2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS AND OTHER LEGISLATION AMENDMENT (PROTECTION OF SUBMARINE CABLES AND OTHER MEASURES) BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Communications, Information Technology and the Arts, the Senator the Hon. Helen Coonan)
In 1999 the National Bandwidth Inquiry\(^1\) examined Australia’s regulatory framework for submarine telecommunications cables and recommended:

- a stronger planning and protection regime for cables;
- explicit authority to install submarine cables; and
- increased penalties for damaging cables to create an effective deterrent to unnecessary disruption of communications.

The Government is concerned about lack of security for submarine fibre optic telecommunications cables, which are vulnerable to damage from several sources, particularly some kinds of fishing, anchoring of vessels and dredging.

Submarine cables in Australian waters carry about 99 per cent of Australia’s international voice and data traffic, and constitute a vital element of the national infrastructure. Cable owners in 2002 estimated their value to the national economy at more than A$5 billion per annum.

Cable breakage impedes information flow, affecting the capacity of Australians (particularly businesses) to conduct international transactions. Any sustained outage slows information flow, and can cause the loss of data, loss of business and damage to reputation. There have been several cable breaks in recent years, caused by fishing equipment or a ship’s anchor. Cable owners estimate the direct cost to them of repairing a cable break at between $1.2 million and $3.3 million. The flow-on costs to users have not been estimated.

The current Submarine Cables and Pipelines Protection Act 1963 does not provide sufficient incentives to avoid damage to cables. The Telecommunications Act 1997 is silent on submarine cables. It does not give telecommunications carriers authority to install submarine cables nor provide penalties for damaging them. Cables in coastal waters are currently governed by State and Territory legislation.

The Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Bill 2005 (the Bill) establishes a scheme for creating protection zones over submarine cables of national significance. Activities within protection zones likely to damage cables will be prohibited or restricted.

The Bill amends the *Telecommunications Act 1997* by adding a Schedule dealing with the protection of submarine telecommunications cables, and amends the *Submarine Cables and Pipelines Protection Act 1963* so that penalties under that Act cease to apply for damaging submarine telecommunications cables in protection zones. This means that the only penalties for damaging submarine cables in protection zones will be those under the *Telecommunications Act 1997*.

The Bill amends the *Telecommunications Act 1997* to provide that, if anything done by a carrier under that Act, as proposed to be amended, results in an acquisition of property, then compensation will be payable by the carrier, not the Commonwealth.

The Commonwealth has consulted extensively with stakeholders in developing this proposal. Consultations included meetings with all State and Territory Governments, Commonwealth agencies with marine and maritime responsibilities, telecommunications carriers and cable owners, peak bodies representing fishing and other resource industries, and the Australian Communications Authority (ACA).

The main elements of the Bill are:

- the declaration of protection zones over cables of national significance, running through State, Territory and Commonwealth waters, both for existing cables and those installed in the future;
- ACA declaration of a protection zone, or the variation or revocation of a declaration, by legislative instrument;
- mandatory consultation by the ACA with users of the sea and seabed through an advisory committee representing affected interests before protection zone decisions are made;
- prohibition or restriction of activities most likely to damage cables within protection zones;
- immunity from certain State and Territory laws within protection zones, similar to the immunities that now apply to carriers under the *Telecommunications Act 1997* when they install underground cables on land;
- criminal penalties for damaging submarine telecommunications cables, for engaging in prohibited activities or for engaging in restricted activities in a way that contravenes a restriction;
- issuing of permits by the ACA for the installation of submarine cables, both in protection zones and in Australian waters other than in a protection zone or coastal waters;
- penalties for installing a cable without a permit or contrary to a permit condition;
- recovery of the cost of the protection regime from the telecommunications industry; and
- review of the regulatory arrangements by the ACA within five years of their commencement.
FINANCIAL IMPACT STATEMENT

This Bill will not have any significant impact on Commonwealth expenditure or revenue. If the Bill is enacted before the establishment of the proposed Australian Communications and Media Authority (the ACMA) on or before 1 July 2005, the Australian Communications Authority will recover the full cost of the protection regime by way of a determination under section 53 of the *Australian Communications Authority Act 1997*. If the Bill is enacted on or after the establishment of the ACMA, the ACA’s proposed successor, by the proposed *Australian Communications and Media Authority Act 2005*, the ACMA will recover the full cost of the protection regime by way of a determination under section 60 of that Act.
REGULATION IMPACT STATEMENT

Australian Maritime Zones
The States and the Northern Territory have primary jurisdiction over coastal waters (up to three nautical miles from the coastline) as well as over the land where cables emerge from the sea.

The Commonwealth has sovereignty over its territorial waters (three to 12 nautical miles). It has the right to explore and exploit living resources, and the obligation to protect and conserve the marine environment in the Exclusive Economic Zone (EEZ), which extends either to 200 nautical miles or to the edge of the continental shelf, whichever is the further.

* or to the edge of the continental shelf

<table>
<thead>
<tr>
<th>Australian Territorial waters</th>
<th>Exclusive Economic Zone (EEZ)</th>
<th>High Seas</th>
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<tbody>
<tr>
<td>Coastal waters (State)</td>
<td>Commonwealth-controlled waters</td>
<td>UNCLOS (Convention on Law of the Sea)</td>
</tr>
<tr>
<td>Sovereignty</td>
<td>Right to explore &amp; exploit resources</td>
<td></td>
</tr>
</tbody>
</table>

The international context
New Zealand regulates its telecommunications cables through the Submarine Cables and Pipelines Protection Act 1996. The New Zealand Act allows for the declaration of protected areas in which all fishing and anchoring is prohibited. The areas are patrolled by enforcement and protection officers who have the power to order ships from protection areas or seize equipment in certain circumstances. Large penalties can be applied for damage to cables by fishing or anchoring vessels.
Indonesia and Singapore also have systems of submarine cable protection, with restrictions on fishing and anchorage in protection zones.

In Japan and Korea, the strength of the fishing industries means that cable owners pay millions of dollars to the industry to lay cables in fishing areas. There is, however, little protection afforded to these cables once they have been installed. The Japanese often report cable damage due to the inadequacy of the protection regime.

The USA, Canada and the UK focus on licensing provisions for the landing of cables but there are no offshore protection zones. The object of licensing in the Canadian and US context is to manage competition and limit the number of cables. In the USA, the licence also includes a reserved right for the Federal Communications Commission to impose additional regulations on the licensee, if the conditions are considered to be in the public interest. In the UK, considerations for licensing are predominantly confined to safety issues associated with navigation. Environmental impacts are secondary considerations.

1. ISSUES

Ensuring the security and reliability of submarine cables
Fibre optic submarine cables are susceptible to damage and breakage. Activities that pose the greatest threat are sea-bottom trawl fishing, dumping, sand dredging, and anchoring. The isolation and vulnerability of cables, and their significance to the Australian economy, also render them a potential terrorist target.

- In July 2001, a trading ship dragged anchor off Sydney. It severed two submarine cables, the high capacity Southern Cross cable and the Tasman 1 cable. The second arm of the Southern Cross cable was undergoing routine maintenance at the time, compounding the effect of the breakage.
- The Tasman 2 cable was broken off the New South Wales coast by trawl fishing in 1997 and the ANZCAN cable was broken, again by trawl fishing, in 1991 off Sydney.
- The SEA-ME-WE3 cable that lands at Perth has been cut several times between Singapore and Jakarta by sand dredging operations.

Cable breakage impedes information flow, affecting the capacity of Australian business to conduct international transactions. Any sustained outage slows information flow, and can cause lost data, lost business and damage to reputation.

Cable owners estimate the direct cost to them of repairing a cable to be A$1.2 million to A$3.3 million. Cost to consumers and the public can be substantial but is difficult to estimate.

Providing penalties as a disincentive to causing cable damage
The Telecommunications Act 1997 does not make it an offence to cause damage to a submarine cable.
The Submarine Cables and Pipelines Protection Act 1963 provides a maximum penalty of $2,000 or imprisonment for 12 months where a person engages in conduct that results in a ship registered in Australia or an Australian Territory breaking or injuring a telecommunications cable. However, this applies only to cables beneath the high seas and EEZ (not in the territorial sea or coastal waters).

Providing a consistent regulatory regime
There is inconsistent treatment under the Telecommunications Act 1997 for submarine cables and terrestrial underground cables. Some terrestrial underground cables are specified as ‘low-impact facilities’ in the Telecommunications (Low-impact Facilities) Determination 1997, made under subclause 6(3) of Schedule 3 to the Telecommunications Act 1997. These facilities are considered essential to maintaining telecommunications networks, but are of low visual impact. On land, low-impact facilities include some radiocommunications facilities, underground and above-ground housing, underground cables, public payphones, emergency and co-located facilities.

The Telecommunications Act 1997 and instruments made under that Act are silent on submarine cables. This silence creates confusion because, while that Act and subordinate instruments do not explicitly provide authority to install submarine cables, some carriers have claimed submarine cables as low-impact facilities, saying the cables are underground cables. In doing so, the carriers claim exemption from certain State and Territory planning laws by virtue of Schedule 3 of the Telecommunications Act 1997. Other carriers comply with State and Territory laws and local government authority by-laws to obtain authority to install cables in State-controlled and Territory-controlled coastal waters. These State- and Territory-based planning processes can be protracted and costly, and vary from jurisdiction to jurisdiction.

Clarify liability for compensation
There is some uncertainty about the operation of the proposed submarine cable protection regime and Schedule 3 activities, in the application of s. 51(xxxi) of the Constitution. It is possible that in certain circumstances a court may find that the installation of submarine cables, the establishment of protection zones or the existence of rights conferred on a carrier under the Act, amount to an ‘acquisition of property’, and that compensation ‘on just terms’ has not been provided.

As the law currently stands, if a court were to find that there has been an acquisition of property otherwise than on ‘just terms’, the Commonwealth may be liable to pay compensation under s. 591 of the Act. Section 591 of the Act provides, in effect, that the Commonwealth is liable to pay compensation to a person whose property is acquired through the operation of the Act, if that acquisition would otherwise contravene s.51(xxxi) of the Constitution.

The current telecommunications regime recognises that public interest is served through providing carriers with powers and immunities to install telecommunications infrastructure of importance from which the carriers receive an ongoing financial benefit.
There are various provisions in the Act which might result in ‘just terms’ being provided in many cases without the need to resort to s.591. The most significant in this respect is clause 42 of Schedule 3 which provides that a person who suffers ‘financial loss or damage’ because of ‘anything done by a carrier’ under Schedule 3 to the Act, in relation to property owned by the person (or any property in which the person has an interest), is entitled to a reasonable amount of compensation.

While the circumstances are likely to be limited, the requirement for ‘just terms’ compensation may, in some circumstances, require compensation for more than the ‘financial loss or damage’ suffered by the property owner as a result of the acquisition. As the legislation currently stands the Commonwealth may be liable to pay the gap between ‘financial loss or damage’ and ‘just terms’ compensation should a court determine that it exists.

A similar compensation provision is proposed for Schedule 3A (clause 87) to provide that a person who suffers ‘financial loss or damage’ because of anything done by a carrier under Schedule 3A in relation to any property owned by the person (or any property in which the person has an interest) is entitled to a reasonable amount of compensation.

It is also possible that infrastructure installed by carriers under Schedule 3 to the Act may, in some circumstances, amount to an acquisition of property. Schedule 3 to the Act provides carriers with statutory power to install certain terrestrial telecommunications infrastructure with immunity from State and Territory planning laws.

Section 591 was intended to ensure the viability of the Act generally should any question arise that a provision was otherwise contrary to s.51(xxxi) of the Constitution. It is not appropriate for the Commonwealth to be liable for any compensation payments arising from the acquisition of property by a carrier. It is particularly inappropriate given the carrier gains a direct financial benefit from the installation of telecommunications infrastructure using the powers and immunities regime. In addition, by leaving some potential compensation obligation on the Commonwealth, the current powers and immunities regime does not balance the commercial rewards with the full financial risks.

