



## Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Bill 2005

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## **Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Bill 2005**

**Date Introduced:** 23 June 2005

**House:** House of Representatives

**Portfolio:** Communications, Information Technology and the Arts

**Commencement:** Sections 1 to 3 and Schedule 2 commence on the day the Act receives Royal Assent. Part 1 of Schedule 1 commences 28 days after the day the Act receives Royal Assent. Part 2 of Schedule 1 will not commence as the changes were made redundant by the commencement of section 6 of the *Australian Communications and Media Authority Act 2005* on 1 July 2005.

### **Purpose**

The Bill amends the *Submarine Cables and Pipelines Protection Act 1963* and the *Telecommunications Act 1997*, by inserting a whole new set of legislative provisions, aiming to protect submarine cables.

The proposed amendments will:

- Establish protection zones over cables of national significance;
- Prohibit or restrict certain activities within those protection zones;
- Provide criminal penalties for persons engaged in those prohibited and restricted activities;
- Grant responsibility to the Australian Communications and Media Authority (ACMA)<sup>1</sup> for the authorisation and regulation process, and for the installation of submarine cables; and
- Establish a carrier-based compensation regime that does not offend Constitutional provisions regarding acquisition of property on just terms.<sup>2</sup>

### **Background**

#### **Basis of policy commitment**

The Hon. Warren Entsch, MP, Parliamentary Secretary to the Minister for Industry, Tourism and Resources, introduced the Bill to the House of Representatives, and commented that the Bill was a response to the recommendations and several incidents of damage to important submarine cables in recent years:

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The protection regime for telecommunications submarine cables established by this bill provides a comprehensive and transparent process for the protection of cables of national significance. It will significantly reduce the risk of damage to the cables through the high penalty provisions. It will provide benefits to the fishing industry and other users of the sea and seabed by clarifying the responsibilities of both carriers and users, and by encouraging co-location of telecommunications facilities.<sup>3</sup>

The National Bandwidth Inquiry<sup>4</sup> examined Australia's regulatory framework for submarine cables and made the following recommendations:

- To strengthen the planning and protection regime of submarine cables;
- To authorise the explicit installation of submarine cables;
- To provide increased penalties for damage to cables; and
- To develop any new provisions in consultation with other stakeholders including fishing, shipping and other maritime agencies, environmental and relevant State and Territory agencies.<sup>5</sup>

### **Submarine Cables**

Clause 3 of the Bill, defines submarine cables to be part of a line link that lies beneath Australian waters, laid for the purpose of connecting Australia with countries overseas.<sup>6</sup> Line links are physical mediums such as wire, optical fibre etc. that serve as a continuous artificial guide to carry communications by electromagnetic energy.<sup>7</sup>

Ninety-five percent of international telecommunications traffic to and from Australia is routed via submarine cables.<sup>8</sup> Submarine cables carry mostly voice and in some instances, data traffic. Reliance on submarine cables for international communications is likely to increase over the next five years.<sup>9</sup>

The cables are vulnerable to damage. Fishing activities, particularly certain procedures involving trawling or dredging equipment, are most likely to damage submarine cables in place, although anchoring, mining and other seabed activities could also cause damage.<sup>10</sup> Note that more than eight percent of repairs to submarine cables occur at depth of less than 1000 metres, and are due to external factors relating to faults intrinsic to the cable itself.<sup>11</sup> Nonetheless, repair and replacement costs, and the effects of disruption to telecommunications, outweigh the inconvenience to fishing or commercial shipping operators in restricting fishing or anchoring in cable and pipeline protection areas.<sup>12</sup>

### **Enforcement Measures**

The enforcement of the provisions of the Bill will be the responsibility of the Australian Federal Police.<sup>13</sup> In contrast, New Zealand has specified enforcement and cable protection officers that are drawn from the ranks of their police and navy.<sup>14</sup> Additionally, the New Zealand scheme completely prohibits all activities such as commercial fishing in a

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protection zone whereas the Australian regime restricts activities in order to balance protection interests with the activities of the other commercial users of the sea.

