Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

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Law and Bills Digest Section

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Date introduced: 14 November 2013
House: House of Representatives
Portfolio: Communications
Commencement: Sections 1 to 3 commence on Royal Assent. Schedule 1 commences on the day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
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The Bills Digest at a glance

Australia is one of only a few nations with a dedicated regime for the protection of submarine cables. In 2005, the Howard Government established a regime for the protection of international submarine cables landing in Australia, in the form of Schedule 3A of the *Telecommunications Act 1997*.

In 2010, the Australian Communications and Media Authority (ACMA) undertook a statutory review of Schedule 3A and made six recommendations to improve the operation of the regime. This Bill responds to those recommendations by amending Schedule 3A of the *Telecommunications Act* to:

- ensure its consistency with the United Nations Convention on the Law of the Sea
- enable domestic submarine cables to be brought within the scope of the existing submarine cable regime
- provide a clearer consultative process for submarine cable installation permit applications
- streamline the submarine cable installation permit process and
- enhance the operation of Schedule 3A by ensuring the protection zone declaration, revocation and variation processes are more efficiently administered.

The Bill engages a number of significant human rights. That being the case, the Bills Digest contains a detailed explanation of each of those rights and the implications of that engagement.
Purpose of the Bill

The primary purpose of the Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013 (the Bill) is to amend Schedule 3A of the Telecommunications Act to enhance the operation of Australia’s submarine cable protection regime.1

The amendments to Schedule 3A do not capture international submarine cables that do not connect to a place in Australia. The amendments will, however, bring domestic submarine cables (cables that enter Australia’s territorial sea and connect places in Australia) within the existing submarine cable protection regime.

Structure of the Bill

The Bill has two Parts:

- Part 1 of the Bill contains the amendments to Schedule 3A of the Telecommunications Act as well as making consequential amendments to the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act)2 and the Australian Security Intelligence Organisation Act 1979 (ASIO Act)3 and
- Part 2 of the Bill contains application and transitional provisions.

Background

Submarine cables are a vital component of Australia’s telecommunications infrastructure, linking Australia to the global telecommunications network and the global digital economy. An estimated 99 per cent of the world’s international internet traffic is carried on submarine cables.4 As an island nation, Australia is particularly dependent on subsea cables, which carry the bulk of voice and data traffic in and out of the country.5 Figures concerning the dependency of the Australian finance sector on submarine cables indicate that non-cash payments worth approximately $220 billion are made each business day—the equivalent of 20 per cent of gross domestic product (GDP).6

Given that damage to submarine cables can have a major impact on the Australian economy, protection of the security of submarine cables is critical. Damage to subsea cables is mostly accidental, caused by fishing trawlers, anchors, mining and dredging. However, there are growing fears internationally of the risk of sabotage to cables. ‘There is a vulnerability, not just in times of war, but to terrorist attack.’7

Vulnerability of submarine cables

There are over 200 submarine cables buried in the ocean worldwide, connecting the global telecommunications network and the global digital economy.8 Behind the abstract virtual cloud of cyberspace is a very real physical infrastructure with some surprising vulnerabilities.9 Man-made causes account for the overwhelming majority of damage caused to cables,10 with 70 per cent of all cable faults caused by fishing and anchoring in depths of less than 200 metres.11 Natural disasters, such as the 2011 earthquake and tsunami in Japan, can also sever cables.12

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10. Explanatory Memorandum, op. cit., p. 1
However, while most subsea cable breakages are accidental, there is a risk of deliberate attack. During World War II, the British cut the German cables and the Royal Australian Navy cut Japanese telegram cables off Indochina.\textsuperscript{13} Today, terrorism poses a particular threat to the safety of submarine cables:

> There is no shortage of infrastructure that terrorists might attack, but fiber-optic cables hold a symbolic appeal, being the vehicle that delivers cyberspace to the masses worldwide – and also the conduit for global financial transactions.\textsuperscript{14}

In his second reading speech on the Bill, Minister for Communications, Malcolm Turnbull told the House of Representatives that the Government was working with domestic and international stakeholders to increase the resilience of submarine cables to disruption.\textsuperscript{15} The interruption caused by breakage of submarine cables can have enormous consequences. A recent APEC report on the Economic Impact of Submarine Cable Disruptions highlighted the risk to trade in goods and services, international financial markets, social welfare, political stability, and domestic security posed by submarine cable disruptions.\textsuperscript{16}

The physical placement of the cables is also an important issue. For instance, if too many cables are located in the same pathway and go to the same access points, a single-point-of-failure can arise. This was evidenced in December 2008 at a cable station off the coast of Alexandria, Egypt, where an anchor cut three of the four cables connecting Europe to the Middle East. Those three cables carried over 90 per cent of all internet traffic between Europe and the Middle East. India lost up to 80 per cent of its connectivity, while the Maldives lost 100 per cent.\textsuperscript{17}

In addition to the risk of cable breakage—both accidental and due to sabotage—concerns have also been raised about the vulnerability of fiber optic cables to tapping. Media reports in the United States of America (US) have detailed operations that allegedly included placing listening devices on the outside of subsea cable housing, allowing electronic copying of data.\textsuperscript{18}

\begin{footnotes}
\item[14] P Saffo, op. cit.
\item[16] APEC, op. cit., p. iii. See footnote 6.
\item[17] M Turnbull, op. cit., p. 284.
\end{footnotes}
Connecting Australia to the rest of the world

Submarine cable map

There are currently seven international submarine cables connecting to Australia. The main companies operating the cables are:

- Southern Cross Cable Ltd, which operates the Southern Cross Cable
- PIPE International, which operates PPC-1
- Telstra, which operates APNG-2 and Telstra Endeavour and
- Singtel and Reach, which operate the SEA-ME-WE 3 cable.

