Australian Government

Department of Communications

Ms Christine McDonald
Secretary
Standing Committee on Environment and Communications
Legislation Committee
Email: ec.sen@aph.gov.au

Dear Ms McDonald

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

Thank you for your letter dated 3 March 2014 to the Secretary of the Department of Communications providing questions on notice in relation to the Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013. The Secretary has asked me to respond on his behalf.

Please find enclosed the Department's responses to Questions 1 and 2.

Questions 3 to 7 are better addressed by the Attorney-General's Department, which will provide a separate response to you.

Yours sincerely

Ian Robinson
Deputy Secretary, Telecommunications

14 March 2014

cc. Attorney-General's Department

Answers to written questions taken on notice
Senate Standing Committee on Environment and Communications

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

(1) In its submission (attached), Telstra has suggested that additional drafting changes be made to Schedule 3A of the *Telecommunications Act 1997* (Cth) in relation to the submarine cables protection regime. In particular Telstra has suggested that:

- **When declaring new 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 protection zone (Telstra, *Submission 3*, p. 7).**

  The existing and proposed provisions in Schedule 3A to the *Telecommunications Act 1997* provide for extensive consultation on proposed protection zone declarations. Proposed subclause 17(2) of Schedule 3A requires the Australian Communications and Media Authority (ACMA) to publish the proposal to declare a protection zone and invite public submissions. Existing paragraph 20(b) of Schedule 3A requires the ACMA to have regard to public submissions in deciding whether to declare a protection zone. As a protection zone is a legislative instrument, the ACMA must publicly consult on proposed declarations. Industry intentions to install new submarine cables can be raised with the ACMA during these consultation processes. If such intentions were raised with the ACMA, it would be able to consider them.

- **The Protection Zone Advisory Committee processes 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 (Telstra, *Submission 3*, p. 8).**

  The existing provisions in Schedule 3A require the ACMA to consult with the public on proposals to declare, vary or revoke protection zones (proposed clauses 17 and 32). These processes provide all interested parties with an opportunity to comment on protection zone proposals.

  Under Schedule 3A, the ACMA is also required to refer a proposal to declare, vary or revoke a protection zone to a Protection Zone Advisory Committee (PZAC). In terms of the composition of the PZAC, the ACMA may appoint any person it considers represents the concerns of an interested authority, industry or group that is or is likely to be affected by the proposal (existing clause 49). For example, this could include submarine cable operators within the vicinity of the protection zone that is the subject of the proposal. Given its responsibilities as the industry specific regulator, the ACMA would need to consider the views of stakeholders, including submarine cable operators, on the merits of a protection zone.

  Telstra has also suggested that a similar consultation requirement should also be included in relation to applications for submarine cable installation permits.

Proposed paragraphs 55A(1)(b) and 70(1)(b) provide that before making a decision on an application for an installation permit, the ACMA must consult any other person it considers relevant. That is, the ACMA can consult submarine cable owners and operators during the permit application process. Given their interests and its responsibilities, it is envisaged that the ACMA would consult operators of cables within the vicinity.

- **The defence to an offence of engaging in prohibited or restricted activity if the person took all reasonable steps to avoid engaging in the prohibited or restricted activity be removed (Telstra, *Submission 3*, p. 8).**

  In its submission, Telstra notes that this defence should be removed from existing clause 42 as submarine cable owners bear the entire evidential burden in protecting cables of national and international significance. The core object of Schedule 3A is to better protect submarine cables, particularly by discouraging people from engaging in conduct in protection zones that could damage cables. To enhance the effectiveness of the regime, there is a shift in the evidentiary burden of proof from the prosecution to the defendant. That is, there is an onus on the defendant to prove they did not engage in the conduct alleged. However, in recognition of this reversal of the burden of proof, the significant penalties that apply under Schedule 3A and the unpredictable nature of activities and conditions in a maritime environment, paragraph 42(c) was included as a defence – namely that the person took all reasonable steps to avoid engaging in the prohibited or restricted activities. Parliament has previously accepted that paragraph 42(c) was an appropriate defence when it passed the Bill which became Act No. 104 of 2005 (being the Act which inserted Schedule 3A).

- **Carriers should not be required to indemnify ship owners for a loss of an anchor or gear if the ship owner or their representative acted recklessly or negligently (Telstra, *Submission 3*, pp. 8–9).**

  This requirement is set out in existing clause 46 of Schedule 3A. The clause is based on Article 115 of the United Nations Convention on the Law of the Sea (UNCLOS).

  UNCLOS is the international agreement that establishes the rights and duties of nations in relation to the seas and oceans. Australian ratified UNCLOS on 5 October 1994. Article 115 states:

  > *Every State shall adopt the laws and regulations necessary to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.*

(2) Telstra also suggested that a Commonwealth study into further compliance monitoring be undertaking to consider the expanded use of the Automatic Identification System (AIS) and greater access to Vessel Monitoring Systems (VMS) (Telstra, *Submission 3*, p. 5).

What is the Department's response to this suggestion?

The Australian Government's work in relation to submarine cable protection is progressed collaboratively by a number of Government agencies in close consultation with industry. The Attorney-General's Department has whole-of-government policy oversight and coordination responsibility for the security and resilience of Australia's submarine cables. The Department of Communications has responsibility for the *Telecommunications Act 1997* (including Schedule 3A) and broad policy responsibility for critical communications infrastructure resilience (that includes submarine cables).

The issue of active compliance monitoring is receiving ongoing consideration and continued engagement with industry.

The Attorney-General's Department and the Department of Communications are continuing to work together to monitor the issue of active compliance monitoring, including the expanded use of AIS and VMS, through the Communications Sector Group of the Trusted Information Sharing Network for Critical Infrastructure Resilience.

Both Departments will also work with the Communications Sector Group to promote education and raise awareness about submarine cable protection zones and the associated prohibited activities and penalties under Schedule 3A of the *Telecommunications Act 1997*.