It is desirable that the compensation arrangements in the event of a s.51(xxxi) issue arising in relation to submarine cables be clarified in the new regulatory regime for submarine cables to ensure that the Commonwealth does not bear an inappropriate, albeit unlikely, liability. It is also sensible at the same time to ensure consistent regulatory treatment of both terrestrial and submarine telecommunications facilities.

2. OBJECTIVES

The objectives of Government action relating to submarine telecommunications cables are to:

- provide security and reliability for the submarine cable component of Australia’s national information infrastructure;
- clarify the liability for compensation; and
provide increased consistency and clarity in the Commonwealth telecommunications regulatory regime.

3. OPTIONS

Four options to increase protection for, and streamline the regulation of, submarine cables were considered:
1. retaining the current legislative framework, without amendment;
2. extending the existing terrestrial telecommunications regime to submarine cables;
3. New Zealand’s ‘protected area’ model; and
4. protection zones with restricted activities, increased penalties and clarification of liability provisions.

Option 1: Retaining the current legislative framework
Authorisation for installing submarine cable networks under current regulation results in a single cable network being installed as follows:
- the land-based portion authorised under Commonwealth law as a ‘low-impact facility’;
- the cable laid in coastal waters (from the shore to three nautical miles) authorised under State and Territory law; and
- the cable laid in Commonwealth-controlled waters, from three nautical miles seaward, installed without authorisation or notification.

Option 2: Extending the existing terrestrial telecommunications regime to submarine cables
Submarine cables would be declared low-impact facilities by ministerial determination under the Telecommunications (Low-Impact Facilities) Determination 1997. Submarine cables specified as low-impact facilities would have clear authorisation to be installed in both Commonwealth- and State-controlled waters. Clause 37 of Schedule 3 to the Telecommunications Act 1997 provides licensed carriers with the power to install low-impact facilities with exemption from State and Territory planning laws.

Option 3: New Zealand’s ‘protected area’ model
New Zealand’s Submarine Cables and Pipelines Protection Act 1996 was identified by the National Bandwidth Inquiry as a possible model for Australia, though a sub-optimal one. The New Zealand legislation provides for:
- The Governor-General to declare protected areas over submarine cables or pipelines in any area within the internal territories, territorial sea or EEZ of New Zealand.
- All anchoring and fishing operations to be prohibited in protected areas.
- Protection officers to be specially appointed, and members of the police or naval forces to be designated as enforcement officers who have the power to order ships from protected areas or to seize equipment.
- Fines of up to NZ$250,000 to apply for wilfully or negligently damaging a submarine cable, and up to NZ$100,000 for undertaking a prohibited activity in a...
protected area if in pursuit of commercial gain, plus (if convicted) forfeiture of the equipment used in the offence.

**Option 4: Protection zones with restricted activities, increased penalties and clarification of liability provisions**

Protection zones would be declared over submarine cables of national significance, with prohibited and restricted activities, and increased penalties for damaging cables. This option would have the following key features:

- The Australian Communications Authority (ACA) would be empowered to declare protection zones over cables of ‘national significance’ to Australia, and to vary, review and revoke those zones. Cables of national significance would generally be high capacity cables that are important to the national economy and that link Australia to global communications systems.
- The ACA would establish an advisory committee with representatives of stakeholders, and would be required to consult widely with, and to take into account the views of, affected industries, environmental interests, relevant Commonwealth, State, Territory and local government bodies, Native Title holders and the public.
- Activities that provide a significant threat to cables (such as bottom-trawl fishing, anchoring of ships, dredging, and mineral exploration and mining) would be prohibited in protection zones. Other less dangerous activities (other types of fishing, installation and maintenance of cables and pipelines, the construction of jetties, wharves, boat ramps and the like, and the construction and maintenance of navigational aids) would be restricted. Restricted activities may include activities that normally take place near submarine telecommunications cables under agreements between parties who need to share access to the sea and seabed.
- Heavy penalties would apply under the offence provisions of the proposed law. The Australian Federal Police would be responsible for enforcement.
- Each declaration of the ACA in relation to a protection zone would be tabled in Parliament as a legislative instrument.
- The ACA would also be empowered to issue permits allowing carriers to install submarine cables, both within protection zones and in Commonwealth-controlled waters outside protection zones.
- The carrier would be liable for payment of any compensation that might result from the new submarine cable regime.
- The legislation would be reviewed within five years of implementation.
- The cost of administering the protection regime would be recouped from the telecommunications industry.

Additionally, to provide a consistent regulatory regime for both terrestrial and submarine telecommunications facilities it is proposed that a carrier, engaged in installation or maintenance activities under Schedule 3 to the Act that give rise to an acquisition of property, would bear the risk of liability.
A fifth option, of a cable-landing licensing regime such as those in the United States and the United Kingdom, was not considered in detail. These regimes have different objectives than the National Bandwidth Inquiry recommendations and are not suitable for Australia. These regimes seek to limit rollout in highly competitive markets, but do not protect submarine cables. In addition, these markets have many more submarine cables landing on their shores, lower costs, higher returns, higher levels of competition and more redundancy than Australia, which is dependent on just a few cables.

4. CONSULTATION

Submarine cables protection regime
In response to the National Bandwidth Inquiry’s report on the regulatory arrangements for submarine cables, a discussion paper was widely circulated in February 2001. Submissions were received from Commonwealth agencies, State and Northern Territory Governments, the telecommunications carriers and peak bodies representing fishing and offshore resource interests.

On the basis of the submissions received in response to the discussion paper, a draft framework was prepared and circulated during May 2002 for further consultation with those stakeholders who responded to the initial round of consultation.

There is broad support among stakeholders for the proposed regime (option 4), tempered by competing sectoral interest. Most concerns have been addressed, particularly by providing for mandatory consultation with stakeholders. This provision was crucial to securing stakeholder agreement to the proposal.

Telecommunications industry
In 2001, cable owners supported the protection zones proposal to provide greater protection to submarine telecommunications cables and streamline cable planning and authorisation processes.

Further consultations were undertaken with major carriers and cable owners on a detailed proposal of the submarine cables protection regime in October 2004. Whilst carriers suggested the proposed regime over-regulates the protection of submarine cables, they continue to support the requirement for greater regulatory protection for submarine telecommunications cables.

- A strong regulatory approach was considered necessary to balance the interests of all users of the sea and seabed.

Resource sector
The Australian Petroleum Production and Exploration Association (APPEA), this resource sector’s peak body, was concerned to ensure that the regime should be flexible enough to balance the competing interests of their industry. Petroleum explorers and producers are given exploration licences for specific areas, and their infrastructure can be in close proximity to cables.
APPEA also suggested that the existing international safety zone standard of 500 metres around offshore drilling equipment should be enough.

- Given the vulnerability of telecommunications cables and their location out of sight on the seabed, it was considered that a safety zone of only 500 metres would be insufficient.

**Fishing industry**

Peak fishing industry bodies, the Australian Seafood Industry Council and the South East Trawl Fishing Industry Association, were strongly supportive of a formal planning process (including consultation) in the interests of equitable access to resources. These organisations were, however, concerned about the high penalties proposed and the rights of fishers to negotiate compensation from cable owners if they are excluded from fishing grounds.

- The proposed regime was amended to address both points.

The Department of Agriculture, Fisheries and Forestry – Australia (AFFA) was concerned about access and use rights to marine resources, the proposed environmental impact procedures, and some details of the proposed process. AFFA also suggested integrating arrangements for all sea installations, including energy and petroleum installations.

- The proposed regime enables users other than the cable owners to take advantage of protection zones through the ‘restricted activities’ provision. Restriction of zones to telecommunication cables of ‘national significance’ would ensure that the number of zones is kept to a minimum.

**Commercial shipping**

The Department of Transport and Regional Services supported the proposal but did not support the prohibition on anchoring of trading ships in protection zones.

**Native title**

The Attorney-General’s Department has advised that the declaration of protection zone decisions by legislative instrument and the issue of permits to lay cables would be ‘future acts’ for the purposes of the *Native Title Act 1993*, but suggested that exempting native title activities from the operation of protection zones be considered. However, it was considered that there was insufficient justification for this exemption.

**Environmental agencies**

The Department of the Environment and Heritage, the National Oceans Office and the Great Barrier Reef Marine Park Authority were consulted. In declaring a protection zone, varying or revoking a protection zone, or granting a permit to install a submarine cable in Australian waters outside State and Territory coastal waters, the ACA would be required to consult the Environment Secretary.

**Other Commonwealth agencies**

Two rounds of Interdepartmental Committee meetings were held. The Department of Industry, Tourism and Resources made suggestions about the consultation process, an
appropriate safety zone model, the determination of cable protection zone activities and
the appeals process.
• These matters were considered in developing the model.

The ACA, the Attorney-General’s Department and the Australian Federal Police were
consulted on the enforcement of protection zone restrictions. The Attorney-General’s
Department has been consulted about proposed offence provisions and penalty levels.

State and Territory Governments
All States and the Northern Territory have provided input into the proposed regime.
Concerns raised included the possible impact on State and Territory government revenue.
• Research suggests that there would be no loss of revenue from fisheries to State and
  Territory governments, given that fisheries operate at a loss and are subsidised by
  State and Territory governments.
• There may, however, be loss of revenue depending on the jurisdiction’s land
  management policies.

Liability for compensation
Consultation was undertaken with major carriers and cable owners in 2000 when this
issue was previously considered in the context of a package of measures associated with
carriers’ powers and immunities under Schedule 3 to the Act. Policy approval was
received; however, it was decided not to proceed with the amendment at that time.

At that time, carriers expressed the view that the current compensation provision for
financial loss or damage, as provided by clause 42 of Schedule 3 to the Act, will almost
always provide ‘just terms’ because an owner’s interest in their property is financial and
financial compensation will always be found to be reasonable.

Major carriers and cable owners were further consulted in October 2004 regarding the
application of these provisions to carriers’ powers and immunities to both terrestrial and
submarine telecommunications infrastructure and did not raise any significant concerns.

4. ASSESSMENT OF IMPACTS (COSTS AND BENEFITS) OF EACH
   OPTION

Four options were examined in relation to the management of submarine
telecommunications infrastructure, measured against the following objectives:
• security and reliability of cables;
• beneficiary liable for compensation; and
• a consistent regulatory regime.
<table>
<thead>
<tr>
<th>Option 1: Current regime</th>
<th>Objective</th>
<th>Beneficiary liable for compensation</th>
<th>Consistent regulatory regime</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STAKEHOLDERS</strong></td>
<td><strong>Low benefit, high cost</strong></td>
<td><strong>High benefit, low cost</strong></td>
<td><strong>Low benefit, high cost</strong></td>
</tr>
</tbody>
</table>
| Cable owners & operators| - Cables remain vulnerable to damage, mostly from commercial trawl fishing and ships dragging anchor, as low penalties under the *Submarine Cable and Pipelines Act 1963* (up to $2000) provide no effective disincentive to damage cables.  
- Cable owners can seek damages for cable breaks in civil courts, but the cost to repair a broken cable is between $1.1 to $3.3 million. Repair typically costs from A$167,500 to A$236,000 per day and takes from seven to 14 days to complete. | - Carriers will continue to maintain their powers and immunities to install telecommunications infrastructure from which they derive a commercial benefit.  
- Because of their ability to derive a financial benefit, it is inappropriate that carriers are able to pass any potential liability to the Commonwealth. | - Cable owners subject to State and local jurisdiction within coastal waters and at landing sites. The variation of State and local planning regimes results in an uncertain investment and planning environment.  
- The *Telecommunications Act 1997* is silent on submarine cables.  
- The absence of explicit authorisation for submarine cable installations through Commonwealth law, and |
| Cable owners operate patrol boats over their key east-coast cables to protect their investment – at a cost of $2m per year. |
| Carriers may be subject to ongoing fees paid to State governments for right to occupy the seabed in coastal waters – this cost does not guarantee sole occupancy of that easement or provide for the cessation of trawl fishing activity in the area. |
| Cable owners negotiate commercial agreements with local fishing industries to ensure cables are protected from trawl fishing operations. |
| Cable breaks disrupt communications for clients of the cable owners; impose costs, particularly on e-commerce, and threaten reputation with overseas customers for quick inconsistency between State and Commonwealth laws, creates confusion and variable approval practices among carriers and doubt about legal rights to occupy seabed. Some carriers claim to install submarine cables as ‘underground cables’ on the seabed as a ‘rural area’. |
| No mechanism to reconcile competing claims to use seabed in territorial waters. |
and reliable service.