### **ALP policy position**

In 2001, the ALP Leader Kim Beazley endorsed the National Bandwidth Inquiry's recommendations.<sup>15</sup>

As mentioned above, the Bill provides for an authorisation and regulation process for the installation of submarine cables. This measure would be of benefit to cable owners, both new and existing. Labour Shadow Minister for Communications, Stephen Smith outlined in 1999, that new carriers have to pay large upfront fees to use the infrastructure.<sup>16</sup> Additionally, Mr. Smith noted that:

Encouraging investment in international bandwidth capacity is an important step in ensuring Australia's success in the age of information... It will contribute towards a more robust and internationally competitive communications infrastructure.<sup>17</sup>

## **Main Provisions**

### Schedule 1 – Amendments

#### ***Amendment of the Submarine Cables and Pipelines Protection Act 1963***

**Item 1** repeals and replaces subsection 5(1) of the *Submarine Cables and Pipeline Protection Act 1963* with the effect that that Act will not apply to submarine cables in protection zones installed under the authority of this Bill. Other submarine cables of less national significance will still be governed by the 1963 Act.

#### ***Amendment of the Telecommunications Act 1997***

**Item 2** inserts **new Part 24A** into the *Telecommunications Act 1997*, which in turn provides for the **new Schedule 3A** to come into effect.

### **Schedule 3A – Protection of Submarine Cables**

#### **i) Declaration of protection zones**

**Clause 4** allows the ACMA<sup>18</sup> to declare a protection zone in relation to one or more submarine cables in Australian waters. The term Australian waters is defined as meaning waters of the 'territorial sea'; waters of the 'exclusive economic zone' and sea above that part of the 'continental shelf' of Australia that is beyond the limits of the exclusive economic zone.

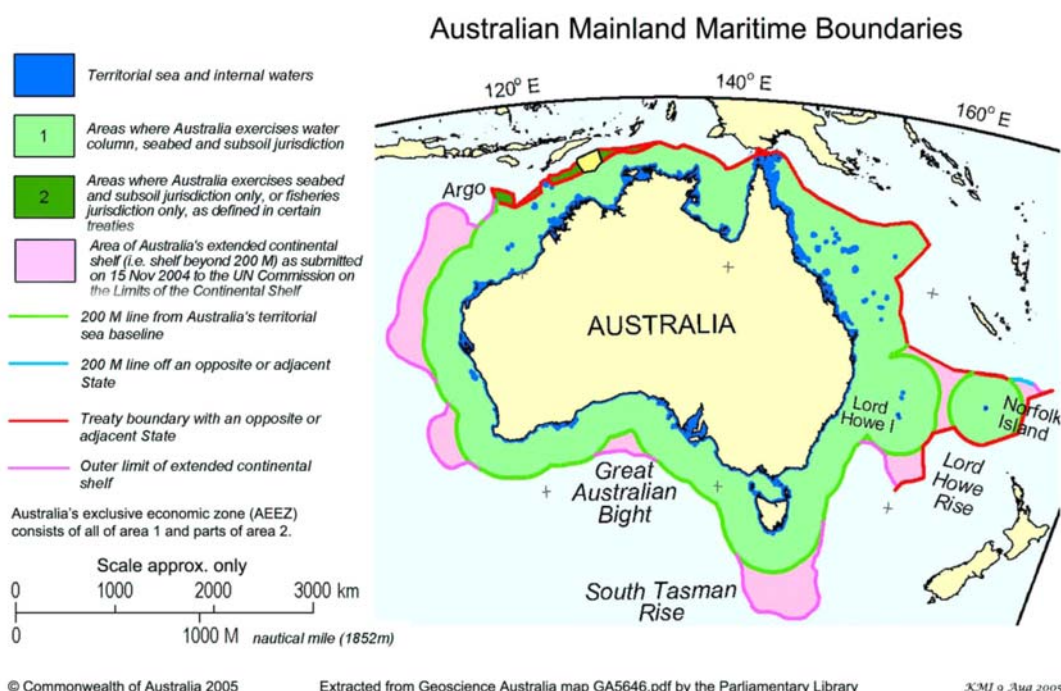
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Clause 4 provides that a declaration is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. It will therefore be required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament within six sitting days, and be subject to Parliamentary disallowance. It would also be subject to judicial review under section 39B of the *Judiciary Act 1903* by the Federal Court or High Court.