The organisation for Asia-Pacific Economic Co-operation (APEC) commented that:

> This high concentration in infrastructure and geography and the lack of alternative cables and routes constitutes a certain risk concerning loss of traffic and decline in connection speed and quality, as events such as earthquakes or storms could harm several cables at once.\(^{20}\)

APEC modelling indicates that a fault in all landing points in Australia would entail direct costs (for cable repair) of US$ 2.2 million and indirect costs of US$ 3,169 million, due to the loss of 100 per cent of international internet traffic.\(^{21}\)

The loss of internet connection in Australia would also cut off all internet connection in Papua New Guinea.

Mr Turnbull has also advised that further investment in cables includes:

- cables on the Perth to Singapore route by the Nextgen Group, SubPartners and Trident. The SubPartners proposal plans to have a connection through to Jakarta.\(^{22}\) The Trident cable will provide an underwater link to Perth via Onslow, as well as to Jakarta, Indonesia and Singapore\(^{23}\)

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20. APEC, op. cit., p. 17.
21. Ibid., p. 42.
• proposals by SubPartners and Hawaiki Pty Ltd to construct cables connecting Australia and the United States.
• a joint venture between Telstra, Vodafone NZ and Telecom NZ to build another cable between Australia and New Zealand.25

Australia’s regime to protect submarine cables

Australia is one of only a few nations with a dedicated regime for the protection of submarine cables. In 2005, the Howard Government established a regime for the protection of international submarine cables landing in Australia, in the form of Schedule 3A of the Telecommunications Act.

The regime gives the industry regulator, the Australian Communications and Media Authority (ACMA), the power to establish protection zones around international submarine cables of national significance.26 In protection zones, activities such as trawling, mining, certain types of fishing, anchoring of vessels and dredging are prohibited or restricted.27 The regime also establishes an installation permit system, requiring carriers seeking to install an international submarine cable that will land in Australia to apply for a permit.28 This system provides certainty regarding people’s rights in Australian waters, and manages cable congestion. Since the introduction of the regime, there have been no reported incidents of cable damage in Australian waters.29

In 2010, ACMA undertook a statutory review of Schedule 3A and made six recommendations to improve the operation of the regime.30 Those recommendations, together with other proposals identified by the Government and stakeholders, form the basis for the amendments in the Bill.

Australia’s regime has been praised by both the International Cable Protection Committee and APEC as a global best practice regulatory example for the protection of submarine cables.31 The amendments in this Bill seek to further enhance the regime.32

Australia is the first government member of the International Cable Protection Committee, a peak international body that brings together submarine cable owners and operators and national governments to discuss issues associated with submarine cables.

Protection zones

ACMA declared three Protection Zones in 2007: Northern Sydney, Southern Sydney and Perth. Within protection zones, it is an offence to damage a submarine cable, engage in prohibited activities, or contravene a restriction.33 Penalties include fines of up to $66,000 and/or ten years imprisonment for an individual, or up to $330,000 for a corporation.34

The Australian Strategic Policy Institute (ASPI) contends that with just three protection zones and what may be regarded as ‘unsatisfactory’ protection zone monitoring arrangements, there is ‘a significant hole’ in the protection of Australia’s physical cyber infrastructure.35 ASPI noted that in contrast, New Zealand ‘is far more

25. Ibid.
34. Ibid.
conscious of protecting’ such infrastructure, with ten cable protection zones providing more options to cable laying companies and reducing the risk of simultaneous breakages.6 In addition, protection officers and Maritime Police patrol New Zealand’s zones with ships and helicopters, sometimes operating 24 hours a day.

ASPI concluded:

The risk created by Australia’s dependency upon a few highly concentrated submarine cables jeopardises our cyber and communications resilience. We already have comprehensive legislation to help protect these cables, but by spreading them out and preventatively monitoring the protection zones, we would significantly lower the risk to Australia’s communication infrastructure. 37

**Australia’s territorial waters**

In order to understand the inherent difficulties of legislating to protect submarine cables, it is necessary to also understand the operation of the complex rules governing Australia’s territorial waters. The *Seas and Submerged Lands Act 1973*38 stipulates Australia’s sovereignty over sea, the airspace over sea, and the sea-bed and subsoil beneath the sea, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS).39

Under international law, coastal states may claim maritime zones extending from their coastlines and have certain rights and obligations over the ocean, seabed, subsoil and air space adjacent to their territory.40 The following maritime zones are relevant to the submarine cable regime.41

**Coastal waters**

Coastal waters are governed by Australian law. The states and the Northern Territory have primary jurisdiction over their coastal waters (up to three nautical miles from the coastline) and the land where submarine cables emerge from the sea. Schedule 3A of the *Telecommunications Act* provides carriers with immunity from certain state and territory laws when installing submarine cables within protection zones. However, submarine cable installation permits do not apply in coastal waters outside protection zones, and carriers may need to obtain certain permits under state and territory law. The Bill does not alter these arrangements.

