Department of Communications
Attorney-General's Department
Joint Submission to the Senate Environment and Communications Legislation Committee

Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

The Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013 (the Bill) seeks to amend Schedule 3A to the *Telecommunications Act 1997* (the Act).

This joint submission by the Department of Communications and the Attorney-General's Department outlines the background to and the operation of the submarine cable protection regime, and the rationale of the provisions in the Bill.

Submarine cable protection regime

Submarine cables are a critical component of Australia's telecommunications infrastructure, linking us to the rest of the world and carrying over 99 per cent of our international voice and data traffic. Submarine cables are therefore vital to Australia's trade and investment, social and economic wellbeing, and defence and national security. Given our heavy dependence on submarine cables, the risks associated with cable damage are particularly serious. A strong, effective and contemporary submarine cable protection regime is therefore an essential component to ensuring a reliable, resilient and secure telecommunications network.

Schedule 3A to the Act was introduced in 2005 and sets out a regime for the protection of submarine cables that connect a place in Australia to places outside of Australia. The purpose of the regime is to minimise the risk of damage to submarine cables from human activity, particularly some kinds of fishing, anchoring of vessels and dredging.

Schedule 3A gives the industry regulator, the Australian Communications and Media Authority (ACMA), powers to establish protection zones around existing or planned submarine cables of national significance and regulate activities of vessels and persons within protection zones. Activities within protection zones likely to damage cables are prohibited or restricted. Schedule 3A also establishes an installation permit regime for international submarine cables that connect to Australia. The permit regime requires carriers to obtain a permit to install international submarine cables that land in Australia, so as to provide certainty in relation to people's rights in Australian waters and to manage cable congestion.

To date, the ACMA has declared three protection zones – the North and South Sydney Protection Zones and the Perth Protection Zone.

Global nature of submarine cables

Australia's submarine cable protection regime is considered best practice amongst industry and governments around the world. The submarine cable protection regime only applies in Australian waters. Given the global nature of submarine cables, they are also subject to relevant international law and the domestic laws of the countries in which they transit or land.

International law permits all States the freedom to lay submarine cables and pipelines on the bed of the high seas, and in the exclusive economic zone and continental shelf. Articles 113 to 115 of the United Nations Convention on the Law of the Sea (UNCLOS) establish

obligations on States Parties to adopt domestic laws and regulations for the protection of such submarine cables and pipelines. The effect of these provisions is to require a State to criminalise conduct which results in the wilful or negligent damage to a submarine cable or pipeline on the high seas, and places the responsibility of enforcement on the relevant flag state, or state of nationality, of the vessels and persons involved.

The domestic laws and regulations adopted by each State Party must:

- make breaking or injury of a submarine cable in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable, done wilfully or through culpable negligence by a ship flagged to that State or a person subject to the jurisdiction of that State, a punishable offence,
- make a person subject to that State's jurisdiction who, in laying or repairing a cable or pipeline, causes a break in or injury to another cable or pipeline, liable to bear the cost of any required repairs, and
- ensure that the owners of ships be indemnified by the owners of a cable or pipeline, if the owner of the ship can prove they have sacrificed an anchor or fishing gear in order to avoid breaking or injuring a submarine cable or pipeline.

The provisions in UNCLOS reflect the language of the Convention for the Protection of Submarine Telegraph Cables, an earlier treaty to which Australia is also a Party. In Australia, these obligations are given effect under the *Submarine Cables and Pipelines Protection Act 1963*.

Background to the Bill – and public consultation undertaken

In 2010 the ACMA undertook a statutory review of Schedule 3A. Based on feedback received from industry, the ACMA made several recommendations to improve the operation of the regime.

These recommendations form the basis of the amendments proposed in the Bill, along with other proposals that have been identified by the Government and stakeholders to further enhance the regime and ensure the protection afforded to cables by the regime is maintained.

Public consultation on the proposed amendments in the Bill was undertaken in March 2013. Industry stakeholders generally supported the amendments.

Overview of the Bill

The provisions in the Bill fall into five categories:

(a) Ensuring consistency with UNCLOS

The Bill would ensure consistency between the protection regime and UNCLOS. UNCLOS sets out coastal nations' rights and obligations in relation to the seas and oceans, including Australia's right to regulate foreign ships and persons beyond its territorial sea.[1] Some concerns have been expressed that the current regime may seek to regulate foreign nationals for certain actions in waters beyond Australia's territorial sea in a manner inconsistent with

[1] The territorial sea is measured from the low water mark of the coastline, known as the territorial sea baseline, out to 12 nautical miles.

international law. This has not raised any practical issues to date because the Act requires the ACMA to consider UNCLOS when exercising its powers. However, to the extent the regime may be used as a model by other jurisdictions, this carries the risk that other jurisdictions may replicate this model. The Bill would address this by modifying the regime's application, including criminal and civil enforcement provisions, in respect of foreign ships and foreign nationals in the waters beyond Australia's territorial sea.