The ‘territorial waters’ of Australia extend 12 nautical miles from the territorial sea baseline.<sup>19</sup> The ‘territorial waters’ of Australia will include the coastal waters of a State or Territory. Coastal waters are generally the first three nautical miles of the territorial sea adjacent to each State and Territory.<sup>20</sup> Note that Commonwealth has sovereignty and title at international law over ‘Australian waters’. Under domestic law the States have jurisdiction over the ‘coastal waters’.<sup>21</sup> The ‘exclusive economic zone’ of Australia extends 200 nautical miles from the territorial sea baseline.<sup>22</sup> The ‘continental shelf’ is defined to mean the natural prolongation of a coastal state’s land territory to the outer edge of the continental margin, or a distance of 200 nautical miles from the territorial sea baseline, whichever is the further.<sup>23</sup>



**Clause 5** allows the declaration of a protection zone at the request of a person or on the ACMA’s own initiative. For example, carriers can initiate the declaration process.

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Under **Clause 7** ACMA develops a protection zone proposal in response to a request from a person. If subsequently, ACMA decides not to declare a protection zone, then ACMA must notify the person in writing providing the reasons for its decision. The *Explanatory Memorandum* comments that this decision may be subject to judicial review however, it is not reviewable on its merits by the AAT.<sup>24</sup>

If ACMA develops a protection zone proposal and then, decides to declare a protection zone that is different from the request, ACMA must provide the person with a copy of the declaration.

#### ii) Prohibited Activities within a Protection Zone

**Clause 10** prohibits activities that are likely to result in a physical connection between a ship or other object and the sea bed, potentially causing serious damage to a cable. These activities include fishing using equipment such as nets, trawl gear, traps or dredges. Trawl gear is towed behind a vessel and some vessels pull heavy equipment across the sea bottom, which can cause damage to cables.<sup>25</sup> Traps are stationary structures, usually fixed to the bottom in shallow water with anchors or stakes.<sup>26</sup> Dredges are of various kinds.<sup>27</sup> An example is fishing dredges which are dragged across the bottom and used to collect clams and scallops in a rigid frame or mesh bag.<sup>28</sup>

Additionally, towing, operating or suspending items (such as net, line, rope, chains) from a ship in a protection zone are also included in the list of prohibited activities. The clause also prohibits anchoring a ship; mining activities and the use of mining techniques; sand mining; and exploiting or exploring for resources for instance exploiting and exploring for petroleum.

Note that subparagraph 10(4)(g) enables the ACMA to prohibit activities dangerous to submarine cables in the future.

#### iii) Restricted Activities within a Protection Zone

The focus of **clause 11** is on activities that are less likely to result in physical contact between a ship or other object and the seabed.<sup>29</sup> Nonetheless, if contact does occur, the result is physical damage to a cable.<sup>30</sup> Hence, the activities in this clause are restricted but not prohibited. Restricted activities include types of fishing that use equipment, designed to lie above the seabed. This includes fishing or towing, operating or suspending from a ship, using equipment such as nets that are above the seabed at all times. Additionally, fishing using a line from the ship or the shore also falls within the scope of a restricted activity.<sup>31</sup>

Restrictions may also be placed on the installation, removal or maintenance of electricity cables, oil or gas pipelines and any like cables. Additionally, the ACMA may also impose restrictions on the construction, maintenance and removal of installations for the use of ships such as a wharf, or of a navigational aid such as a buoy.<sup>32</sup>

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Note that subparagraph 11(3)(g) enables the ACMA to prohibit activities dangerous to submarine cables in the future.

iv) Prerequisites and procedures for the development of a protection zone

**Clause 15** specifies that before the ACMA declares a protection zone it must develop a proposal for the declaration of the zone. Subclause (3) provides that a proposal is not a legislative instrument.

**Clause 16** provides that the ACMA must refer any proposal to an advisory committee.

According to **Clause 49** the composition of an advisory committee is to be up to 12 members. The appointees are to include representatives of the Commonwealth, interested State or the Northern Territory, interested Commonwealth, State or Territory authorities or instrumentalities, interested industries or interest groups. Subclause (3) defines ‘interested’ as having concerns or interests that are affected by the proposal, that the advisory committee is to consider or those likely to be affected should the protection zone be declared, varied or revoked.

**Clause 17** outlines that the ACMA must invite public submissions about the proposal. Additionally, the proposal is to be published in the *Gazette*; on the ACMA website; and in a newspaper with general circulation in each State and Territory, and in any affected external Territory.