**Territorial sea**

A coastal state exercises full sovereignty, subject only to the right of innocent passage by foreign ships, in its territorial sea. The territorial sea is measured from the low water mark of the coastline, known as the territorial sea baseline, out to 12 nautical miles.42

**Contiguous zone**

Australia may exercise control necessary to prevent and punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. The contiguous zone is measured from the territorial sea baseline out to 24 nautical miles.43

**Exclusive economic zone**

A coastal state has sovereign rights and jurisdiction with respect to certain activities in its Exclusive Economic Zone (EEZ). The EEZ extends from the limits of the territorial sea out to 200 nautical miles from the territorial sea baseline.44

**Continental shelf**

36. Ibid.
37. Ibid.
40. These rights and obligations are covered by UNCLOS.
42. Under section 3 of the *Sea and Submerged Lands Act*, the term *territorial sea* has the same meaning as in Articles 3 and 4 of UNCLOS.
43. Under section 3 of the *Sea and Submerged Lands Act*, the term *contiguous zone* has the same meaning as in Article 33 of UNCLOS.
44. Under section 3 of the *Sea and Submerged Lands Act*, the term *exclusive economic zone* has the same meaning as in Articles 55 and 57 of UNCLOS.
The continental shelf is the seabed and subsoil of the submarine area which forms a natural prolongation to a coastal state’s land territory. The continental shelf extends to 200 nautical miles, from the territorial sea baseline, and may extend up to 350 nautical miles. Coastal states have sovereign rights over natural resources in the continental shelf.

UNCLOS provides that states are entitled to lay submarine cables on the continental shelf. Australia may exercise jurisdiction over Australians and Australian-flagged ships anywhere in the world, and foreign nationals and ships in Australia’s territorial sea. However, Australia does not have jurisdiction to regulate foreign nationals or ships in the EEZ or on the continental shelf unless specifically provided for under UNCLOS or other international law. Australia can require foreign carriers to obtain a permit to install a cable that enters its territorial sea, but any conditions on the permit must be consistent with Australia’s rights and obligations under UNCLOS or other international law.

Committee consideration

**Senate Environment and Communications Committee**

The Bill has been referred to the Senate Environment and Communications Legislation Committee for inquiry and report by 31 March 2014.

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) reported on the contents of the Bill on 4 December 2013. The comments of the Scrutiny of Bills Committee are referred to in the Human Rights Implications section of this Bills Digest.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights considered that the Bill was unlikely to raise human rights concerns, noting that the statement of compatibility ‘adequately addresses the issues it raises and provides sufficient justifications for any proposed limitations’.

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45. Under section 3 of the Sea and Submerged Lands Act, the term *continental shelf* has the same meaning as in Paragraph 1 of Article 76 of UNCLOS.

46. Department of Communications, Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013, op. cit.

47. Details of the terms of reference, submissions to the Environment and Communications Committee and the final report, when published, are on the [inquiry homepage](#), accessed 11 December 2013.

The committee accepts that ensuring the protection of submarine cable infrastructure is a legitimate objective and considers that, in general, the Bill appropriately confines the powers that ACMA and the Minister may exercise.

The committee notes that the changes proposed by the Bill would expand the application of existing civil penalty provisions in the *Telecommunications Acts*. As our predecessor committee has noted, a penalty which is described as 'civil' under domestic law may nonetheless be classified as 'criminal' for the purposes of human rights law because of its purpose, character or severity. Given that these civil penalty provisions appear in a regulatory context, it is arguable that the penalties are not 'criminal' in nature. Although the penalties are substantial, it may be considered that they are not excessive in terms of a business and in view of the national interests that are being protected. 49

Human rights issues are discussed in further detail under the heading ‘Human rights implications’, below.

**Policy position of non-government parties**

**Australian Labor Party**

The Australian Labor Party (ALP) supports the Bill. 50 According to Jason Clare, ‘Labor developed the legislation while in government, and will support it in opposition’. 51

**Australian Greens**

Adam Bandt of the Australian Greens (the Greens) stated that although the Greens generally supported the principle behind the Bill, they would refer the Bill to a Senate committee for inquiry:

> We will do this for several reasons: first, to ensure that the results of the statutory review undertaken by ACMA five years after the 2005 legislation are adequate; second, to review the decisions taken by the government in addition to the outcomes of the review. 52

The Greens appear to have two main concerns. The first is whether the monitoring arrangements are satisfactory. Mr Bandt pointed to concerns raised by the Australian Strategic Policy Institute over effective protection and physical monitoring of critical infrastructure.

The Australian Federal Police (AFP) is responsible for the enforcement of prohibitions and restrictions in submarine protection zones. Investigations of offences are driven by a complaint-based process. In a submission to the ACMA review of the operation of the submarine cable regulation, the AFP said:

> ... the AFP’s responsibility for the enforcement of prohibitions and restrictions does not extend to the monitoring of the protection zones to prevent or supervise the safekeeping of the submarine cables in Australian maritime zones. The AFP is not physically equipped with the resources to monitor the protection of cables in Australian waters and relies on agencies such as the Australian Fisheries Management Authority and the Australian Maritime Safety Authority who have the surveillance capability to perform a monitoring function of the protection zone. 53

Mr Bandt commented that:

> AMSA, the Australian Maritime Safety Authority, and the FMA provide some surveillance, but these agencies, as well as the cable owners, indicated in the review process that monitoring arrangements were unsatisfactory. It is unclear whether these issues have been dealt with in the Bill. 54

The second concern relates to the potential surveillance of telecommunications via fibre optic cables on the seabed. Mr Bandt acknowledged the need to protect the integrity of Australia’s legislated privacy protections

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53. Australian Federal Police (AFP), *Submission to the Australian Communications and Media Authority, Review of the Operation of the Submarine Cable Regulation*, accessed 6 February 2014.
54. A Bandt, op. cit., p. 1688.
and the human right of Australian citizens to privacy and the rule of law standards. He raised concerns that the privacy of Australians’ telecommunications be protected from illegal and unsupervised surveillance:

Our cables also require protection from tapping, which could lead to indiscriminate and unlawful access to Australian telecommunications data and content. Are the mechanisms outlined in this Bill, and those already in place arising from the 2005 legislation, preventing this type of interference, and will they prevent this type of interference in the future? This is a question that we hope the Senate committee will be able to resolve.