<table>
<thead>
<tr>
<th>Fishing industry</th>
<th><strong>High benefit, low cost</strong></th>
<th><strong>No effect</strong></th>
<th><strong>Low benefit</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- The current absence of protection mechanisms for submarine cables provides no regulatory constraint on fishing operations.</td>
<td></td>
<td>- Lack of an explicit regime has created friction between cable owners and fishers, especially where the cable owners have substantial resources to expend on negotiating commercial agreements.</td>
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<tr>
<td></td>
<td>- Where agreement has been reached to keep trawl fishing away from cables, this has been achieved through commercial agreement.</td>
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<td></td>
<td>- Current low penalties for damaging cables might be regarded as an ordinary cost of business for some trawler operators.</td>
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</table>

<table>
<thead>
<tr>
<th>Trading ships</th>
<th><strong>Low benefit, low cost</strong></th>
<th><strong>No effect</strong></th>
<th><strong>No effect</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Trading ships are not hindered in innocent passage.</td>
<td></td>
<td>- Currently, carriers notify commercial shipping through publication of marine notices informing of dates of installation.</td>
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<td></td>
<td>- Generally, trading ships are observant of cable locations and do not anchor near cables. Accidental damage through dragging of anchors</td>
<td></td>
<td>- No known conflict between</td>
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Penalties under the *Submarine Cable and Pipelines Act 1963* are low in relation to trading ship costs. The application of penalties is highly restricted: penalties apply only to cables under the high seas and EEZ, and only to Australian-registered ships.

<table>
<thead>
<tr>
<th>Resource industry (mining and petroleum)</th>
<th>Low benefit, low cost</th>
<th>No effect</th>
<th>No effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>- The <em>Petroleum (Submerged Lands) Act 1967</em> provides for exclusion zones around surface submarine petroleum infrastructure. No such exclusions exist for submarine cables.</td>
<td>- The International Submarine Cable Protection Committee, of which existing carriers are members, has relevant guidelines governing collocation of cables and pipelines</td>
<td>- No conflict over submarine installations to date.</td>
<td></td>
</tr>
</tbody>
</table>
and the resource industry operates responsibly in the vicinity of cables.
- Current low penalties for damaging cables would be little disincentive to resource industry operators.

<table>
<thead>
<tr>
<th>State governments</th>
<th>Low benefit, low cost</th>
<th>No effect</th>
<th>Mixed benefit, high cost and returns</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>The absence of protection for submarine cables and the lack of incentives to avoid cable damage are not in the States’ interest because of the direct benefit to the States of having high-capacity cables directly linking the States’ economies to the global market.</td>
<td></td>
<td>The installation of cables on landing stations and in coastal waters is subject to the planning and environment laws of the States.</td>
</tr>
<tr>
<td></td>
<td>The States do not resource the protection of submarine cables or areas.</td>
<td></td>
<td>States have a high level of control over infrastructure planning and authorisation, which carries an administrative cost.</td>
</tr>
<tr>
<td></td>
<td>Agencies noted the need for improved cable location information, although hydrographic charts are available.</td>
<td></td>
<td>Some States charge carriers an annual lease or charge for occupying the seabed in coastal waters.</td>
</tr>
<tr>
<td>Commonwealth agencies</td>
<td><em>Low benefit, low cost</em></td>
<td><em>Low benefit, high cost</em></td>
<td><em>Low benefit, low cost</em></td>
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</table>
|                       | - The absence of protection and the low penalties for submarine cables do not reflect the national interest in protecting Australia’s high-capacity cables.  
- The Commonwealth does not resource the protection of submarine cables or areas.  
- The penalties for damaging cables within the *Submarine Cables and Pipelines Act 1963* require increasing.  
- The current penalties, when imposed, provide low benefit to consolidated revenue.  
- The Commonwealth incurs low costs in enforcing offences relating to submarine cables. | - There is the potential for the Commonwealth to be liable to pay compensation for acquisition of property not on ‘just terms’ arising from the actions of carriers in accordance with the Act.  
- The Commonwealth provides carriers with powers and immunities to install telecommunications infrastructure, but receives no direct benefit from this infrastructure. | - The Commonwealth currently exercises no control over the authorisation, location, or installation practices relating to submarine cables. |

<table>
<thead>
<tr>
<th>Public interest</th>
<th><em>Low benefit, high cost</em></th>
<th><em>No effect</em></th>
<th><em>Low benefit</em></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Insecure cables mean uncertain links</td>
<td>- The current regime recognises the</td>
<td>- Stakeholders are generally</td>
</tr>
</tbody>
</table>
to global communications networks.  
- Low penalties for damage to cables do not reflect their value to the nation, or the public interest in their protection.  
- Any sustained outage would put at risk A$6.2 billion of GDP derived from international business.  
- Cost of cable breaks and repairs is ultimately borne by end users.

| Public interest in carriers having powers and immunities to install important telecommunications infrastructure. However, by leaving some potential compensation obligation on the Commonwealth, it does not balance the commercial rewards with the full financial risks. | unsure of Commonwealth and State division of responsibilities.  
- Public interest is in transparency of regulation. |

| Native title claimants | No impact | No impact | No impact |
## Objective

<table>
<thead>
<tr>
<th>Objective</th>
<th>Beneficiary liable for compensation</th>
<th>Consistent regulatory regime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extend existing telecommunications regime to submarine cables</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Security &amp; reliability of submarine cables</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Stakeholders

<table>
<thead>
<tr>
<th>Stakeholders</th>
<th>Low benefit, high cost</th>
<th>High benefit, low cost</th>
<th>High benefit, low cost</th>
</tr>
</thead>
</table>
| Cable owners & operators | • Existing land ‘low impact’ regime provides no protection for cables.  
                           | • Low penalties under the Submarine Cable and Pipelines Act 1963 (up to $2000) provide no effective disincentive to damage cables.  
                           | • Carriers’ policy is to recover the cost of negligent breakages on land, but civil damages are generally less than actual costs.  | • The existing regime does not address this issue, duplicating the costs and benefits as stated in Option 1.  
                           | • Would provide for a single authority for submarine cables and underground cables on land.  
                           | • Reduced compliance costs.  
<pre><code>                       | • Would provide explicit authorisation to install and exemptions from State laws in coastal waters.  |
</code></pre>
<p>| Fishing industry         | No effect              | No effect              | No effect              |
|                          | • Would provide no added incentive | • Would provide no protection to |</p>
<table>
<thead>
<tr>
<th><strong>Resource Industry (mining and petroleum)</strong></th>
<th><strong>State Governments</strong></th>
<th><strong>Trading ships</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><em>No effect</em></td>
<td><em>Low benefit, low cost</em></td>
<td><em>No effect</em></td>
</tr>
<tr>
<td>- The current low penalties for damaging cables are no deterrent to resource industry operators.</td>
<td>- Lack of protection for submarine cables and low disincentives to damage cables is not in States’</td>
<td>- Would provide no extra incentive to avoid cable damage from anchoring or increase certainty of rights and responsibilities.</td>
</tr>
<tr>
<td>- The International Submarine Cable Protection Committee, of which the carriers are members, has guidelines governing the co-location of cables and pipelines.</td>
<td></td>
<td>- Would provide no protection to submarine cables.</td>
</tr>
</tbody>
</table>

**Table: Summary of Impacts**

- **Submarine Cables:**
  - Low benefit, low cost
  - No effect
  - No effect
  - No effect

- **Commonwealth law would override State planning laws regarding installation of cables.**
<table>
<thead>
<tr>
<th>Commonwealth agencies</th>
<th>Public interest</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>No effect</strong></td>
<td><strong>Mixed benefit, low cost</strong></td>
<td><strong>No effect</strong></td>
<td><strong>Low benefit, low cost</strong></td>
</tr>
<tr>
<td>- This option provides no protection for submarine cables and lacks extra disincentives to damage cables.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Commonwealth agencies favour protection.</td>
<td>- This option provides no specific protection provisions.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- States may lose revenue.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- States are willing to cede jurisdiction to the Commonwealth if properly consulted on each decision.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- The existing regime does not address this issue, duplicating the costs and benefits as stated in Option 1.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- National Bandwidth Inquiry considered this a ‘less than optimal mechanism’ for regulation.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- This option would provide clear authority to install cables in Commonwealth and State waters under a single regulator.</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>- Environment Australia questioned whether it is established that submarine cables are in fact ‘low-impact’ facilities.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Stakeholders are generally unsure of Commonwealth and State</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>costs and benefits as indicated in Option 1.</td>
<td>division of responsibilities.</td>
</tr>
<tr>
<td>-------------------------</td>
<td>-----------------------------------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td></td>
<td>• Carriers are subject to a legislated Code of Practice when they install and operate ‘low-impact’ facilities.</td>
<td></td>
<td>• Public interest is in transparency of regulation.</td>
</tr>
<tr>
<td></td>
<td>• Low penalties for cable damage do not reflect their value to the nation, or the public interest in their protection.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Native title claimants</td>
<td><em>No impact</em></td>
<td><em>No impact</em></td>
<td><em>No benefit</em></td>
</tr>
<tr>
<td></td>
<td>Proposed activities or developments that affect native title may be classed as ‘future acts’ under the Native Title Act 1993.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>A valid ‘future act’ is necessary to protect existing native title rights. It is not clear that the ‘low impact’ regime provides this.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Option 3: New Zealand model</td>
<td><strong>Objective</strong></td>
<td><strong>Beneficiary liable for compensation</strong></td>
<td><strong>Consistent regulatory regime</strong></td>
</tr>
<tr>
<td>----------------------------</td>
<td>--------------</td>
<td>--------------------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td></td>
<td>Security &amp; reliability of submarine cables</td>
<td>High benefit, low cost</td>
<td>High benefit, no cost</td>
</tr>
<tr>
<td><strong>STAKEHOLDERS</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cable owners &amp; operators</td>
<td><em>High benefit, low cost</em></td>
<td><em>High benefit, low cost</em></td>
<td><em>High benefit, no cost</em></td>
</tr>
<tr>
<td></td>
<td><em>Would provide protection from the most likely hazards to cables.</em></td>
<td><em>The New Zealand model does not address this issue duplicating the costs and benefits as stated in Option 1.</em></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Protection within zones would encourage owners to install new cables within protection zones.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Increased penalties would apply throughout protection zones.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fishing industry</td>
<td><em>Mixed benefit</em></td>
<td><em>No effect</em></td>
<td><em>No benefit</em></td>
</tr>
<tr>
<td></td>
<td><em>Exclusion from traditional fishing grounds reduces the inshore areas available for trawlers and the need to travel further adds to costs.</em></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>New Zealand fishing industry bodies recognised the need for</em></td>
<td></td>
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<td></td>
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</tr>
</tbody>
</table>

The New Zealand model does not address this issue duplicating the costs and benefits as stated in Option 1.

This model is funded from general revenue – no cost to cable owners.

No permission is required to lay cables.

This model allows no fishing in protection zones.
Protection of cables, but queried high penalties, which can include seizure of gear and vessels, and forfeiture to the Crown.
- Protection zones would reduce the likelihood of fishers’ incurring liability for accidental cable damage, and of damage to trawling gear from cables.

<table>
<thead>
<tr>
<th>Industry</th>
<th>Benefit/Cost</th>
<th>Effect</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trading ships</td>
<td>No benefit, high cost</td>
<td>No effect</td>
<td>No effect</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resource industry (mining and petroleum)</td>
<td>High benefit, low cost</td>
<td>No effect</td>
<td>No effect</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
damaging them.