**Clause 18** notes that a protection zone cannot be declared by the ACMA unless it is of ‘national significance’. The *Explanatory Memorandum* mentions that the purpose behind this criterion is to minimise the effect on other sea users whilst protecting critical infrastructure.<sup>33</sup> Additionally, the *Explanatory Memorandum* explains that some cables are more important than others in terms of linking Australia with global communications systems, for instance, the Australia-Japan cable which links Sydney with Japan and then the US.<sup>34</sup>

**Clause 20** provides a list of factors the ACMA must consider in order to make a decision for the declaration of a protection zone. Examples are recommendations by the advisory committee; submissions received from the public; public interest specifically in relation to efficient and cost-effective communications network.<sup>35</sup>

If the proposed protection zone relates to a submarine cable that is not installed, matters to consider are ‘impact on the environment’; any relevant technical and economic aspect; economic and social benefits; and whether the submarine cable is to be co-located with other submarine cables. Additionally, subclause 20(h) equips the ACMA with a discretionary power by allowing the body to consider any other factors that may be relevant to the declaration of a protection zone.

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With respect to environmental factors, **clause 21** provides a list of environment and heritage matters to consider for determining whether the installation of a submarine cable, would have an 'impact on the environment'. Additionally, **clause 19** provides that a protection zone is not to be declared, unless the ACMA consults with the Environment Secretary.

v) Variation or revocation of a protection zone

**Clause 23** provides that ACMA may vary or revoke a protection zone by legislative instrument. The *Explanatory Memorandum* provides that a revocation or variation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This means, if a previous made declaration is varied or revoked, it will be required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament and be subject to Parliamentary disallowance and possibly judicial review under section 39B of the *Judiciary Act 1903*.

**Clause 24** is similar to clause 5, as mentioned above, i.e. a variation or revocation of a declaration of a protection zone may be made on the ACMA's own initiative or at the request of any person.

**Clause 25** states that when a person requests the ACMA to vary or revoke a protection zone, the ACMA is to notify the carrier responsible for the submarine cable or cables in the protection zone, as soon as practicable.

**Clause 27** mentions that in response to a request by a person, any decision that the ACMA makes in relation to variation or declaration of a protection zone, the ACMA must notify the person in writing providing the reasons for the decision.

**Clauses 30–32** are similar to clauses 15-17 as mentioned above. For variation or revocation of a protection zone, the ACMA is required beforehand to develop a proposal; refer the proposal to the advisory committee; and to publish the proposal in the proposed forum, as outlined above.

**Clause 34** provides that in varying or revoking a protection zone, the ACMA must have regard to recommendations of the Advisory Committee; submissions from the public; legitimate commercial interests of the owner of the submarine cable in the protection zone; and if the carrier is not the owner of the cable, then that specific carrier responsible for the cable. Note that the ACMA may consider any other relevant matter.

Similar to clause 19, as mentioned above, **clause 33** provides that the variation or revocation of protection of a zone is not to be declared, unless the ACMA consults with the Environment Secretary.

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vi) Offences

**‘Division 4 – Offences in relation to a protection zone’** in proposed Schedule 3A contains the main offence provisions of the Bill. **Subdivision A** creates substantial criminal penalties for intentionally (**clause 36**) or negligently (**clause 37**) damaging a submarine cable in a protection zone. Strict liability (as defined by section 6.1 of the Criminal Code) attaches to the location of the cable in a protection zone. The penalty for damaging a cable is up to 10 years imprisonment, or 600 penalty units, or both. The penalty applicable for negligently damaging a cable is up to 3 years imprisonment, or 180 penalty units, or both. The master or owner of a ship who lets the ship be used to damage a cable and is ‘reckless to that fact’ could be liable to a penalty of up to 10 years imprisonment, or 600 penalty unit, or both (**clause 39**).

**Clause 38** creates five defences, including that of necessity to save a life or a ship (a), prevent pollution (b), taking of all reasonable steps to avoid damage (c), defendant is the owner (d) or agent (e) of the cable.

**Subdivision B clause 40** creates the offence of engaging in prohibited or restricted activities in a protection zone if you are not the owner carrier with a permit. It carries a maximum penalty of imprisonment for up to 5 years, or 300 penalty units, or both. **Clause 41** creates an aggravated offence of engaging in the prescribed conduct with the ‘intention of making a commercial gain’, drawing a penalty of imprisonment for 7 years, or 420 penalty units or both. The lists of ‘prohibited’ and ‘restricted’ activities are set out in **clauses 10 and 11** of Part 2, Division 2, Subdivision A. The master or owner of a ship who lets the ship be used to engage in prohibited or restricted conduct and is ‘reckless to that fact’ could be subject to a penalty of 5 or 7 year imprisonment, or 420 or 600 penalty units, or both, depending on the intent to make a commercial gain (**clause 44**).