Position of major interest groups

The review of the operation of Schedule 3A of the Telecommunications Act commenced in December 2009 when ACMA released the Submarine Cable Regulation Discussion Paper and sought comments from stakeholders. Eighteen submissions were received.

While Telstra Corporation submitted that the ‘underlying policy objectives [of Schedule 3A] are being met’ other comments indicated that improvements could be made. Some, but not all, of those comments are addressed in the Bill.

A number of themes emerged, including:

- current arrangements for measuring compliance with and enforcing submarine cable legislation require strengthening
- there is a need to investigate the possibility of new protection zones and
- changes need to be made to improve ACMA’s permit application processes.

Financial implications

The Explanatory Memorandum states that the amendments in the Bill are not expected to have any direct financial impact on Commonwealth revenue or expenditure.

Key issues and provisions

Consistency with international law of the sea

The Bill aims to ensure consistency between UNCLOS and Australia’s cable protection regime. UNCLOS governs the rights and obligations of nations in relation to the seas and oceans, including Australia’s right to regulate foreign ships and persons beyond its territorial sea. Australia ratified UNCLOS on 5 October 1994.

In its current form, Schedule 3A of the Telecommunications Act appears to enable the regulation of foreign nationals and vessels in the waters of the EEZ and continental shelf. Although this issue has not arisen in practice because ACMA is required to consider UNCLOS when it exercises its powers, there has been concern that the regime may seek to regulate foreign nationals for certain actions in waters of the EEZ or continental shelf in a manner that is inconsistent with international law. According to

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55. Ibid.
56. Ibid.
59. Telstra Corporation, Submission to the Australian Communications and Media Authority: Submarine cable regulation discussion paper, March 2010, p. 3. accessed 3 February 2014.
60. Ibid., p. 2.
61. B Worrall (Director IWCS), Submission to the Australian Communications and Media Authority: Submarine cable regulation discussion paper, accessed 6 February 2014.
63. Explanatory Memorandum, op. cit., p. 11.
Telstra Corporation, this perception may ‘encourage other nations to consider imposing similar regimes on Australian cable operators crossing non Australian EEZs’.  

The Bill addresses these concerns by modifying the regime’s application to foreign ships and nationals. **Item 41** of Part 1 of the Bill inserts **proposed clause 44A** into Schedule 3A of the *Telecommunications Act* so that it will not be an offence for foreign nationals and ships to engage, beyond Australia’s territorial sea, in an activity which would otherwise be prohibited under the Act, unless such regulation is consistent with UNCLOS.

Clauses 78–83 of Schedule 3A of the *Telecommunications Act* impose permit conditions on carriers including those who are foreign nationals installing submarine cables landing in Australia. Civil and criminal penalties could be incurred if breaches of the permit conditions were enforced. Under **proposed clause 83A** the Minister or a government agency would be required to obtain the Attorney-General’s consent before it could institute civil proceedings for injunctive relief or recovery of civil pecuniary penalties against a foreign carrier for breach of a permit condition where the breach occurs beyond the territorial sea. Under **proposed clauses 85(2) and (3)**, the Attorney-General’s permission must also be obtained before proceedings are brought against a foreign national for breaching a condition of a permit, if that breach involved an act or omission outside Australia and did not involve an Australian ship. In deciding whether to grant the relevant consent, the Attorney-General must have regard to Australia’s obligations under international law, including UNCLOS.

**Bringing domestic submarine cables under the regime**

Currently, domestic submarine cables are not allowed to land in protection zones. The Bill enables significant domestic submarine cables to be brought under and protected by the regime.

**Proposed subclause 4(1A) of Schedule 3A of the Telecommunications Act** stipulates that ACMA must not declare a protection zone in relation to one or more domestic submarine cables unless the cable(s) are specified in the regulations or the route(s) of the proposed cable(s) are specified in the regulations. If the cable or route has been specified in the regulations, **proposed subclause 18(2)** operates so that the cable is taken to be of national significance and allows ACMA to declare a protection zone around that cable or route.

Clause 51 of Schedule 3A of the *Telecommunications Act* allows a carrier to apply to ACMA to install a submarine cable in a protection zone. **Item 47** of Part 1 of the Bill repeals and replaces clause 51 of Schedule 3A to clarify the grounds on which an application may be made. The effect of **proposed paragraph 51(1)(a)** would be to allow carriers to lay domestic submarine cables in a protection zone. **Item 49** of Part 1 of the Bill inserts **proposed subclauses 52(2) and (3)** into Schedule 3A of the *Telecommunications Act* to clarify the content of the relevant application. Under **proposed clause 84A**, a person commits an offence if he or she installs a domestic submarine cable in a protection zone without having a permit to do so.