<table>
<thead>
<tr>
<th>State Government</th>
<th>No effect</th>
<th>No effect</th>
<th>Not relevant</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>As New Zealand is a unitary state, this model does not fit the Australian federal system.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Commonwealth agencies</th>
<th>High benefit, low cost</th>
<th>High benefit, low cost</th>
<th>Medium benefit, low cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Commonwealth agencies are supportive of good communications infrastructure.</td>
<td>• The New Zealand model does not address this issue duplicating the costs and benefits as stated in Option 1.</td>
<td>A single regime would be established, but this model has no obligation to consult with and take into account the interests of all affected Commonwealth agencies.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Public interest</th>
<th>High benefit, moderate cost</th>
<th>No effect</th>
<th>Moderate benefit, moderate cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Increased security for cables means more reliable links to global communications networks.</td>
<td>The New Zealand model does not address this issue duplicating the costs and benefits as stated in Option 1.</td>
<td>• This model does not provide for consultation with other stakeholders before protection zones decisions are made.</td>
</tr>
<tr>
<td></td>
<td>• Increased penalties for damage to cables realistically reflect their increased value to the nation, and the public interest in their protection.</td>
<td></td>
<td>• Cable owners do not need explicit authority to lay cables.</td>
</tr>
<tr>
<td></td>
<td>• Reliance on submarine cables is</td>
<td></td>
<td>• Enforcement under this model includes police and naval forces, and allows for fishing gear and</td>
</tr>
</tbody>
</table>
increasing and will continue to increase.

- Trade and the national economy would benefit from cheaper and more secure communication.
- Funding from general revenue means that cable owners do not bear the cost of protecting cables.

<table>
<thead>
<tr>
<th>Native title claimants</th>
<th></th>
<th></th>
</tr>
</thead>
</table>
| No effect              | No effect       | No effect       

vessels to be removed, seized and forfeited to the Crown.
| Option 4: Protection zones with restricted activities, increased penalties and clarification of liability provisions | **OBJECTIVE** |
| --- | --- | --- |
| **STAKEHOLDERS** | **Security & reliability of submarine cables** | **Beneficiary liable for compensation** | **Consistent regulatory regime** |
| Cable owners & operators | High benefit, low cost - Cable owners support this proposal which will encourage owners to install new cables within protection zones. - Regime would provide protection from the most likely hazards to cables and would, over time, reduce the need for cable owners to run private patrols. - Increased penalties would apply | High benefit, unknown cost - Carriers will continue to maintain their powers and immunities to install telecommunications infrastructure from which they derive a commercial benefit. - The powers and immunities will be extended to submarine cable infrastructure. - The financial impact is unknown, but is expected to be minimal as | High benefit, low cost - Regime would provide immunity from State laws over the whole of a protection zone, and a single authority. - Compliance costs would be reduced. |
The telecommunications industry would pay for the cost of the regime. Carriers’ liability will only increase if compensation for acquisition of property on ‘just terms’ is determined to be more than compensation for financial loss or damage.

<table>
<thead>
<tr>
<th>Fishing industry</th>
<th>Mixed benefit</th>
<th>No effect</th>
<th>High benefit, low cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Exclusion from traditional fishing grounds reduces the inshore areas available for trawlers to work off Sydney. The need to travel further adds to costs.</td>
<td></td>
<td>Formal regime, clarifying rights and responsibilities, and formal consultation requirements would provide increased certainty of rights and responsibilities.</td>
</tr>
<tr>
<td></td>
<td>A current commercial agreement is in force under which fishers avoid cables.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Fishing industry bodies support a protection zone regime (if they are involved in decision-making) insofar as it would concentrate cables in a small area, and reduce</td>
<td></td>
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<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
- Encroachment of future cables into other fishing areas.
  - Placement of cables off Perth was negotiated with fishers. There has been no conflict, and fishers would be little affected by the proposal.
  - Fishers off Sydney are constrained by costs of civil action if they damage a cable.
  - Protection zones would reduce the likelihood of fishers’ incurring liability for accidental cable damage, and of damage to trawling gear from cables.
  - Fishers could be adversely affected by increased penalties for damage to cables.

<table>
<thead>
<tr>
<th></th>
<th>No benefit, high cost</th>
<th>No effect</th>
<th>No effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trading ships</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The establishment of protection zones would effectively increase</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
the existing areas in which anchoring is prohibited.
  - Increased penalties for damaging a cable.

<table>
<thead>
<tr>
<th>Resource industry (mining and petroleum)</th>
<th>Mixed benefit, low cost</th>
<th>No effect</th>
<th>High benefit, low cost</th>
</tr>
</thead>
</table>
|                                         | - Industry would welcome added communications security.  
  - Mandatory consultation would require conflicting interests to be formally addressed – drilling & anchoring in prohibited zones, cables & pipelines crossing.  
  - Possible conflict if petroleum/mineral explorers want to conduct seismic activities in protection zones – it is not settled whether seismic activities can damage cables. | No effect | - A single regime would be established, and the right of affected industries to have their interests taken into account would be acknowledged. |

<table>
<thead>
<tr>
<th>State Government</th>
<th>High benefit, low cost</th>
<th>No effect</th>
<th>Mixed benefit, low cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- State governments have an interest in reliable</td>
<td>No effect</td>
<td>- State Governments willing to cede jurisdiction to</td>
</tr>
<tr>
<td><strong>Commonwealth agencies</strong></td>
<td><strong>High benefit, low cost</strong></td>
<td><strong>High benefit, low cost</strong></td>
<td><strong>High benefit, low cost</strong></td>
</tr>
<tr>
<td>--------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
<td>---------------------------</td>
</tr>
<tr>
<td><em>Commonwealth agencies</em></td>
<td><em>Communications and are generally supportive.</em></td>
<td>*Clarify that the beneficiary of the acquisition of property (the carrier) is liable to pay compensation on ‘just terms’. *</td>
<td><em>A single regime would be established, with a requirement to consult with and take into account the interests of all affected Commonwealth agencies.</em></td>
</tr>
<tr>
<td><strong>Public interest</strong></td>
<td><strong>High benefit, low cost</strong></td>
<td><strong>High benefit, unknown cost</strong></td>
<td><strong>High benefit, low cost</strong></td>
</tr>
<tr>
<td><em>Public interest</em></td>
<td><em>Increased security for cables means more reliable links to global communications networks.</em></td>
<td><em>The proposed regime maintains carriers’ powers and immunities to install important telecommunications infrastructure in the public interest, whilst balancing the obligation on carriers to be fully liable for their</em></td>
<td><em>The public interest would be served by mandatory consultation with all stakeholders before decisions are made, transparent decision-making by an independent authority, and the tabling of</em></td>
</tr>
<tr>
<td></td>
<td><em>Increased penalties for damage to cables realistically reflect their increased value to the nation, and the public interest in their</em></td>
<td><em>words.</em></td>
<td><em>words.</em></td>
</tr>
<tr>
<td>Protection</td>
<td>Actions</td>
<td>Decisions</td>
<td></td>
</tr>
<tr>
<td>------------</td>
<td>---------</td>
<td>-----------</td>
<td></td>
</tr>
<tr>
<td>Reliance on submarine cables is increasing and will continue to increase.</td>
<td>As we are unable to quantify the financial impact on carriers, it is difficult to predict if there will be any flow-on effects to the community in the form of increased costs for the provision of telecommunications services.</td>
<td>Explicit authority would be required to lay cables in Commonwealth-controlled waters.</td>
<td></td>
</tr>
<tr>
<td>Trade and the national economy would benefit from cheaper and more secure communication.</td>
<td>The rights of possible claimants will be unaffected.</td>
<td>Declaration of protection zone decisions by legislative instrument constitutes a valid ‘future act’ under the <em>Native Title Act 1993</em>, and preserves native title rights.</td>
<td></td>
</tr>
<tr>
<td>The cost of regulation would be recouped from the telecommunications industry.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Native title claimants</th>
<th>No effect</th>
<th>No effect</th>
<th>High benefit, low cost</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Native title claimants</strong></td>
<td><strong>No effect</strong></td>
<td><strong>No effect</strong></td>
<td><strong>High benefit, low cost</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Declaration of protection zone decisions by legislative instrument constitutes a valid ‘future act’ under the <em>Native Title Act 1993</em>, and preserves native title rights.</td>
</tr>
</tbody>
</table>
1. CONCLUSION AND RECOMMENDED OPTION

Option 1: Current regime

Option 1 meets none of the objectives and is unsatisfactory. It provides no net benefit for any stakeholder. There are no direct resource implications for the Commonwealth. This option would provide no protection to cables and retains the disproportionate benefits for carriers to acquire property by virtue of powers and immunities granted under the Telecommunications Act without being fully liable for compensation on ‘just terms’.

Option 2: Extend existing telecommunications regime to submarine cables

Option 2 meets few of the objectives and is unsatisfactory. It would not provide increased incentives to avoid cable damage, would not require balancing the interests of other users of the sea and seabed and would not clarify that the liability for compensation for acquisition of property on ‘just terms’ should lie with the carrier rather than the Commonwealth. It would provide consistency of terrestrial and submarine cable regimes. Resource implications for the Commonwealth would be minimal.

Option 3: New Zealand model

Option 3 meets few of the objectives, is not suitable for Australia’s federal system, would not clarify that the liability for compensation for acquisition of property on ‘just terms’ should lie with the carrier rather than the Commonwealth and is unsatisfactory. Cable owners would benefit from higher penalties. The blanket ban on all fishing and anchoring in a protected area would not balance competing interests. The capacity for seizure of fishing gear and vessels and forfeiture to the Crown is more coercive than other options. It would be funded from revenue with the main impact falling on the police and naval forces for enforcement. There would be no cost recovery from the telecommunications industry.

Option 4: Protection zones with restricted activities, increased penalties and clarification of liability provisions

Option 4 meets all of the objectives, balances the interests of all sea and seabed users, is transparent, has broad support and is self-funding. It requires the interests of other sea and seabed users to be taken into account, and minimises the impact of cables on other users. It would provide enhanced protection for submarine cables, more consistent planning, greater regulatory certainty, and streamlined authorisation processes, in line with the National Bandwidth Inquiry recommendations.

This option will also clarify the original intent of the legislation to ensure the validity of the Telecommunications Act generally, should a question arise that any provision was otherwise contrary to s.51(xxxi) of the Constitution. In addition, the carrier would be liable for fully compensating property owners for their actions.
RECOMMENDATION

It is recommended that option 4 be adopted.

6. IMPLEMENTATION AND REVIEW

Implementation
The recommended option would enable the national information infrastructure to be protected, while the number of protection zones, and their effect on other users of the sea and seafloor, would be minimised.

The regime would apply both to existing cables of ‘national significance’, and those installed in the future. Currently, two cables landing in Sydney and one cable landing in Perth are likely to be considered as nationally significant.

The proposed legislation would impose mandatory requirements on the ACA to consult and take account the interests of users of the sea and seabed, other than the telecommunications industry, through an advisory committee. The ACA would publish information about a proposed protection zone and invite people to make submissions to the ACA.

In deciding whether a protection zone should be declared, the ACA would determine the location and dimensions of the zone. The Bill specifies the sorts of activity that would be prohibited or restricted in protection zones generally, and the ACA would have the power to specify prohibited or restricted activities in a particular zone.

A standard protection zone model would reach from the shore up to the limit of the EEZ, or to the edge of the continental shelf, whichever is the further, and up to one nautical mile to either side of the outermost cable. These dimensions would span State-controlled coastal waters and Commonwealth-controlled territorial seas and the EEZ.

The Constitution allows the Commonwealth Parliament to make laws with respect to telecommunications services (section 51(v)). Submarine cables, like terrestrial underground cables, would be authorised under Commonwealth law.

While the Telecommunications Act 1997 allows for the application of State and Territory laws with respect to approval for the installation of some facilities, the Commonwealth retains responsibility for the authorisation of some facilities including underground cables, some radiocommunications facilities, and temporary defence facilities.