**Clause 42** creates three defences in the same terms as clause 38, (a)-(c) above.

vii) Compensation

**Schedule 1 clauses 45, 46, 87 and 88** in the proposed Schedule 3A aim to clarify that carriers’ bear responsibility for any financial loss suffered by a person because of the operation of this Act.

It is a clear premise of the Bill that carriers, rather than the Commonwealth, are liable to pay compensation for any damages incurred as a result of this scheme.<sup>36</sup> Several provisions were required in new Schedule 3A and the existing Schedule 3 to ensure the viability of section 591 in the primary Act, which the Government calls a ‘constitutional safety-net’. Paragraph 51(xxxi) of the Constitution requires any acquisition of property to be ‘on just terms’ which may be found by a court to be more than pure financial loss.

Section 591 of the *Telecommunications Act 1977* provides, in effect, that the Commonwealth may be liable to pay compensation to a person whose property is acquired

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through the operation of the Act, if that acquisition would otherwise contravene s51(xxxi) of the Constitution. It states:

591 Compensation—constitutional safety net

(1) If:

(a) apart from this section, the operation of this Act would result in the acquisition of property from a person otherwise than on just terms; and

(b) the acquisition would be invalid because of paragraph 51(xxxi) of the Constitution;

the Commonwealth is liable to pay compensation of a reasonable amount to the person in respect of the acquisition.

(2) If the Commonwealth and the person do not agree on the amount of the compensation, the person may institute proceedings in the Federal Court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Under existing clause 42 of Schedule 3 of the *Telecommunications Act 1977*, a person who 'suffers financial loss or damage' because of 'anything done by a carrier' is entitled to compensation. This clause has been the subject of consultation, according to the Explanatory Memorandum.<sup>37</sup> The *Explanatory Memorandum* posits that section 591 is designed to meet any gap between this financial loss compensation and just terms compensation, and therefore 'ensure the viability of the Act'.<sup>38</sup>

**Clause 45** deals with carrier responsibility for damages arising from a submarine cable in a protection zone. **Clause 46** provides an indemnity from the carrier for the loss of an anchor, or part of a ship lost whilst trying to avoid damaging a cable.

**Clause 87** deals with carrier responsibility for any financial loss or damage suffered by a person in relation to their property. **Clause 88** deals with compensation arising as the result of a carrier acquiring their property. This could arise from the installation of infrastructure by carriers with immunity from State and Territory planning laws, for example.

**Schedule 2 item 2** amends existing Schedule 3 of the *Telecommunications Act 1977* in terms mirroring clause 88 to provide for carrier liability for compensating a person whose property is acquired as a result of that Schedule (new **Part 3 clause 63**).

Requirements on carriers to communicate with the ACMA in relation to matters affecting the protection zone are set out in **clause 48** (notice if carrier decommissions cable), **clauses 79-83** (conditions applicable to the installation of cables); **clause 85** (breaching conditions of permit) and **clause 86(2)** (failing to comply with ACMA direction to remove an unlawfully installed cable).

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**Part 3** of proposed Schedule 3A deals with 'Permits to install submarine cables'. **Clause 51** provides that a carrier may apply to the ACMA to install a submarine cable in a protection zone in Australian waters. This process is 'streamlined' (**clause 50**) and set out in **clauses 52-63**. A permit lasts 18 months (**clause 59**).

**Clause 63** provides that holding a valid permit means the carrier is exempt from State and Territory planning laws with some exceptions such as laws which relate to the cultural heritage of Aboriginal or Torres Strait Islander persons (**paragraph 3**) or taxation (**paragraph 6**).

**Clause 64** provides that a carrier may apply to the ACMA to install a submarine cable in Australian waters (ie not a protection zone or coastal waters).<sup>39</sup> The ACMA must consult with the Environment Secretary before making a decision about a non-protection zone installation permit (**clause 70**), and must take into account certain matters set out in **clause 71** such as public interest requirements, mirroring **clause 20** above. Under **clause 72**, the ACMA must also have regard to environment and heritage considerations, which reflect those set out in **clause 21** above.

**Clause 84** makes it an offence to install a submarine cable without a permit in a protection zone, or in Australian waters, carrying a fine of 200 penalty units.