(b) Providing a clearer consultation process on installation permit applications

As previously noted, submarine cables are a critical component of Australia's telecommunications infrastructure and therefore the security and integrity of this infrastructure is essential. The Bill proposes a number of amendments that aim to provide a clearer consultation process for submarine cable installation permits. In particular, the amendments establish a mechanism to identify and address potential security concerns relating to the installation and operation of this critical infrastructure.

The Commonwealth Attorney-General's portfolio, including the Australian Security Intelligence Organisation (ASIO), has significant expertise relevant to the protection of critical infrastructure. Schedule 3A of the Act does not currently provide a structured process for consideration of matters relevant to the Attorney-General's portfolio in relation to proposed submarine cable installations. To provide a more structured and transparent process for the consideration of these matters, including security matters, the Bill will require the ACMA to consult the Secretary of the Attorney-General's Department on installation permit applications.

As a result of such consultation, the Secretary of the Attorney-General's Department can give notice that no further consultation is required, or make a submission, or extend the consultation period by giving notice to the ACMA. If the Secretary of the Attorney-General's Department makes a submission, the ACMA would be required to consider the submission in deciding whether to issue a permit.

These amendments better enable potential security concerns relating to the installation of submarine telecommunications cables to be identified and addressed where possible, in consultation with the applicant, at an early stage prior to the construction of the infrastructure.

The Attorney-General's portfolio in rare circumstances may identify significant security risks which cannot be appropriately addressed through the consultation process or the potential imposition by the ACMA of security-related conditions on a proposed permit. In these circumstances, the Bill gives the Attorney-General the power, after consultation with the Prime Minister and the Minister for Communications, to direct the ACMA not to issue a permit. The Attorney-General can only give this direction on the consideration of security matters, not on consideration of other matters within the Attorney-General's portfolio responsibilities.

In exercising this power, the Attorney-General would need to form a view as to whether issuing the proposed permit would be prejudicial to 'security' as described in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). It is envisaged that this power would only be used in exceptional cases and that the vast majority of security concerns raised by an application would be dealt with during the consultation undertaken by the ACMA with the Secretary of the Attorney-General's Department during the application assessment processor through the imposition of relevant security-related permit conditions.

To support the proposed process, the Bill includes consequential amendments, including appropriate review rights. The proposed provisions are modelled on the carrier licence application process under the Act, particularly sections 56A and 58A, which operate effectively and are well known to industry.

Oversight of the Attorney-General's power

Ordinarily, a decision to grant a submarine cable installation permit and/or impose any conditions on a permit is a matter for the ACMA, as the original decision maker. In these circumstances, where an application is refused by the ACMA on non-security related grounds, it remains appropriate for the ACMA to review the merits of its own decisions, and for the decision to be subject to merit reviews by the Administrative Appeals Tribunal (AAT). The Bill makes provision for this under the Act.

However, where a permit application raises security issues, the ACMA would be relying on the advice of the Attorney-General's Department or complying with a direction from the Attorney-General. Given the ACMA's decisions in these circumstances would rely upon this security advice, it would not be practical for the ACMA to review the merits of the advice it is given. As such, a decision by the ACMA to refuse a permit on security grounds or to specify or vary a permit condition relating to security, should not be open to reconsideration by the ACMA or merits review under the Act.

In addition, security (in particular national security) forms a well-accepted category of exclusions of merits review under Commonwealth law, such as the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) and the ASIO Act.

However, merits review is not entirely excluded where the ACMA refuses to issue a permit on a security ground following direction by the Attorney-General. A security assessment by ASIO would form the basis of consideration by the Attorney-General whether to exercise his or her power to direct the ACMA to not grant a permit. That is, the Attorney-General would only exercise the power where an adverse or qualified security assessment is issued by ASIO in respect of the Attorney-General's power. An applicant who is the subject of an adverse or qualified security assessment would have a right to apply to the AAT for merits review of that assessment under Division 4 of Part IV of the ASIO Act.

As noted above, the proposed provisions are based on the existing carrier licence application process under the Act, particularly sections 56A and 58A. If the Bill is enacted, the proposed provisions will have the same administrative review rights as apply in respect of those existing (and analogous) sections of the Act.

(c) Enabling domestic submarine cables to be protected by regulation

The Bill would give the Governor-General power to specify in regulations that a domestic submarine cable – that is, cables that connect two places in Australia – or domestic submarine cable route, warrants protection. The ACMA would then have discretion to decide whether a protection zone should be declared around that cable or route. Carriers would also be able to install domestic submarine cables in protection zones by applying for a permit to do so. These are things not currently possible under the regime because it only applies to international submarine cables. In recognition that other users of the sea may be impacted by protection zone declarations, consultation would be required before any regulations were made and any new protection zones specified.

(d) Streamlining the installation permit process

This group of amendments is aimed at ensuring the permit process is administratively more efficient and provides industry with greater certainty with regard to permit decisions. The streamlining of the process would not impact on the protection of submarine cables and the requirement to obtain an installation permit for all international submarine cables that land in Australia remains in place. Rather, these amendments aim to remove unnecessary duplicative provisions and tighten application processing timeframes. Currently, Schedule 3A requires a carrier to obtain two types of permits where its cable will traverse a protection zone and non-protection zone – a protection zone permit and non-protection zone permit. In addition, the timeframe for processing a non-protection zone permit application – 180 days with the possibility of an extension of 90 days – is lengthy.