**Consultation process for permit applications**

The Bill introduces mechanisms to enable the consideration of matters including security, international law and native title that may affect submarine cable installations.

NTSCORP, which has statutory responsibilities under the *Native Title Act 1993* to protect the rights and interests of Aboriginal communities in NSW, emphasised that it is important that any proposal developed by

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67. Ibid.
68. Inserted by **item 73** in Part 1 of Schedule 1 of the Bill.
69. *Telecommunications Act*, sections 564 and 571, respectively.
70. Inserted by **item 79** in Part 1 of Schedule 1 of the Bill.
71. *Telecommunications Act*, proposed subclauses 83A(3) and 85(3).
72. Submarine cables of national significance are generally high capacity cables that link Australia to global communications systems. The drafting of existing Schedule 3A of the *Telecommunications Act* applies only to international submarine cables.
73. Examples of significant domestic submarine cables are those owned by Telstra and Basslink crossing the Bass Strait.
74. Inserted by **item 20** of Part 1 of the Bill.
75. Inserted by **item 29** of Part 1 of the Bill.
76. Explanatory Memorandum, op. cit., p. 38
77. Inserted by **item 77** of Part 1 of the Bill.
ACMA or a proponent for a submarine cable permit include consultation with NTSCORP, traditional owners and other Aboriginal groups.\textsuperscript{79}

The Bill provides a structured process for the consideration of matters within the Attorney-General’s portfolio in relation to submarine cable installation permit applications by:

- requiring ACMA to consult with the Secretary of the Attorney-General’s Department (AGD) and other persons ACMA considers relevant on protection zone installation permit applications: \textit{proposed clause 55A}\textsuperscript{80}
- requiring ACMA to consult with the Secretary of the AGD and other persons ACMA considers relevant on a non-protection zone installation permit applications: \textit{proposed clause 70} and \textit{proposed paragraph 71(aa)}\textsuperscript{81}
- giving the Attorney-General power, after consultation with the Prime Minister and the Minister for Communications, to direct ACMA to refuse a permit on security grounds: \textit{proposed subclause 57A(1)}\textsuperscript{82} for protection zones and \textit{proposed clause 72A}\textsuperscript{83} for non-protection zones.

During the consultation period, the Secretary of AGD may make a submission on the permit application, which may include a recommendation about the conditions that should be specified in the permit: \textit{proposed subclauses 55A(10)-(11)} for protection zones, and \textit{proposed subclauses 70(10)-(11)} for non-protection zones.\textsuperscript{84}

The proposed provisions are based on the current carrier licence application provisions under the \textit{Telecommunications Act}, and formalise existing practice.\textsuperscript{85}

\textbf{Streamlining the installation permit process}

A number of responders to ACMA’s discussion paper commented about the need to apply for two permits in circumstances where the relevant cable would cross a protection zone (Division 2 of Part 3 of Schedule 3A) and a non-protection zone (Division 3 of Part 3 of Schedule 3A).\textsuperscript{86} In that case, ACMA must decide whether to grant the permit in the protection zone within 20 business days.\textsuperscript{87} However the time limit for granting the permit in the non-protection zone is 180 days.\textsuperscript{88} According to Telstra Corporation ‘this results in uncertainty in the selection of the cable route and construction schedule, and delays the commencement of construction of a new cable.’\textsuperscript{89}

The Bill aims to streamline the installation permit process so that:

- carriers only need to apply for and obtain one type of permit to land a cable in Australia (currently two applications may be required, one for a permit zone and one for outside it): \textit{proposed clause 51}\textsuperscript{90}
- the default timeframe for processing a non-protection zone permit application will be reduced from 180 days to 60 business days: \textit{proposed clause 73},\textsuperscript{81} the timeframe for a decision on a protection zone permit will be 25 days and
- processes under the regime that duplicate existing processes under the \textit{Environment Protection and Biodiversity Conservation Act 1999}\textsuperscript{92} will be removed (items 55, 63, 66 and 69).

\textsuperscript{79} NTSCORP, \textit{Submission to the Australian Communications and Media Authority, Submarine cable regulation discussion paper}, 8 March 2010, accessed 6 February.
\textsuperscript{80} Inserted by item 51 of Part 1 of the Bill.
\textsuperscript{81} Inserted by items 63 and 65 of Part 1 of the Bill.
\textsuperscript{82} Inserted by item 54 of Part 1 of the Bill.
\textsuperscript{83} Inserted by item 68 of Part 1 of the Bill.
\textsuperscript{84} Inserted by item 51 of Part 1 of the Bill.
\textsuperscript{87} \textit{Telecommunications Act}, subclause 57(2) of Schedule 3A.
\textsuperscript{88} \textit{Telecommunications Act}, clause 73 of Schedule 3A.
\textsuperscript{89} Telstra Corporation, op. cit., p. 7.
\textsuperscript{90} Inserted by item 47 of Part 1 of the Bill.
\textsuperscript{91} Inserted by item 68 of Part 1 of the Bill.
\textsuperscript{92} \textit{Environmental Protection and Biodiversity Conservation Act 1999}, accessed 6 February 2014.