**Clause 85** makes it an offence to breach any conditions of the permit, carrying a fine of 100 penalty units.

**Clause 89** provides that the ACMA is to review the operation of proposed Schedule 3A and report to the Minister within 5 years after the Schedule commences. The report must then be tabled in Parliament.

Clause 1 of the existing Schedule 4 sets out certain decisions of the ACMA which may be reviewed by the Administrative Appeals Tribunal following a process of internal reconsideration by the ACMA. **Item 7** adds decisions made by the ACMA as a result of the new regime to this list.

**Part 2** of Schedule 1 of the Bill deals with amendments to the name of the agency (ie substituting ACMA for ACMA) which was not required as the *Australian Communications and Media Authority Act 2005* received Royal Assent on 1 April 2005 and therefore commenced before this Act.

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## Endnotes

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- 1 It should be noted that the former Australian Communication Authority (ACA) is now the Australian Communications and Media Authority (ACMA). The *ACMA Act 2005* was assented to on 1 April 2005, and its operative provisions commenced on 1 July 2005.
- 2 Department of Communications, Information Technology and the Arts (DCITA), 'Issues: Submarine telecommunications cables' available at: [http://www.dcita.gov.au/tel/carrier\\_powers\\_to\\_install\\_telecommunications\\_infrastructure/issues/submarine\\_telecommunications\\_cables](http://www.dcita.gov.au/tel/carrier_powers_to_install_telecommunications_infrastructure/issues/submarine_telecommunications_cables), accessed on 8 August 2005.
- 3 Warren Entsch MP, House of Representatives *Debates*, 23 June 2005, p. 10. See also *Explanatory Memorandum*, pp, 51–52 and Stephen Smith, Shadow Minister for Communications, 'Labor Welcomes Taxation Incentive for Investment in Telecommunications Capacity via Submarine Cables', *Media Statement*, 21 September 1999.
- 4 Australian Information Economy Advisory Council, *National Bandwidth Inquiry*, Report of the Australian Information Economy Advisory Council, Department of Communications, Information Technology and the Arts, Australia, 1999, p. 182.
- 5 *ibid.*, p. 175.
- 6 *Explanatory Memorandum* to the Telecommunications and Other Legislative Amendment (Protection of Submarine Cables and Other Measures) Bill 2005, pp 51–52.
- 7 *Telecommunications Act 1997*, s. 7 and s. 30, as cited in *Explanatory Memorandum*, *op. cit.*
- 8 Australian Information Economy Advisory Council, *op. cit.*, p. 174.
- 9 *ibid.*, p. 175.
- 10 *ibid.*, p. 179.
- 11 Williams D.O., 'An Oversimplified Overview of Undersea Cable Systems'. European Laboratory for particle Physics (CERN). Geneva, 1999, as cited in Australian Information Economy Advisory Council, *op. cit.*, p. 174.
- 12 Des Ryan, 'Submarine Cables and Pipelines Protection Bill 1995', *Bills Digest*, no. 143, Parliamentary Library, New Zealand, 1995.
- 13 Warren Entsch, *ibid.*, p. 3.
- 14 Des Ryan, *op. cit.*
- 15 Kim Beazley, 'Labor's Plan for Telstra and Telecommunications', *Media Statement*, 31 October 2001, p. 17.
- 16 Stephen Smith, *op. cit.*
- 17 *ibid.*
- 18 The Bill refers to the ACA not the ACMA. As noted in endnote 1 above, since the time of drafting, the ACA has changed its name.
- 19 *Explanatory Memorandum*, pp. 44–45.

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- 20 *ibid.*
- 21 Australian Information Economy Advisory Council, *op. cit.*, p. 176.
- 22 *Explanatory Memorandum*, pp. 44–45.
- 23 *ibid.*
- 24 *ibid.*, p. 56.
- 25 *ibid.*, p. 59.
- 26 *ibid.*
- 27 *ibid.*
- 28 *ibid.*
- 29 *ibid.*, p. 60.
- 30 *ibid.*
- 31 *ibid.*
- 32 *ibid.*
- 33 *ibid.*, p. 63.
- 34 *ibid.* For a map of Australian submarine cables refer to, Reach et al, ‘*Catch fish. Not cables*’, Reach, NSW, December 2001.
- 35 *ibid.*, p. 64.
- 36 *ibid.*, p. 36.
- 37 *ibid.*, p. 12.
- 38 *ibid.*, p. 7.
- 39 Refer to map on, p. 5.

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