The Bill would amend Schedule 3A so that:

- carriers only need to apply for and obtain one type of permit to land a cable in Australia;
- the default timeframe for processing a non-protection zone permit application will be reduced from 180 days to 60 business days; and
- processes under the current regime that duplicate existing processes under the *Environment Protection and Biodiversity Act 1999* are removed.

The main focus of this group of amendments is reducing processing timeframes, but there is one amendment that would increase the processing timeframe for protection zone permits from 20 days to 25 business days. This is to accommodate the proposed requirement for the ACMA to consult the Secretary of the Attorney-General's Department on protection zone permit applications. Currently, there is no formal consultation requirement under Schedule 3A before the issue of protection zone installation permits.

(e) Otherwise enhancing the operation of Schedule 3A through administrative and technical amendments

Finally, the Bill would make several administrative and technical amendments to enhance the overall operation of the Bill. These include:

- expanding the list of authorities the ACMA must notify when it declares, varies or revokes a protection zone to include relevant authorities involved in sea monitoring, offshore law enforcement and management activities;
- permitting minor deviations to the routes of submarine cables;
- requiring permit applicants to notify the ACMA of any changes to their application;
- permitting the ACMA to publish a summary of a proposal to declare, vary or revoke a protection zone in the newspapers and the electronic *Commonwealth Gazette*, while ensuring the full proposal is published on its website;
- requiring the ACMA to provide reasons if it declares a protection zone that is different to the original request; and
  clarifying that prohibited or restricted activities in a protection zone do not include activities associated with maintenance or repair of a submarine cable.

Protections against unlawful interception

Schedule 3A's purpose is to minimise the risk of physical damage to submarine cables and the Bill aims to improve the operation of the Schedule. The interception of telecommunications services falls outside the scope of Schedule 3A and of the Bill.

The *Telecommunications (Interception and Access) Act 1979* (the TIA Act) protects the privacy of communications passing over telecommunications networks in Australia. The TIA criminalises covert access to the content of a communication other than by certain Government agencies acting with lawful authority granted by a warrant. The TIA 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.

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. This means that the TIA Act's protections include the point at which submarine cables land in Australia and a portion of the cable's undersea length. 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. Such issues are properly matters for international, not domestic, law.

The privacy protections created by the TIA Act comply with international law, including Article 12 of the Universal Declaration of Human Rights and Article 15 of the Council of Europe Convention on Cybercrime. Warrants and authorisations within the TIA Act, which always include consideration of proportionality, ensure access is never arbitrary or unlawful.

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) tabled its report into its *Inquiry into Potential Reform of National Security Legislation* on 24 June 2013.
The PJCIS made 43 recommendations, including six referring to privacy in the context of the lawful interception regime. Recommendation 18 of that report was that the TIA Act be comprehensively revised with clear protection for the privacy of communications and that the revision be undertaken in consultation with privacy advocates and practitioners.

On 12 December 2013, the Senate referred the issue of the comprehensive revision of the TIA Act, with regard to recommendations of the 2013 PJCIS Inquiry report and the Australian Law Reform Commission's 2009 report, *For your information: Australian privacy law and practice*, to the Senate Legal and Constitutional Affairs References Committee, for inquiry and report by 10 June 2014. Concerns relating to interception are presently best considered through the Senate Legal and Constitutional Affairs References Committee's *Inquiry into the Comprehensive Revision of Telecommunications (Interception and Access) Act 1979* rather than through the Bill. The Attorney-General's Department intends to provide a comprehensive submission to that Inquiry.

Conclusion

Australia is one of only a handful of nations that has a dedicated regime for the protection of international submarine cables. Australia's regime has been commended by both the International Cable Protection Committee[2] and the Asia-Pacific Economic Cooperation[3] as a global best practice regulatory example for the protection of submarine cables.

As drafted, the Bill will ensure that Australia's regime continues to be a best practice regime and the protection the regime affords to this vital infrastructure is maintained. The Bill does not go to, or impact on, legal frameworks in relation to telecommunications interception and access nor is it appropriate for it to do so.

[2] International Cable Protection Committee, 'Critical Infrastructure – Submarine Telecommunications Cables', <http://www.iscpc.org/information/Openly%20Published%20Members%20Area%20Items/Submarine_Cable_Network_Security_PDF.pdf>
International Cable Protection Committee, 'Australia's amendments to its pioneering cable protection legislation recognize the value of government partnership with the ICPC for protecting critical submarine cable infrastructure', media release, 18 November 2013, <http://www.iscpc.org/information/ICPC_News_Release_on_Australian_Legislation_2013.pdf>

[3] Detecon Asia-Pacific Ltd, *Economic Impact of Submarine Cable Disruptions* prepared for Asia-Pacific Economic Cooperation Policy Support Unit, Bangkok, 2012, p. 60, <http://publications.apec.org/publication-detail.php?pub_id=1382>