**Monitoring and enforcement**

Several stakeholders raised concerns about monitoring arrangements in their submissions to the ACMA review. Australia Japan Cable noted that resource constraints limit the time and the area in which the AFP is able to monitor the cables, and that without adequate monitoring and enforcement there is a greater possibility of infringements. 93

Telstra contended that existing monitoring and enforcement arrangements needed to be strengthened, highlighting incidents of anchors damaging cables in the Singapore Straits. 94 Telstra argued that the reliance on a complaints-based model was inadequate. 95 Optus also submitted that monitoring was reactive and relied on observation by third parties advising authorities of breaches, possibly after the event. 96 Optus called for a review and a solution utilising patrols by law enforcement agencies or technical systems. 97

Although the Bill does not directly address these concerns, it expands the list of authorities ACMA must notify when it declares, varies or revokes a protection zone to include authorities involved in sea monitoring, offshore law enforcement and management activities, for example the Australian Customs and Border Protection Service, the Australian Defence Force and the Australian Federal Police: proposed paragraphs 47(2)(aa)–(ac). 98

**Administrative and technical amendments**

The Bill will make administrative and technical amendments including:

- setting allowable minor deviations to the routes of submarine cables in a protection zone installation permit and a non-protection zone installation permit; 99
- requiring permit applicants to notify ACMA of any changes to their application while the application is under consideration: proposed subclause 54A(1) (for protection zone installation permits) 100 and proposed subclause 67A(1) (non-protection zone installation permits); 101
- permitting 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: proposed clauses 17A and 32A; 102
- requiring ACMA to provide reasons if it declares a protection zone that is different to the original request: proposed subclause 7(2); 103 and
- clarifying that prohibited or restricted activities in a protection zone do not include activities associated with maintenance or repair of a submarine cable: proposed subclauses 10(5) and 11(4). 104

**Statement of compatibility with human rights**

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. 105 No human rights issues were raised during consultation on the Bill. 106

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95. Ibid., p. 8.
96. SingTel Optus, Submission to the Australian Communications and Media Authority, Submarine cable regulation: Optus response, 18 February 2010, accessed 10 February 2014.
97. Ibid.
98. Inserted by item 42 of Part 1 of the Bill.
99. Inserted by items 55 and 69 of Part 1 of the Bill respectively.
100. Inserted by item 50 of Part 1 of the Bill.
101. Inserted by item 60 of Part 1 of the Bill.
102. Inserted by items 27 and 31 of Part 1 of the Bill.
103. Inserted by item 23 of Part 1 of the Bill. There are consequential amendments to subclause 7(2) of Schedule 3A of the Telecommunications Act in items 21 and 22 of Part 1 of the Bill.
104. Inserted by items 25 and 26 of Part 1 of the Bill respectively.
105. The Statement of Compatibility with Human Rights can be found at page 12 of the Explanatory Memorandum to the Bill.
The Government considers that the Bill is compatible with human rights and ‘to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to the objectives of protecting critical infrastructure of national significance’.\footnote{107}

**Human rights implications**

The Bill engages the following rights and freedoms:\footnote{108}

- the right to access courts and tribunals for a fair hearing (**International Covenant on Civil and Political Rights** (ICCPR) Article 14(1))\footnote{109}
- the presumption of innocence and imposition of burden of proof on accused person (ICCPR Article 14(2))
- the right to freedom from arbitrary or unlawful interference with privacy (ICCPR Article 17) and
- the right to non-discrimination on the basis of other status (ICCPR Article 26).

**Right to a fair hearing**

Article 14(1) of the ICCPR provides that in any criminal or civil proceeding, a person has a right to a fair and public hearing by a competent, independent and impartial tribunal or court.

The Bill excludes decisions of the Attorney-General to direct ACMA not to grant a permit to install a submarine cable from expedited judicial review under the **ADJR Act: proposed paragraph (d aaa) of Schedule 1 to the AJDR Act**\footnote{110} and **proposed clauses 57A and 72A** of Schedule 3A of the **Telecommunications Act**.\footnote{111}

The Bill also excludes reconsideration by ACMA and merits review by the Administrative Appeals Tribunal (AAT), where the grounds for refusing a permit included security, or where ACMA imposed or varied a security-related permit condition: **proposed paragraphs 1(za), (zaa), (zd) and (zda)** of Schedule 4 of the **Telecommunications Act**.\footnote{112} The Government considers that, due to sensitive national security implications, it is a legitimate objective that decisions under **proposed clauses 57A and 72A** of Schedule 3A not be subject to judicial review under the **ADJR Act** or reconsideration and merits review.\footnote{113} This was considered necessary for protecting Australia’s national security interests.\footnote{114}

In a case where the Australian Security Intelligence Organisation (ASIO) provided an adverse or qualified security assessment to the Attorney-General which would enable him, or her, to consider whether to direct ACMA not to issue a permit (under **proposed clauses 57A and 72A**), that person would have a right to merits review by the AAT, in accordance with Division 4 of Part IV of the **ASIO Act**.\footnote{115}

The Government concluded that, given the above factors, the Bill would be compatible with the right to a fair hearing under Article 14(1) of the ICCPR.\footnote{116}

The Scrutiny of Bills Committee examined the exclusion of decisions made by the Attorney-General under **proposed clause 57A and 72A** of Schedule 3A from judicial review and determined that the question of whether the proposed approach is appropriate should be left to the Senate as a whole:

> The committee draws Senators’ attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1a(i) of the committee’s terms of reference.\footnote{117}

\footnote{107.Ibid.}
\footnote{108.Ibid., p. 14.}
\footnote{110.Inserted by Item 1 of Part 1 of the Bill.}
\footnote{111.Inserted by Items 54 and 68 of Part 1 of the Bill.}
\footnote{112.Inserted by Items 85–88 of Part 1 of the Bill.}
\footnote{113.Explanatory Memorandum, op. cit., p. 15.}
\footnote{114.Ibid.}
\footnote{115.Ibid.}
\footnote{116.Ibid.}
\footnote{117.Standing Committee for the Scrutiny of Bills, op. cit., p. 54.}
Presumption of innocence

The presumption of innocence under Article 14(2) of the ICCPR imposes on the prosecution the burden of proving the charge against the accused and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Limitations on the right to be presumed innocent are permitted where they are reasonable, necessary and proportionate to achieving a legitimate aim.

