

Chapter 2

Key issues

2.1 The committee received three submissions from submarine cable operators and installers in addition to a joint submission from the Department of Communications and the Attorney-General's Department.

2.2 All submarine cable operators and installers were supportive of the bill.

2.3 SubPartners, an Australian-owned company involved in the delivery of submarine cables, agreed with the policy rationale for simplifying the permit process.¹ In particular, it supported the replacement of separate 'protection zone' and 'non-protection zone' permits with one permit that covers both activities and extending the coverage of the scheme to domestic submarine cables.²

2.4 A joint submission on behalf of Southern Cross Cables, Telstra, SingTel Optus, Australian Japan Cable and Basslink (the Australian submarine cable operators) also supported the proposed legislation.³ The organisations were pleased that:

...the proposed amendments are consistent with the aims of the industry to continue to provide security and protection over Australia's submarine cables which are part of the nation's critical infrastructure.⁴

2.5 In a separate submission from Telstra, the telecommunications company indicated that the amendments proposed to the submarine cable protection regime 'provide sufficient reporting and oversight of the protection of submarine cable telecommunications infrastructure'.⁵ Telstra also suggested drafting changes to improve the bill which are discussed below.

Suggested drafting changes

2.6 Telstra recommended four drafting changes to Schedule 3A of the Telecommunications Act.

Declaration of new protection zones

2.7 Telstra suggested an amendment to new clause 20 so that when declaring new protection zones, the ACMA should be required to canvass industry intentions to install new submarine cables and have regard to the likelihood that those future cables

1 SubPartners, *Submission 4*, p. 1.

2 SubPartners, *Submission 4*, p. 1.

3 Southern Cross Cables, Telstra, SingTel Optus, Australia Japan Cable and Basslink (Australian submarine cable operators), *Submission 2*, p. 2.

4 Australian submarine cable operators, *Submission 2*, p. 2.

5 Telstra, *Submission 3*, p. 4.

will be laid in the same zone. Telstra suggested that new paragraph 20(1)(h) and subclause 20(2) be inserted in clause 20:

- paragraph 20(1)(h) –
(h) the likelihood that additional submarine cables will be installed in the area near the proposed protection zone; and
- subclause 20(2) –
(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).⁶

2.8 Telstra noted that these additions would also need to be reflected in clause 34 of Schedule 3A relating to the revocation or variation of protection zones.⁷

2.9 In response to this suggestion, the Department of Communications (the department) commented that the existing, and proposed, provisions in Schedule 3A provide for extensive consultation on proposed protection zone declarations: proposed subclause 17(2) requires the ACMA to publish the proposal to declare protection zones and invite public submissions; and existing paragraph 20(b) requires the ACMA to have regard to public submissions in deciding whether to declare a protection zone.

2.10 The department went on to state:

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.⁸

Protection Zone Advisory Committee

2.11 Telstra argued that the Protection Zone Advisory Committee (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.

2.12 Telstra suggested that a new clause 19A be inserted into Schedule 3A:

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.

6 Telstra, *Submission 3*, p. 7.

7 Telstra, *Submission 3*, p. 7.

8 Department of Communications, *Answer to question on notice*, No. 1.

(2) The ACMA must have regard to any comments provided by each person referred to in subclause 19A(1).⁹

2.13 Telstra noted that similar items would need to be added to clause 32A in relation to variations or revocations of declarations, clause 55A in relation to applications for protection zone installation permits, and clause 68A in relation to applications for non-protection zone installation permits.¹⁰

2.14 In response, the department noted that 'the existing provisions in Schedule 3A require the ACMA to consult with the public on proposals to declare, vary or revoke protection zones' thus providing all interested parties with an opportunity to comment on protection zone proposals. It also noted that the ACMA must refer a proposal to declare, vary or revoke protection zones to the PZAC. Under existing clause 49, 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 to the PZAC. The department concluded that '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'.¹¹

2.15 In relation to Telstra's suggestion that similar items be included in clause 55A in relation to applications for protection zone installation permits, the department pointed to proposed paragraphs 55A(1)(b) and 70(1)(b). The department stated that these proposed paragraphs provide that before making a decision on an application for an installation permit, the ACMA must consult any other person it considers relevant which can include owners and operators. The department concluded 'given their interests and its responsibilities, it is envisaged that the ACMA would consult operators of cables within the vicinity'.¹²

Defence of 'reasonable steps'

2.16 Under clauses 40 and 41 of Schedule 3A, a person may face imprisonment or a financial penalty if they engage in prohibited or restricted activities in relation to submarine cables in a protection zone. Certain defences to these offences are allowed under clause 42, including paragraph 42(c) that a 'defendant took all reasonable steps to avoid engaging in the conduct'.¹³

2.17 Telstra submitted that 'this defence should be removed as cable owners bear the entire evidential burden in protecting cables of national and international significance'.¹⁴

9 Telstra, *Submission 3*, p. 8.

10 Telstra, *Submission 3*, p. 8.

11 Department of Communications, *Answer to question on notice*, No. 1.

12 Department of Communications, *Answer to question on notice*, No. 1.

13 Item 42(c), Schedule 3A, *Telecommunications Act 1997*.

14 Telstra, *Submission 3*, p. 8.

2.18 In responding, the department noted that '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'. The shift in the evidentiary burden of proof from the prosecution to the defendant will enhance the effectiveness of the protection regime. The department went on to note that in recognition of this shift:

...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.¹⁵

Scope of carrier indemnity

2.19 Telstra suggested 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.¹⁶ Accordingly, Telstra recommended that clause 46 of Schedule 3A be amended by inserting new subparagraph 46(1)(b)(iii).¹⁷

2.20 The department noted that clause 46 is based on Article 115 of the UNCLOS which states that:

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.¹⁸

Compliance monitoring

2.21 A further issue raised by the Australian submarine cable operators was the compliance monitoring regime. The operators noted that the ACMA review made a recommendation in relation to compliance monitoring. The operators commented that they believed 'it is essential that active compliance monitoring be undertaken in a cost effective and practical manner to ensure the security of cable infrastructure'.¹⁹

2.22 The ACMA review recommended (Recommendation 1) that:

The Minister consult with the Attorney-General about the conduct and funding for a study to determine whether active compliance monitoring in

15 Department of Communications, *Answer to question on notice*, No. 1.

16 Telstra, *Submission 3*, p. 8.

17 Telstra, *Submission 3*, p. 9.

18 Department of Communications, *Answer to question on notice*, No. 1.

19 Australian submarine cable operators, *Submission 2*, p. 3.

protection zones is necessary and if needed, how this monitoring could be provided.²⁰

2.23 The Australian submarine cable operators supported this recommendation for a review and further requested that:

- additional receiving stations for the Automatic Identification System (AIS) be placed at protection zone sites;²¹ and
- greater freedom of access be provided to Vessel Monitoring System (VMS) data held by the Australian Fisheries Management Authority.²²

2.24 Telstra reaffirmed its support for these initiatives in its individual submission noting that:

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.²³

2.25 The committee notes that in the Explanatory Memorandum to the bill, it is stated that Recommendation 1 'has been considered separately by the Government, and the Government has decided to rely on existing practices to ensure protection zones are monitored'.²⁴ In its response to the committee, the department added:

This 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 protection zones and the associated prohibited activities and penalties under Schedule 3A of the *Telecommunications Act 1997*.²⁵

20 ACMA, *Report on the operation of the submarine cable protection regime*, September 2010, p. 4.

21 The AIS is an automatic tracking system used on vessels of greater than 300 gross tons for identification and location purposes.

22 All fishing vessels are required to have working VMS equipment. Australian submarine cable operators, *Submission 2*, p. 3.

23 Telstra, *Submission 3*, p. 6.

24 Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013, *Explanatory Memorandum*, p. 2.

25 Department of Communications, *Answer to question on notice*, No. 2.

Interception of cable traffic

2.26 One of the principle issues for consideration by the committee was the vulnerability of cable traffic to interception. Telstra commented that it did not believe that its submarine cables are vulnerable to unlawful interception but noted 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'.²⁶

2.27 The joint submission from the Department of Communications and the Attorney-General's Department also commented on this issue while noting that interception of telecommunications services falls within the *Telecommunications (Interception and Access) Act 1979* (the TIA Act). The TIA Act protects the privacy of communications passing over telecommunications networks in Australia. The TIA Act criminalises covert access to the content of a communication other than by certain Government agencies acting with lawful authority granted by a warrant under the Act. The Attorney-General's Department added that non-state entities 'cannot lawfully intercept communications passing over telecommunications networks in Australia unless they are subject to a limited range of exemptions under the TIA Act, such as an employee of a carrier engaged in the operation or maintenance of a telecommunications system'.²⁷

2.28 The Act also creates a civil remedy regime to ensure that legal avenues are available to any person who is subject to unlawful interception of their communications. The protections extend to equipment, lines and facilities connected to the network.

2.29 The jurisdiction of the TIA Act's protections is limited to Australia, including the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands. Generally speaking, jurisdiction includes the waters of Australia's territorial sea. It was noted that the TIA Act does not extend to communications during their passage outside of Australia 'because such extended jurisdiction would generate conflict of laws and enforcing such obligations would not be practicable' and are properly matters for international, not domestic, law.²⁸

Committee comment

2.30 Australia's submarine cable protection regime is considered to be the world's-best practice and provides stringent security and protection for infrastructure that is vital to Australia's economic prosperity. The ACMA's statutory five-year review of the regime has ensured that stakeholders have had an opportunity to provide input in ensuring that the protection measures remain relevant, strong and effective.

26 Telstra, *Submission 3*, p. 1.

27 Attorney-General's Department, *Answer to question on notice*, No. 4.

28 Joint submission from the Department of Communications and the Attorney-General's Department, *Submission 1*, p. 6.

2.31 The committee is satisfied that the bill would improve consistency between the protection regime and UNCLOS. The committee also supports the bill in providing a clearer and more streamlined consultation process on installation permit applications and enabling domestic submarine cables to be protected by regulation.

2.32 The committee acknowledges that all submitters to the inquiry, including the owners and operators of submarine cables, have fully supported the bill.

2.33 In relation to the suggested drafting amendments proposed by Telstra, the committee is satisfied with the Department of Communications' response and that the issues raised by Telstra are adequately addressed in existing or proposed clauses of Schedule 3A.

2.34 The committee recommends that the bill be passed.

Recommendation 1

2.35 The committee recommends that the bill be passed.

Senator John Williams

Chair