The protection regime would be implemented by adding a separate schedule to the Telecommunications Act 1997, dealing with the protection and regulation of submarine cables. The installation of submarine cables would be exempt from specified State and Territory laws.
Cable owners would apply to the ACA for permits to install new cables, both in protection zones and in Australian waters outside protection zones and State and Territory coastal waters.

A consistent approach to the penalties applying to offences relating to cables of national significance would be applied across all relevant Commonwealth legislation. The Australian Federal Police would be responsible for enforcing the criminal penalty provisions. Requirements of the Bill that are imposed on carriers (including clauses 48, 79 to 83, 85 and 86(2)) would be carrier licence conditions that may be enforced by the ACA (see sections 61 and 68 and clause 1 of Schedule 1 of the *Telecommunications Act 1997*).

The ACA’s declaration of a protection zone, or the variation or revocation of a declaration, would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. Accordingly, the declaration, variation or revocation would be registered on the Federal Register of Legislative Instruments and would be required to be tabled in both Houses of Parliament within 6 sitting days. The ACA’s declaration would be subject to judicial review by the Federal Court under section 39B of the *Judiciary Act 1903* and by the High Court under section 75(v) of the Constitution.

The protection regime would act as a significant incentive to carriers to co-locate their submarine cables in protection zones. Protection for cables and a simplified regulatory regime would encourage future investment in international telecommunications infrastructure in Australia.

It would not be mandatory to locate submarine cables in protection zones. Outside a protection zone, authorisation from the relevant State or Territory government to install a cable in coastal waters would be required, as is the case currently, and a permit from the ACA to install a cable in Commonwealth-controlled waters. Cables installed outside protection zones would not enjoy protection from the prohibition or restriction of certain activities, and the enhanced penalty provisions would not apply.

Carriers would be exempt from certain State and Territory laws when installing a submarine cable in Commonwealth-controlled waters.

Carriers would be liable to pay any compensation that may result from actions taken under the submarine cables protection regime and Schedule 3 to the *Telecommunications Act 1997*.

**Review**

The ACA would review the operation of the protection zone regime and report to the Minister within 5 years of the date on which the regime comes into operation. The Minister would table a copy of the ACA’s report in each House of Parliament within 15 sitting days of receiving the report.
Cost and cost recovery

Given the benefits provided for submarine telecommunications infrastructure: enhanced protection for submarine cables; more consistent planning; greater regulatory certainty; and streamlined authorisation processes, it is appropriate that the cost of the submarine cables protection regime is recovered from the telecommunications industry.

Under Option 4, the ACA’s costs in undertaking these activities would be fully recovered from the telecommunications industry, by way of a Determination made under section 53 of the Australian Communications Authority Act 1997. The details of the cost recovery arrangement will be the subject of a Cost Recovery Impact Statement prepared by the ACA when the relevant Determination is made.

Charges will reflect the costs of providing protection zone services and are directly related to the provision of protection zone services. The ACA uses an activity-based costing methodology to determine the costs of regulatory functions undertaken by the ACA as a basis for determining its charges. The ACA’s cost recovery arrangements are scheduled for review in 2005-06. The protection zones being considered for cost recovery are relevant to the ACA’s responsibility for regulation of the telecommunications industry. Recovery of costs for these activities would be consistent with the Government’s cost recovery policy.

The ACA’s indicative start up and running costs for providing protection zone services for the first year are approximately $600,000. It is anticipated that costs will reduce to approximately $440,000 for the second year and approximately $220,000 for the third and future years.
### ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AAT</td>
<td>Administrative Appeals Tribunal</td>
</tr>
<tr>
<td>ACA</td>
<td>Australian Communications Authority</td>
</tr>
<tr>
<td>ACA Act:</td>
<td><em>Australian Communications Authority Act 1997</em></td>
</tr>
<tr>
<td>ACMA</td>
<td>The proposed Australian Communications and Media Authority</td>
</tr>
<tr>
<td>ACMA Act:</td>
<td><em>The proposed Australian Communications and Media Authority Act 2005</em></td>
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<tr>
<td>Bill:</td>
<td>Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Bill 2004</td>
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<td>Criminal Code</td>
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NOTES ON CLAUSES

Part 1 – Introduction

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the Telecommunications and Other Legislation Amendment (Protection of Submarine Cables and Other Measures) Act 2005.

Clause 2 – Commencement

Clause 2 provides for various provisions of the Bill (specified in column 1 of the table in clause 2), when enacted, to commence on specific days.

Item 1 of the table in clause 2 provides that clauses 1 to 3 and anything in the Bill that is not covered in the table will commence on the day on which the Bill receives the Royal Assent. These are the introductory provisions, including the short title of the Bill, the commencement provisions and an explanation of the Schedules to the Bill.

Item 2 of the table provides that Part 1 of Schedule 1 to the Bill will commence 28 days after Royal Assent. This Part of the Schedule relates to the protection of submarine cables and amends the Submarine Cables and Pipelines Protection Act 1963 and the Telecommunications Act. The provisions set out the rules defining submarine cables eligible for protection and the power of the ACA to declare protection zones. The 28-day period after Royal Assent will allow for the making of any relevant regulations or other subordinate instruments in relation to the amendments made by Schedule 1.

Item 3 of the table provides that Part 2 of Schedule 1 to the Bill will commence immediately after the commencement of the provisions in Part 1 of Schedule 1 to the Bill. Part 2 of Schedule 1 contains amendments that will be required if the proposed Australian Communications and Media Authority Act 2005 (the ACMA Act) commences before the Bill, as enacted. The ACMA Act, if enacted, will deal with the proposed merger of the ACA and the Australian Broadcasting Authority to form the ACMA. However, if Part 1 of Schedule 1 to the Bill commences before the establishment of the ACMA, the amendments in Part 2 of Schedule 1 will not commence at all. In that case, the proposed Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005 will make the appropriate amendments from 1 July 2005 or an earlier date to be proclaimed.

Schedule 2 to the Bill will commence on Royal Assent (item 4 of the table). This Schedule relates to other measures and amends the Telecommunications Act. The provisions in this Schedule relate to carrier compensation to persons when engaging in conduct under Schedule 3 to the Telecommunications Act that results in an acquisition of property from those persons within the meaning of section 51(xxxi) of the Constitution.
Clause 3 – Schedule(s)

There are two Schedules to the Bill. Schedule 1 relates to the protection of submarine cables under the Telecommunications Act and also amends the Submarine Cables and Pipelines Protection Act 1963. Schedule 2 amends Schedule 3 to the Telecommunications Act.

This clause of the Bill, when enacted, will amend or repeal the Acts specified in each Schedule to allow for the protection of submarine cables declared by the ACA, and to provide that carriers will be required to pay compensation for acquisition of property by carriers engaging in activities under Schedule 3 to the Telecommunications Act.

Schedule 1 – Protection of submarine cables

Part 1 – Amendments to protect submarine cables

Schedule 1 outlines a regime for establishing, enforcing and reviewing protection zones for the purposes of the Bill. This Schedule, when enacted, will improve the security and reliability of telecommunications services supplied by way of submarine cables and establishes incentives to avoid damaging the cables (Part 2 of proposed Schedule 3A to the Telecommunications Act). Part 1 of Schedule 1 contains amendments to protect submarine cables that refer to the current regulator, the ACA. Part 2 of Schedule 1 contains amendments that will be required if the proposed Australian Communications and Media Authority Act 2005 (the ACMA Act) commences before the Bill, as enacted. The ACMA Act, if enacted, will deal with the proposed merger of the ACA and the Australian Broadcasting Authority to form the ACMA.

Submarine Cables and Pipelines Protection Act 1963

Item 1 – Subsection 5(1)

Item 1 repeals subsection 5(1) of the Submarine Cables and Pipelines Protection Act 1963 and replaces it with a new subsection that makes that Act applicable only to submarine cables and pipelines that are beneath the high seas or in the exclusive economic zone that are not submarine telecommunications cables of national significance as defined in clause 2 of proposed Schedule 3A to the Telecommunications Act.

The effect of the new subsection will be to remove from the Submarine Cables and Pipelines Protection Act 1963 submarine telecommunications cables in protection zones installed under the authority of this Bill. Cables and pipelines other than telecommunications cables, and telecommunications cables located outside protection zones, will continue to be covered by the Submarine Cables and Pipelines Protection Act 1963.

The Submarine Cables and Pipelines Act Protection 1963 applies to oil and gas pipelines and high-voltage cables as well as to telecommunications cables, and applies only in
Australia’s Exclusive Economic Zone and under the high seas, not within Australia’s territorial waters (ie. not within 12 nautical miles of the shore). This Act provides small penalties for damaging cables or pipelines.

The National Bandwidth Inquiry recommended that the penalties for damaging a submarine telecommunications cable be increased. The option of increasing the penalties for damaging any cable and pipeline to the extent proposed in this Bill was considered.

One of the objectives of this legislation, however, is to provide disincentives to damaging submarine telecommunications cables. This protection zone proposal does so by providing an incentive to locate submarine telecommunications cables in protection zones and thus minimise their effect on other users of the sea and seabed.

This could not be done by providing uniform penalties for damaging any cable or pipeline, and is not consistent with the distinction in this Bill between submarine telecommunications cables of national significance and others.

*Telecommunications Act 1997*

**Item 2 – After Part 24**

Item 2 inserts proposed new Part 24A – Submarine Cables into the Telecommunications Act. Proposed Part 24A consists of section 484A that provides that Schedule 3A has effect.

Schedule 3A outlines a regime for establishing, enforcing and reviewing protection zones over submarine cables that are considered to be of ‘national significance’ (ie. cables that link Australia to global networks and are vital to the national interest).

**Item 3 – Clause 2 of Schedule 3 (at the end of the definition of land)**

Item 3 amends the definition of ‘land’ in Schedule 3 to the Telecommunications Act to make it clear that it does not include land that is beneath ‘Australian waters’ as defined in clause 2 of proposed Schedule 3A to that Act.

Schedule 3 to the Telecommunications Act allows telecommunications carriers to ‘enter on land’ and exercise certain powers in relation to inspection of the land and the installation or maintenance of a telecommunications facility. The term ‘land’ is defined in clause 2 of Schedule 3 to include submerged land. The amendment made by item 3 will avoid any suggestion that Schedule 3 has any application to the installation of a submarine cable in ‘Australian waters’. Schedule 3 may continue, however, to be applicable to the installation of a submarine cable on the landward side of the territorial sea baseline.
Item 4 – After subclause 6(4) of Schedule 3

Item 4 inserts proposed new subclause 6(4A) after subclause 6(4) of Schedule 3 to the Telecommunications Act. Under subclause 6(3) of Schedule 3, the Minister may determine that a specified facility is a low-impact facility by written instrument. The proposed new subclause will prevent the Minister from making a written instrument determining that a submarine cable, as defined by clause 2 of proposed Schedule 3A to the Telecommunications Act, is a low-impact facility.

Under Schedule 3, carriers can install some facilities (low-impact facilities, temporary facilities installed for defence purposes, or where a carrier holds a facility installation permit) under Commonwealth law, and in doing so are exempt from State, Territory and local government laws. Low-impact facilities are covered by the Telecommunications (Low-impact Facilities) Determination 1997, and include certain terrestrial underground cables.

This item makes it clear that submarine telecommunications cables cannot be low-impact facilities. The reason for this provision is that some cables owners have claimed that submarine telecommunications cables are low-impact facilities and not subject to State or local legislative restrictions. This provision specifies that this is not the case. However, the definition of ‘submarine cable’ in clause 2 makes it clear that any part of a submarine cable that is laid elsewhere than on or beneath the Australian seabed is not a submarine cable for the purposes of proposed Schedule 3A. This means that the land-based part of a submarine cable will be capable of being a low-impact facility if it meets the requirements of the Telecommunications (Low-impact Facilities) Determination 1997.