An evidential burden is the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.118

Imposition of evidential burdens on the accused

Subclause 36(1) of Schedule 3A of the Telecommunications Act sets out an offence of strict liability in circumstances where a person engaged in conduct which result in damage to a submarine cable and the cable is in a protection zone.119 Similarly, subclause 37(1) of Schedule 3A of the Telecommunications Act sets out an offence of strict liability in circumstances where a person’s negligent conduct results in damage to a submarine cable and the cable is in a protection zone. These provisions will be amended by items 32 to 37 of Schedule 1 of the Bill to clarify that the offences also apply where only part of a submarine cable (as opposed to the entire cable) is damaged.

Proposed subclauses 4(1A) and 18(2)120 of Schedule 3A of the Telecommunications Act operate so that ACMA may declare protection zones around domestic cables in certain circumstances. The effect of the amendments is that the offence provisions set out above would apply to damage done to those domestic cables.

The defences to the strict liability offences in clauses 36 and 37 are set out in clause 38 of Schedule 3A. However, of importance is that the note to clause 38 provides that the defendant bears the evidential burden in relation to those defences. Generally, it is for the prosecution to prove the guilt of the accused. However, the rationale for the reversal of the onus of proof is that where a matter is peculiarly within the defendant’s knowledge and not available to the prosecution, it is legitimate to cast the matter as a defence.

A person would not be guilty of an offence if he or she displaced the evidential burden for an available defence under clause 38—that is where:

- the conduct that caused the damage to the cable was necessary to save a life or a ship
- the conduct was necessary to prevent pollution
- the defendant took all reasonable steps to avoid causing the damage
- the defendant is the carrier who owns or operates the submarine cable or
- the defendant was acting on behalf of the carrier who owns or operates the submarine cable at the time of the relevant conduct.

The reversal of the evidential burdens is considered by the Government to be a reasonably proportionate means of achieving the legitimate objective of protecting critical infrastructure of national significance.121

In submissions to ACMA, some cable operators addressed the issue of the availability of such defences. Telstra was of the view that where a defendant damages a cable or engages in prohibited or restricted activities not necessary to save a life or to prevent pollution, reasonable steps would have resulted in the defendant not having damaged the cable or engaged in the prohibited or restricted activities.122 Telstra argued that:

‘reasonable steps to avoid damage’ adds a confusing additional defence which is similar, but not the same as, the defence to save a life or ship or to prevent pollution. The onus should be on the defendant to demonstrate why

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119. For an offence of strict liability created under a law there are no fault elements for any physical elements of the offence and the defence of mistake of fact is available. See sections 6.1 and 9.2 of the Criminal Code Act 1995 (Cth). The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) states that ‘strict and absolute liability should only be used in limited circumstances and where there is adequate justification for doing so’. Attorney-General’s Department (AGD), A guide to framing Commonwealth offences, infringement notices and enforcement powers, September 2011 edition, AGD, p. 22, accessed 18 February 2014.
120. Inserted by items 20 and 29 of Part 1 of the Bill respectively.
121. Explanatory Memorandum, op. cit., p. 17.
they were not responsible for the damage occurring consistent with other laws applying to property damage. This approach would also be consistent with UNCLOS.\footnote{123}

**Evidential burdens and offences relating to installing a domestic submarine cable in a protection zone**

**Proposed clause 84A** provides that it is an offence to install a domestic submarine cable in a protection zone without a permit.\footnote{124} The Explanatory Memorandum states that the requirement that cables only be in a protection zone where there is a permit to do so is necessary because this promotes the protection, safety and proper functioning of critical infrastructure.\footnote{125}

**Proposed subclauses 84A(3) and (4)** impose evidential burdens on a person relying on a defence that:

- the carrier has a permit authorising the installation of the domestic submarine cable or
- the person installed, or commenced installing the domestic submarine before commencement of proposed clause 84A.

The Government considers that this approach is reasonable and proportionate as the matters are within the knowledge of the accused.\footnote{126} The carrier would know whether they have a permit authorising the installation of the domestic submarine cable. The carrier would also know whether installation of the submarine cable commenced prior to commencement of proposed clause 84A.

**Strict liability offences**

Strict liability offences also engage Article 14(2) of the ICCPR.

As already stated, the offences already set out in clauses 36 and 37 are strict liability offences, and this will also be the case in relation to the amendments to these provisions, discussed above. Additional offences of strict liability are as follows:

- a master or owner of a ship under clause 39 permitting another person to use the ship damaging a domestic submarine cable under clause 36
- a master or owner of a ship under existing clause 44 permitting another person to use the ship to engage in a restricted or prohibited activity in a protection zone under clause 40 or 41 and
- **proposed clause 84A** provides that it would be an offence to install a domestic submarine cable in a protection zone without a permit.

