directly consult with all operators of cables within the vicinity of the proposed or existing protection zone.

This could be given effect by adding a new clause 19A as follows:

19A Consultation with existing submarine cable operators

(1) The ACMA must not declare a protection zone in relation to one or more submarine cables unless the ACMA has consulted with each person that owns or controls a submarine cable within the vicinity of the proposed protection zone.

(2) The ACMA must have regard to any comments provided by each person referred to in subclause 19A(1).

A similar item should be added as item 32A (in relation to variations or revocations of declarations), item 55A (in relation to applications for protection zone installation permits) and 68A (in relation to applications for non-protection zone installation permits).

c. Defence of “reasonable steps”

It is a defence to an offence of engaging in prohibited or restricted activities, if the person took all reasonable steps to avoid engaging in prohibited or restricted activities. Telstra submitted that this defence should be removed as cable owners bear the entire evidential burden in protecting cables of national and international significance. This could be given effect by amending clause 42 to delete sub-clause (c) as follows:

42 Defences to offences of engaging in prohibited or restricted activities

Clauses 40 and 41 do not apply if:

- (a) the conduct was necessary to save a life or ship or other structure; or
- (b) the conduct was necessary to prevent irreversible damage to the local or broader marine habitat.
- ~~(c) the defendant took all reasonable steps to avoid engaging in the conduct.~~

Note: The defendant bears an evidential burden in relation to the matters in this clause. See subsection 13.3(3) of the Criminal Code.

d. Scope of carrier indemnity

Telstra believes that carriers should not be required to indemnify ship owners for loss of an anchor or gear, if the ship owner or their representative acted recklessly or negligently. This could be given effect by amending clause 46 as follows:

46 Indemnity for loss of anchor etc.

(1) If:

(a) after all reasonable precautionary measures have been taken, an anchor, a net or any other fishing gear belonging to a ship is sacrificed in order to avoid damaging a submarine cable in a protection zone; and

(b) at the time the sacrifice is made, no person on board the ship is engaging in conduct:

(i) that is prohibited in the protection zone; or

(ii) that contravenes a restriction imposed on an activity in the protection zone; or

(iii) that is negligent or reckless and contributes to the sacrifice of the anchor, net or other fishing gear;

the owner of the ship is entitled to be indemnified for that loss by the carrier responsible for the submarine cable.