Item 5 – At the end of subclause 15(1) of Schedule 3

Item 5 inserts the words ‘or by Part 3 of Schedule 3A’ in subclause 15(1) of Schedule 3 to the Telecommunications Act. Subclause 15(1) of Schedule 3 allows the Minister, by written instrument, to make a Code of Practice setting out conditions that are to be complied with by carriers in relation to any or all of the activities covered by Division 2, 3 or 4 of Schedule 3 (other than activities covered by a facility installation permit). Upon the commencement of Schedule 1 to the Bill, the inclusion of Part 3 of Schedule 3A will allow the Minister, by written instrument, to make a Code of Practice in relation to the installation of submarine telecommunications cables in a protection zone or in other Australian waters.

Item 6 – After Schedule 3

Item 6 inserts Schedule 3A – Protection of submarine cables after Schedule 3 to the Telecommunications Act. Proposed section 484A (see item 2 of Schedule 1 to the Bill) brings Schedule 3A into effect. Schedule 3A outlines a regime for establishing, enforcing and reviewing protection zones over submarine cables that are considered to be of ‘national significance’ (ie. cables that link Australia to global networks and are vital to the national interest).
Clause 1 – Simplified outline

This clause gives a simplified outline of Schedule 3A. The outline is designed to assist readers to understand the broad elements in the Schedule.

The outline says that:
- The ACA may declare protection zones for submarine cables.
- In a declared protection zone activities may be prohibited or restricted.
- A telecommunications carrier intending to install a submarine cable in Australian waters must first apply to the ACA for a permit to do so.

Clause 2 – Definitions

Proposed subclause 2(1) of the Schedule defines a number of terms used in the Bill. The meanings of the terms in the Bill are described below, unless the contrary intention appears.

Aboriginal person
The term ‘Aboriginal person’ is defined to mean a person of the Aboriginal race of Australia. Under the Bill, the ACA, in considering a proposal to declare a protection zone or issue a permit must have regard to whether the submarine cables are being installed at or near a thing that is of particular significance to Aboriginal persons, in accordance with their traditions (see clauses 21 and 72 of proposed Schedule 3A to the Bill).

advisory committee
The term ‘advisory committee’ is defined to mean a committee established under section 51 of the ACA Act. Under that section, the ACA may establish advisory committees to assist it in performing any of its functions. Appointments to an advisory committee are made by the ACA from time to time and the committee may be a standing committee or may be an ad hoc committee constituted for a particular purpose that assists the ACA in performing its functions. The ACA will be able to give an advisory committee written directions as to the way in which the committee is to carry out its functions and procedures to be followed in relation to meetings.

Under the Bill, an advisory committee will be established to assist the ACA in its considerations relating to the declaration, variation or revocation of a protection zone. The advisory committee will consist of such persons as the ACA considers appropriate including representatives from key sectors affected by the decision and representatives of State and Commonwealth government agencies, and will make recommendations on each protection zone proposal. An advisory committee established for this purpose will be an ad hoc committee, not a standing committee, and membership is likely to vary depending on the proposal. An advisory committee will not undertake a monitoring or enforcement role in relation to protection zones; these functions will be undertaken by the Australian...
Federal Police (to the extent that they relate to criminal offences) and by the ACA (to the extent that enforcement relates to a breach of carrier licence conditions).

**Australia**
The term ‘Australia’, when used in a geographical sense in proposed Schedule 3A, will include all of the external Territories. This term is used in the definition of ‘Australian waters’.

As a result of s. 17(pd) of the *Acts Interpretation Act 1901*, an external Territory is a Territory, other than an internal Territory, for the government of which as a Territory provision is made by an Act. Australia’s external Territories are the Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island and the McDonald Islands, Norfolk Island and the Australian Antarctic Territory.

The Territory of Norfolk Island does not normally come within the operation of the Telecommunications Act. Proposed Schedule 3A to the Telecommunications Act, will, however, apply in relation to the ‘Australian waters’ surrounding Norfolk Island.

**Australian waters**
The term ‘Australian waters’ is defined to mean the waters of the territorial sea (within the meaning of the *Seas and Submerged Lands Act 1973*) of Australia, the waters of the exclusive economic zone of Australia and the sea above that part of the continental shelf of Australia that is beyond the limits of the exclusive economic zone.

The territorial waters of Australia extend 12 nautical miles from the territorial sea baseline determined in accordance with the United Nations Convention on the Law of the Sea (UNCLOS).

The territorial waters of Australia will include the coastal waters of a State or internal Territory. Coastal waters are generally the first 3 nautical miles of the territorial sea adjacent to each State and internal Territory, plus (in the case of Western Australia) some title areas landward of the territorial sea baseline but external to the State. Waters that are within the geographical limits of a State or internal Territory are waters that constitutionally form part of the State or internal Territory – namely, waters that fall within constitutional boundaries of the State or Territory. The waters that are capable of falling within these limits are described in section 14 of the *Seas and Submerged Lands Act 1973* as bays, gulfs, estuaries, rivers, creeks, inlets, ports or harbours which were on 1 January 1901 within the limits of the States and remain within the limits of the States.

The exclusive economic zone of Australia is an area beyond and adjacent to the territorial sea and extends 200 nautical miles from the territorial sea baseline.

The term ‘continental shelf’ is defined for the purposes of the *Seas and Submerged Lands Act 1973* 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.
The term ‘Australia’, when used in a geographical sense in proposed Schedule 3A, is defined separately in clause 2 to include all of the external Territories. As a result of section 17(pd) of the Acts Interpretation Act 1901, an external Territory is a Territory, other than an internal Territory, for the government of which as a Territory provision is made by an Act. Australia’s external Territories are the Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard Island and the McDonald Islands, Norfolk Island and the Australian Antarctic Territory.

Under Part 2 of proposed Schedule 3A, the ACA will be able to declare a protection zone in relation to a submarine cable installed in Australian waters. Under Part 3 of proposed Schedule 3A, a telecommunications carrier will be able to apply to the ACA to install a submarine cable in a protection zone or in Australian waters (other than Australian waters that are in a protection zone or that are coastal waters).

cetacean
The term ‘cetacean’ is defined to have the same meaning as in the Environment Protection and Biodiversity Conservation Act 1999. Section 528 of that Act defines ‘cetacean’ to mean a member of the sub-order Mysticeti or Odontoceti of the Order Cetacea, and includes a part of such a member and any product derived from such a member. Examples of cetaceans are whales, dolphins and porpoises.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on cetaceans (see cls. 20(d), 21(a)(v), 71(b) and 72(a)(v) of proposed Schedule 3A to the Telecommunications Act).

coastal waters
The term ‘coastal waters’ is defined to mean the waters covered by the Coastal Waters (State Powers) Act 1980 (Cth) or the Coastal Waters (Northern Territory Powers) Act...
Coastal waters are generally the first 3 nautical miles of the territorial sea adjacent to each State and the Northern Territory, plus (in the case of Western Australia) some title areas landward of the territorial sea baseline but external to the State. This term is used in clause 64 of proposed Schedule 3A to the Telecommunications Act.

Under the Bill, protection zones (once declared) will run through the coastal waters of a State or the Northern Territory and certain State or Northern Territory laws will not apply within the protection zones. Implementation and operation of the protection zones will be under Commonwealth law, enforced by the Australian Federal Police (to the extent that criminal offences have been committed) and by the ACA (to the extent that there has been a breach of carrier licence conditions).

**Commonwealth marine area**

The term ‘Commonwealth marine area’ is defined to have the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*. Section 24 of that Act defines what is meant by a ‘Commonwealth marine area’.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on the environment within a Commonwealth marine area (see cls. 20(d), 21(a)(iv), 71(b) and 72(a)(iv) of proposed Schedule 3A to the Telecommunications Act).

**conduct**

The term ‘conduct’ is used in the definition of ‘engage in conduct’ and also in cls. 36, 37, 38, 40, 41, 42, 45, 46 and 85 of proposed Schedule 3A to the Telecommunications Act. It is defined to mean an act, an omission to perform an act or a state of affairs.

**continental shelf**

The term ‘continental shelf’ is defined to have the same meaning as in the *Seas and Submerged Lands Act 1973*. The term ‘continental shelf’ is defined for the purposes of that Act 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. This term is used in the definition of ‘Australian waters’.

**declared Ramsar wetland**

The term ‘declared Ramsar wetland’ is defined to have the same meaning as in the *Environment Protection and Biodiversity Conservation Act 1999*. Section 17 of that Act defines what is meant by a ‘declared Ramsar Wetland’.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the
installation, maintenance or operation of the cable could have an adverse effect on the ecological character of a declared Ramsar Wetland (see cls. 20(d), 21(a)(viii), 71(b) and 72(a)(viii) of proposed Schedule 3A to the Telecommunications Act).

**declared World Heritage property**
The term ‘declared World Heritage property’ is defined to have the same meaning as in the Environment Protection and Biodiversity Conservation Act 1999. Section 13 of that Act defines what is meant by a ‘declared World Heritage property’.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on the world heritage values of a declared World Heritage property (see cls. 20(d), 21(a)(ix), 71(b) and 72(a)(ix) of proposed Schedule 3A to the Telecommunications Act).

**ecological character**
The term ‘ecological character’ is defined to have the same meaning as in the Environment Protection and Biodiversity Conservation Act 1999. Subsection 16(3) of that Act provides that the term ‘ecological character’ has the same meaning as in the Ramsar Convention (the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as in force for Australia immediately before the commencement of that Act on 16 July 2000).

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on the ecological character of a declared Ramsar wetland (see cls. 20(d), 21(a)(viii), 71(b) and 72(a)(viii) of proposed Schedule 3A to the Telecommunications Act).

**ecological community**
The term ‘ecological community’ is defined to have the same meaning as in the Environment Protection and Biodiversity Conservation Act 1999. Under the Bill, the ACA, when deciding whether to declare a protection zone or grant a permit, must have regard to various environmental factors in clauses 21 and 72 of proposed Schedule 3A including whether the installation, maintenance or operation of a submarine cable will damage, adversely effect or significantly impede the recovery of a threatened ecological community.

**engage in conduct**
The term ‘engage in conduct’ is defined to mean to do an act or omit to do an act. Under the Bill, engaging in conduct is an element of the offences in relation to protection zones under Division 4 of Part 2 of proposed Schedule 3A and the offences relating to the installation of submarine cables under Division 5 of Part 3 of proposed Schedule 3A.
The term ‘environment’ is defined to have the same meaning as in the Environment Protection and Biodiversity Conservation Act 1999. Section 528 of that Act defines the term as follows:

(environment) includes:

(a) ecosystems and their constituent parts, including people and communities; and
(b) natural and physical resources; and
(c) the qualities and characteristics of locations, places and areas; and
(d) heritage values of places; and
(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b) or (c).

Note: The places mentioned in paragraph (d) of the definition of environment include places included in the Register of the National Estate kept under the Australian Heritage Council Act 2003.

Under the Bill, the ACA, when deciding whether to declare a protection zone or grant a permit, must have regard to the impact on the environment, including various environmental factors in clauses 21 and 72 of proposed Schedule 3A.

Environment Secretary
The term ‘Environment Secretary’ is defined to mean the Secretary of the Department administering the Environment Protection and Biodiversity Conservation Act 1999, currently the Secretary of the Commonwealth Department of the Environment and Heritage. Under the Bill, the ACA must not declare a protection zone vary or revoke a protection zone declaration, or grant a permit unless it has consulted with the Environment Secretary in relation to the proposal to declare a zone or grant a permit and had regard to any advice or recommendations provided by the Environment Secretary.

exclusive economic zone
The term ‘exclusive economic zone’ is defined to have the same meaning as in the Seas and Seas and Submerged Lands Act 1973. The exclusive economic zone is an area beyond and adjacent to the territorial sea (12 nautical miles from the territorial sea baseline) and extends to the High Seas (200 nautical miles from the territorial sea baseline). This term is used in the definition of ‘Australian waters’.

installation
The term ‘installation’, in relation to a submarine cable, is defined to mean the laying of the cable on or beneath the seabed, and the attachment of the cable to any other cable or thing, and any other activity that is ancillary or incidental to the installation.