However, it should be noted that the imposition of strict liability will not criminalise honest errors and no person can be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations. The objective of the provisions is the protection of critical infrastructure of national significance.\footnote{127}

The Government concluded that the evidential burdens and strict liability offences that would be imposed on a defendant under the proposed amendments to Schedule 3A constitute a permissible limitation on the right to be presumed innocent under Article 14(2) of the ICCPR, and are therefore compatible with that right.\footnote{128} Imposing evidential burdens and strict liability offences on a defendant would be a reasonable and proportionate limitation to protect the security of submarine cables, and to allow for successful prosecution of unlawful conduct.\footnote{129}

In all cases, a defendant would have a right to the general defence of mistake of fact,\footnote{130} and there may be further other offence-specific defences available.

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\footnote{123}{Ibid.}
\footnote{124}{Inserted by Item 77 of Part 1 of the Bill. This mirrors existing clause 84, which applies to international submarine cables only.}
\footnote{125}{Explanatory Memorandum, op. cit., p. 18.}
\footnote{126}{Explanatory Memorandum, op. cit., p. 18.}
\footnote{127}{Explanatory Memorandum, op. cit., p. 19.}
\footnote{128}{Ibid.}
\footnote{129}{Ibid.}
\footnote{130}{Criminal Code, section 9.2.}
Civil enforcement action

The Explanatory Memorandum states that where civil enforcement action is taken by the Minister or ACMA regarding a breach of the Telecommunications Act, there would be no legal burden imposed on the defendant. The Minister or ACMA would need to prove all elements of the civil penalty provision on the balance of probabilities.

The right to freedom from arbitrary or unlawful interference with privacy

Article 17 of the ICCPR provides that everyone has the right to protection from being subjected to arbitrary or unlawful interference with their privacy.

The Bill requires ACMA’s approved application form for an installation permit to include information about the ownership and control of any submarine cables specified in the application: clauses 52 and 65 of Schedule 3A to the Telecommunications Act, as amended by items 48 to 49 and 58 to 59 of Schedule 1 of the Bill. As only a carrier may apply for a permit, ownership and control information will generally relate to ‘persons’ that are corporations. A person applying for a carrier licence must be a corporation, eligible partnership or a public body. However, the information required in an application form would potentially include personal information about an individual.

For the purposes of Article 17 of the ICCPR, the collection of information would not be unlawful, as it would be provided for and authorised under the Telecommunications Act. The Explanatory Memorandum notes that requiring this information would not be an arbitrary interference with the right to privacy, as it would be for the legitimate and necessary objective of ensuring that national security and other relevant matters were taken into account in deciding whether to grant a permit. Information collected on owners or controllers of a submarine cable would be taken into account by ACMA as part of the decision making process for a permit application. The Secretary of the AGD, ASIO or the Attorney-General may have regard to the information in discharging their respective functions in mitigating national security concerns.

This information was considered necessary for protecting Australia’s national security interests, and ensuring that ACMA has the relevant information to decide whether a permit should be granted. The limitations on the right to privacy were considered to be reasonable, necessary and proportionate to protecting critical infrastructure of national significance.

The right to non-discrimination on the basis of nationality

Article 26 of the ICCPR provides that all people are equal before the law and prohibits discrimination on any ground, including a general category of ‘other status’. The United Nations Human Rights Committee (UNHRC) has indicated that ‘other status’ encompasses nationality. However the UNHRC has recognised that not all differential treatment is discriminatory, if the criteria for the differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

The Explanatory Memorandum notes that proposed amendments in the Bill to ensure Schedule 3A’s consistency with UNCLOS may limit the application of offence provisions and penalty enforcement action for foreign nationals, ships and carriers for acts or omissions beyond Australia’s territorial sea under proposed clauses 44A, 83A and 85 of Schedule 3A of the Telecommunications Act. This may result in differential enforcement action taken between Australian nationals and foreign nationals for contravention of Schedule 3A. This was considered to be a reasonable objective of ensuring compliance with Australia’s international obligations.

131. For example, a breach of a statutory condition under existing Division 4 of Part 3 of Schedule 3A.
133. Telecommunications Act, section 52.
135. Ibid.
136. Ibid.
140. Ibid.
did not discriminate on the basis of nationality. Australia has the sovereign right to take enforcement action against its own nationals and foreign nationals regarding Australian flagged ships in all Australian waters.141

**Concluding comments**

Schedule 3A of the *Telecommunications Act* outlines Australia’s preeminent regime to protect Australia’s international submarine cables from damage. The proposed amendments contained in the Bill seek to clarify and strengthen that regime, and extend its reach to domestic cables. The Bill provides for a consultation process for submarine cable installation permit applications, ensuring consideration of security, international law and native title matters.

Whilst the Bill engages several rights and freedoms under the ICCPR, the Government argues that where national security and the protection of critical infrastructure of national significance is paramount, the limitation of specific human rights is reasonable, necessary and proportionate.

The Greens have raised concerns that the right to privacy and the rule of law could be compromised by illegal and unsupervised surveillance of subsea fibre optic cables. This issue may be further examined by the Senate Environment and Communications Legislation Committee, which will hold a public inquiry before reporting on 31 March 2014.

141 Ibid.
Appendix: International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   (c) To be tried without undue delay;
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Telecommunications Legislation Amendment (Submarine Cable Protection) Bill 2013

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