‘Installation’ therefore includes an activity covered by the laying of the cable or the attachment to it of any other thing.
**international agreement**
The term ‘international agreement’ is defined to mean a convention to which Australia is a party or an agreement or arrangement between Australia and a foreign country. International agreements will include agreements, arrangements or understandings between a Minister, an official or authority of a foreign country. This term is used in the definition of ‘listed international agreement’.

**listed international agreement**
The term ‘listed international agreement’ is defined to mean an agreement that is a listed international agreement for the purposes of Schedule 3 to the Telecommunications Act and an international agreement specified in regulations made for the purposes of this definition. Listed international agreements for the purposes of Schedule 3 to the Telecommunications Act are specified in Schedule 1 to the *Telecommunications Regulations 2001*. The definition of ‘listed international agreement’ in the Bill will, however, allow this list to be expanded by the making of regulations for the purposes of the definition.

Under clauses 21 and 72 of proposed Schedule 3A, the ACA, when considering a proposal for a protection zone or an application for a permit, must ascertain whether a carrier is seeking to install, maintain or operate a submarine cable in a place that Australia is required to protect by the terms of a listed international agreement. Under clause 82 of proposed Schedule 3A, a telecommunications carrier will also be required to ensure that the installation of a submarine cable in a protection zone or in Australian waters (other than coastal waters of a State or Territory) is done in a manner that is consistent with Australia’s obligations under a listed international agreement that is relevant to the installation.

**listed marine species**
The term ‘listed marine species’ has the same meaning as in section 248 of the *Environment Protection and Biodiversity Conservation Act 1999*, which requires the Minister for the Environment and Heritage to establish a list of marine species for the purposes of Part 13 of that Act.

Under the Bill, the ACA, when considering a proposal for a protection zone or an application for a permit, must have regard as to whether the installation, maintenance or operation of submarine cables could have an adverse effect on a listed marine species (see clauses 21 and 72 of proposed Schedule 3A).

**listed migratory species**
The term ‘listed migratory species’ is defined to have the same meaning as in the *Environment Protection Biodiversity Conservation Act 1999*. A listed migratory species is a species included in the list referred to in section 209 of that Act.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the
installation, maintenance or operation of the cable could have an adverse effect on a listed migratory species (see cls. 20(d), 21(a)(vi), 71(b) and 72(a)(vi) of proposed Schedule 3A to the Telecommunications Act).

**listed threatened species**
The term ‘listed threatened species’ is defined to have the same meaning as in the *Environment Protection Biodiversity Conservation Act 1999*. A listed threatened species is a native species included in the list referred to in section 178 of that Act.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on a listed threatened species or impede the recovery of such a species (see cls. 20(d), 21(a)(ii), 71(b) and 72(a)(ii) of proposed Schedule 3A to the Telecommunications Act).

**National Heritage List**
The term ‘National Heritage List’ is defined to have the same meaning as in the *Environment Protection Biodiversity Conservation Act 1999*. The National Heritage List is the list kept under Subdivision B of Division 1A of Part 15 of that Act.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the National Heritage values of a place included in the National Heritage List (see cls. 20(d), 21(a)(vii), 71(b) and 72(a)(vii) of proposed Schedule 3A to the Telecommunications Act).

**National Heritage value**
The term ‘National Heritage value’ is defined to have the same meaning as in the *Environment Protection Biodiversity Conservation Act 1999*. Section 324D of that Act defines what is meant by a ‘National Heritage value’.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the National Heritage values of a place included in the National Heritage List (see cls. 20(d), 21(a)(vii), 71(b) and 72(a)(vii) of proposed Schedule 3A to the Telecommunications Act).

**non-protection zone installation permit**
The term ‘non-protection zone installation permit’ is defined to mean a permit under Division 3 of Part 3 of Schedule 3A (see clauses 64 to 77 of proposed Schedule 3A).

Under the Bill, the ACA has responsibility for granting or refusing to grant permits (non-
protection zone installation permits) to licensed carriers for the installation of submarine cables in Australian waters outside protection zones. Cable owners will not be prohibited from installing cables outside protection zones, but those cables will be subject to existing State and Northern Territory laws in coastal waters and will not have the benefit of the regime established under the Bill.

**protection zone**

The term ‘protection zone’ is defined to mean a protection zone declared by the ACA under clause 4 of proposed Schedule 3A to the Telecommunications Act. Under the Bill, the declaration of a protection zone will be made by way of a legislative instrument for the purposes of the *[Legislative Instruments Act 2003]*. The declaration will therefore be required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament within 6 sitting days of being registered and will be subject to Parliamentary disallowance.

Protection zones will run through coastal waters of the States or Northern Territory and through the Commonwealth-controlled territorial sea, including the waters of external territories, up to the limit of the exclusive economic zone or the edge of the continental shelf, whichever is the further. Under clause 9, a protection zone in relation to one submarine cable is a maximum of one nautical mile wide on either side of the outermost cable with the outer limit allowable as far as 200 nautical miles from shore or the edge of the continental shelf, whichever is the further. The ACA may declare a protection zone less than this area. Before declaring a protection zone the ACA must develop a proposal, consult on the proposal and satisfy the other prerequisites of Subdivision B of Division 2 of Part 2 of proposed Schedule 3A.

**protection zone installation permit**

The term ‘protection zone installation permit’ is defined to mean a permit issued under Division 2 of Part 3 of proposed Schedule 3A. Under this Division, a carrier must apply to the ACA to install a submarine cable in a protection zone. If the permit is granted by the ACA the carrier will be issued with a protection zone installation permit. A charge will be imposed on the application by way of a determination under section 53 of the ACA Act.

**ship**

The term ‘ship’ is defined to mean a vessel of any kind used in navigation by water. The term applies to such vessels regardless of how they are propelled or moved. This term is used in various offence and offence-related provisions (see, for example, clauses 38, 39, 42, 44 and 46 of proposed Schedule 3A to the Telecommunications Act).

The definition will include, for example, submarines and all commercial and recreational surface vessels.

**submarine cable**

The term ‘submarine cable’ is defined to mean the part of a line link that lies beneath Australian waters and has been laid for purposes that include connecting Australia with a
place outside Australia. The term ‘line link’ is defined in section 30 of the Telecommunications Act. A ‘line’ constitutes a line link and is separately defined in section 7 of that Act to mean a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided electromagnetic energy.

The term ‘submarine cable’ also includes any device attached to that part of the line link, if the device is used in or in connection with the line link. This would include, for example, a repeater or regenerator. Under the Bill, submarine cables are seen as critical communications links that need greater protection to ensure they are better secured against damage.

A note to the definition makes it clear that any part of a line link that is laid elsewhere than on or beneath the Australian seabed, and any device attached to such part of a line link, is not a submarine cable for the purposes of proposed Schedule 3A. This means that the installation of the land-based part of a submarine cable will not be governed by proposed Schedule 3A but rather by Schedule 3 to the Telecommunications Act (for example as a low-impact facility) or State or Territory laws if Schedule 3 does not apply.

This means that it will be possible for cables to be covered either by Schedule 3 or Schedule 3A to the Telecommunications Act for the whole of their length within any Australian jurisdiction. Terrestrial underground cables normally come within the ambit of the Telecommunications (Low-Impact Facilities) Determination 1997. These provisions cover cables to the edge of ‘Australian waters’ - that is, to baselines determined in accordance with the United Nations Convention on the Law of the Sea, typically the mean low-water mark. Seaward of that point, cables come within this definition of ‘submarine cable’ and will be governed by proposed Schedule 3A to the Telecommunications Act.

The effect of this Bill together with existing legislative arrangements will be to allow the installation of underground telecommunications cables, terrestrial and (for cables of national significance) submarine, with immunity from State and Territory planning laws, within Australia and as far as 200 nautical miles from shore or to the edge of the continental shelf.

**threatened ecological community**

The term ‘threatened ecological community’ is defined to mean an ecological community that is included in the list of threatened ecological communities kept under Division 1 of the Part 13 of the Environment Protection and Biodiversity Conservation Act 1999. Threatened ecological communities can be classed as critically endangered, endangered or vulnerable when listed.

Under the Bill, the ACA, when considering a proposal for a protection zone or an application for a permit, must consider whether the installation, maintenance or operation of submarine cables could have an adverse effect on a threatened ecological community (see clauses 21 and 72 of proposed Schedule 3A).
**threatened species**
The term ‘threatened species’ is defined to mean a species that is included in one of the following species lists kept under Division 1 of Part 13 of *Environment Protection and Biodiversity Conservation Act 1999*:

(a) extinct in the wild;
(b) critically endangered;
(c) endangered; or
(d) vulnerable.

Under the Bill, the ACA must have regard, when considering a proposal for a protection zone and/or an application for a permit for a submarine cable, to whether the installation, maintenance or operation of the submarine cable could threaten the extinction or significantly impede the recovery of a threatened species on the species lists (see clauses 21 and 72 of proposed Schedule 3A).

**Torres Strait Islander**
The term ‘Torres Strait Islander’ is defined to mean a descendant of an indigenous inhabitant of the Torres Strait Islands. Under the Bill, the ACA, in considering a proposal to declare a protection zone or issue a permit for the installation of a submarine cable, must have regard to whether the cable is being installed at or near a thing that is of particular significance to Torres Strait Islanders, in accordance with their traditions (see clauses 21 and 72 of proposed Schedule 3A).

**world heritage values**
The term ‘world heritage values’ is defined to have the same meaning as in the *Environment Protection Biodiversity Conservation Act 1999*. Subsection 12(3) of that Act provides that a property has ‘world heritage values’ only if it contains natural heritage or cultural heritage as defined in the World Heritage Convention (the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972, as in force for Australia immediately before the commencement of that Act on 16 July 2000). The world heritage values of a property are the natural heritage and cultural heritage contained in the property.

In deciding whether to declare a protection zone in relation to a submarine cable that is yet to be installed, or in deciding whether to grant a non-protection zone installation permit, the ACA is required, among other things, to have regard to whether the installation, maintenance or operation of the cable could have an adverse effect on the world heritage values of a declared World Heritage property (see cls. 20(d), 21(a)(ix), 71(b) and 72(a)(ix)).

**Reference to the location of a submarine cable**
Subclause 2(2) of proposed Schedule 3A provides that, in relation to a submarine cable that is yet to be installed, a reference in the Schedule to the location of a submarine cable includes a reference to the proposed location of the cable.
Part 2 – Protection zones

Part 2 of proposed Schedule 3A sets out the principles by which the ACA can declare a protection zone.

Division 1 gives a simplified outline of Part 2. Division 2 provides for the declaration of protection zones, including the development of proposals for protection zones, the imposition of prohibitions and restrictions on activities in protection zones and the prerequisites for declaring a protection zone. Division 3 deals with the ACA’s ability to vary or revoke a declaration of a protection zone. Division 4 provides for offences in relation to a protection zone. Division 5 includes miscellaneous provisions relating to claiming damages where loss or damage arises from certain activities in a protection zone and provisions relating to the composition of advisory committees for the purposes of Part 2.

Division 1 – Simplified outline

Clause 3 – Simplified outline

Clause 3 gives a simplified outline for Part 2. The ACA may declare a protection zone in relation to a submarine cable of national significance installed in Australian waters and must consult with an advisory committee, the Environment Secretary and the public before making the declaration. A declaration for a protection zone may specify the activities that are prohibited or restricted in the zone. If a declaration does not specify prohibited or restricted activities, then default provisions under clause 10 and 11 will apply. The simplified outline notes that it is an offence to damage a cable, engage in prohibited activities or contravene imposed restrictions on activities in a protected zone.

Division 2 – Declaration of protection zones

Subdivision A – Declarations

Before the ACA declares a protection zone it must comply with the requirements of Subdivision B of Division 2 of Part 2. Subdivision B requires the ACA to develop a proposal for a protection zone; refer the proposal to an advisory committee; publish the proposal seeking public comment; determine that the cable in question is a cable of national significance; and consult with the Environment Secretary. The ACA must have regard to any recommendations of the advisory committee; any public submissions; relevant environmental considerations; the objective of facilitating the supply of carriage services to the public, and any other matters that it considers relevant before declaring a protection zone.
Clause 4 – ACA may declare a protection zone

This clause provides that the ACA may declare a protection zone in relation to one or more submarine cables, whether they are existing cables or cables proposed to be installed, in Australian waters. Under clause 18, the ACA must be satisfied that a cable is a cable of national significance before a protection zone is declared in relation to it.

A protection zone declaration is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. It is therefore required to be tabled in both Houses of Parliament and is subject to Parliamentary disallowance. The decision to declare a protection zone will involve extensive consultation to balance the competing interests of stakeholders, including those persons using the area where a zone is declared.

There are two main purposes of a protection zone. The first is to provide a more effective deterrent to stop people who may undertake activities that have the potential to damage submarine cables of national significance, as set out in clauses 10 and 11. The protection afforded will minimise the effect of the cables on other users of the sea and seabed.

The second purpose is to enable cable planning and location decisions to be taken in a more considered way, taking into account the interests of other users of the sea and seabed. This will encourage carriers to co-locate cables in protection zones.

Clause 5 – Declaration on ACA’s initiative or in response to request

This clause says that a declaration of a protection zone may be made at the request of a person or on the ACA’s own initiative.

The ACA’s decision-making role in relation to a protection zone includes the decision to declare a protection zone and once declared the ACA may vary or revoke the protection zone. Carriers or other persons or the ACA will be able to initiate the declaration process.

Any person will be able to initiate proposals to vary or revoke protection zone declarations (see Division 3 of Part 2). This will allow carriers to request the ACA to adjust, for example, the dimensions of a protection zone to allow for emergent circumstances. It will allow other users of the sea and seabed (for example, commercial fishers, recreational fishers, petroleum explorers) to prompt the ACA to vary or revoke a protection zone declaration to better take account of their interests, where necessary. The ACA will also be able to vary or revoke a protection zone declaration.

Clause 6 – Response to a request to declare a protection zone

This clause says that, in response to a request to declare a protection zone by a person, the ACA may decide to develop a proposal for a protection zone, and if the ACA so decides it must then give the person a copy of its proposal. If the ACA decides not to develop a proposal for a protection zone, in response to a request to declare a protection
zone, it must then notify the requesting person in writing providing reasons for its decision.

Providing the ACA with the power not to develop a protection zone proposal will ensure that frivolous, vexatious or inadequately supported requests can be dealt with in an appropriate way.

‘Developing a proposal’ will require the ACA to specify the nominal location of the cable, the area proposed to be covered by the protection zone (where this is different from that specified in clause 9), and the activities proposed to be prohibited or restricted (see clause 15).

Clause 7 – Decision not to declare a requested protection zone or to declare a different protection zone

This clause says that if the ACA develops a protection zone proposal in response to a request from a person but subsequently decides not to declare a protection zone, the ACA must notify the person in writing providing reasons for its decision. A decision not to declare a protection zone will not be reviewable on its merits by the AAT, but may be subject to judicial review.

If the ACA develops a protection zone proposal in response to a request from a person but then declares a protection zone that is different from the proposed protection zone, the ACA must provide the person with a copy of the declaration.

Clause 8 – Location of submarine cable to be specified in declaration

This clause says that a protection zone declaration in relation to one or more submarine cables must specify a nominal location of the cable or cables in all Australian waters in which the cable is installed (regardless of whether this is in fact the actual location of the cable or cables). The protection zone declaration must not specify a location for the cable outside Australian waters as defined in clause 2.

The location must be expressed in geographic coordinates and must include the geodetic datum to which the coordinates refer (see subclause 8(2)). The reference to geographic coordinates means a set of 2 pieces of information, specifically the measurement of longitude and the measurement of latitude of a specific point, but this information does not in itself provide the means of identifying the position of a particular point on the surface of the Earth with any accuracy. A datum, the reference surface for the latitude and longitude, must also be given, as there is more than one datum that could be used. The geodetic datum is the mathematical model of the Earth used to determine the exact position of geographic coordinates having regard to the curvature of the Earth.

The location of a submarine cable will typically be described by giving latitude and longitude at points along the length of the cable from the landing point. The actual location of a submarine cable may change over time, either because of ocean currents or
movements of the seabed, repairs to the cable, or contact of the cable with fishing equipment.

The location of a cable specified by the ACA under clause 8 provides a starting point from which the maximum width of a protection zone can be measured, and provides the basis for the nominal location of the cable as defined in subclause 9(6).

This clause ensures that the boundaries of a protection zone as specified under clause 9, and therefore its area, can be established with precision even if the cable is not laid precisely at the nominal location, or if the cable moves after it is laid. The protection zone boundaries will be specified and fixed.

Clause 9 – Area of a protection zone

This clause provides for the area of a protection zone. In the case of a single cable, a protection zone consists of an area not more than one nautical mile either side of the points on the surface of the sea above the nominal location of the cable, as required by clause 8, and includes the waters, sea and subsoil beneath that area, unless otherwise specified in the declaration by the ACA. That is, one nautical mile will be the maximum distance but the ACA will be able to declare a narrower zone (see subclause 9(3)). It is possible that the ACA may wish to specify a protection zone narrower than two nautical miles, if there are particular local features or protection techniques used by cable owners, such as trenching and burying.

If a cable leaves one area of Australian waters and subsequently enters another area of Australian waters, the protection zone in relation to that cable will cover both areas of Australian waters.

In the case of more than one cable, a protection zone consists of the area between the nominal location of each cable and the area no more than one nautical mile from the outside edge of the points on the surface of the sea above the nominal location of the two outermost cables. The area of the protection zone will include the waters, sea and subsoil beneath that area, unless otherwise specified in the declaration by the ACA. One nautical mile from the outermost cable will be the maximum distance but the ACA will be able to declare a narrower zone (see subclause 9(5)).

The outer limit of a protection zone will extend up to the limit of Australia’s exclusive economic zone or to the edge of the continental shelf, whichever is the further, as defined in clause 2, and includes the waters, sea and subsoil beneath that area, unless otherwise specified in the declaration by the ACA. That is, Australia’s exclusive economic zone or the edge of the continental shelf will be the maximum outer distance, but the ACA will be able to declare a shorter outer limit for the protection zone. It is possible that a carrier may request the ACA to specify a particular outer limit distance for a protection zone proposal.
Clause 8 requires that a protection zone declaration specify a nominal location, which serves as the starting point from which the maximum width of a protection zone is measured. The term nominal location means the location of the submarine cable or cables as specified in the declaration of the protection zone at the time the declaration is made. This specification will apply regardless of the actual location of the cable or cables either at the time the declaration is made or subsequently.

The nominal location of the submarine cable is important for the threshold issue of determining the location of the protection zone for the purposes of making the declaration. Cable-laying ships cannot guarantee to lay cables precisely at the nominal location, particularly in deep water. In addition, the actual location of a submarine cable may change over time because of ocean currents or movements of the seabed, or because of repairs to the cable or contact of the cable with fishing gear.

References to the nominal location of a submarine cable become important when considering restrictions within a protection zone. For example, petroleum exploration may be allowed within half a nautical mile of a cable if certain actions are taken to prevent damage to the cable.

**Clause 10 – Prohibited activities**

This clause allows the ACA to prohibit certain activities in a protection zone. Along with clauses 11 and 12, it forms a framework for regulating activities in protection zones that is intended to minimise the possibility of damage to cables.

This clause says that the ACA may specify, in a declaration of a protection zone, activities that are prohibited in the protection zone. If the ACA’s declaration does not specify any prohibited activities, the activities specified in subclause 10(4) will be prohibited.

The particular focus of this clause is to prohibit activities that are likely to result in a physical connection between a ship or other object and the seabed that are capable of damaging a cable. This clause prohibits activities that constitute a serious threat of damage to a submarine cable, including:

- fishing in protection zones using trawl gear, pots, traps, dredges, jigs, nets, seines, lines, and fish aggregating devices of all kinds in which any part of the equipment used is designed to rest on or to work at or near the seabed;
- the towing, operating or suspending from a ship in a protection zone of equipment used in those kinds of fishing, even if the equipment would not reach to the seabed in the circumstances in which it is being used;
- the raising, lowering and suspending of such equipment, or having such equipment outside the hull of a ship, within a protection zone for any purpose. (For example, it will prohibit having a net over the side of a ship to clean it.)
Trawl gear is towed behind a vessel. Some kinds pull heavy equipment across the sea bottom, which can easily damage cables.

There are many types of pots and traps used to catch fish and shellfish, including lobster, octopus and crabs. Generally a number of pots are loaded on board a vessel, set on the bottom and retrieved after a few hours or days. They can be marked by a line and buoy, or may be set in series attached to branch lines along a main line. They do not penetrate the bottom, but can easily snag a cable on top of the seabed.

Traps are stationary structures into which fish swim but cannot escape. They are usually fixed to the bottom in shallow water with anchors or stakes.

Dredges include, but are not confined to, fishing dredges, which are dragged across the bottom and used to collect molluscs such as clams and scallops in a rigid frame or mesh bag. They include mechanised (hydraulic) dredges that shoot high pressure streams of water into the seabed to dig out molluscs, which are collected in a metal frame.

Squid jigs are artificial hooked lures that may look like prawns or small fish. They are generally cast and retrieved using a fishing rod.

Fish aggregating devices are used to attract fish, not to catch them. A simple type is an anchored buoy which has objects attached and suspended in the water, such as plastic floats, foam blocks or palm branches.

Seines are nets, often with a bag for the catch, which hang vertically in the water, with floats at the top and weights at the bottom. Types include haul seines, which are generally dragged by one or more people parallel to shore, and Danish seines, in which one end of a seine is made fast to a buoy and the other is towed by a boat in a wide arc and back to the buoy.

This clause also prohibits within a protection zone:

- anchoring a ship (as defined in clause 2), including lowering, raising or suspending an anchor from a ship;
- sand mining;
- exploring for resources or exploiting resources. This covers resources of all kinds other than fish, and may include exploring for and exploiting petroleum and minerals in the sea and on or under the sea bed;
- mining activities and the use of mining techniques, including activities preparatory or ancillary to mining;
- any activity that involves a serious risk that an object connected to the surface or attached to a ship (as defined in clause 2) will connect with the seabed, if a connection between the object and a submarine cable would be capable of damaging the cable. This will enable the ACA to prohibit activities dangerous to submarine cables that may be developed in the future.
An activity which, if done near a submarine cable, involves a serious risk of damaging a cable may be specified in the regulations to be a prohibited activity.

An activity dangerous to submarine cables not specifically listed as a prohibited activity (but which may amount to a prohibited activity in certain circumstances) is dumping, which is the deliberate disposal into the sea of wastes or other matter from vessels. Dumping is prohibited under the Environment Protection (Sea Dumping) Act 1981. Heavy penalties apply for offences under this Act.

**Clause 11 – Restricted activities**

The particular focus of this clause is on activities that involve techniques and equipment in the water that are less likely than those specified in clause 10 to result in physical contact between a ship or other object and the seabed but that, if they occur, could still damage a cable. This clause will enable the ACA to restrict activities that constitute a threat of damage to a submarine cable, but a less serious threat than the activities specified in clause 10.

This clause says that the ACA may specify restrictions on activities in a protection zone in the protection declaration.

This will enable the ACA to restrict in a protection zone fishing operations that are not prohibited, specifically types of fishing that do not use equipment designed to rest on or to work at or near the seabed. This includes fishing with nets that are above the seabed at all times, the towing, operating or suspension from a ship of fishing equipment other than that specified in clause 8(3)(b), and line fishing whether from a ship or boat, or from the shore, rocks or beach.

The ACA may specify restrictions to apply in a protection zone to the installation, maintenance and removal of cables and pipelines of all kinds, including electricity cables and oil and gas pipelines. The ACA may for example specify the conditions on which a pipeline can cross a submarine cable, or the conditions on which a pipeline can be installed in a protection zone.

The ACA may impose restrictions in a protection zone on the construction, maintenance and removal of an installation for the use of ships, such as a wharf, jetty, boat ramp or slipway, or of a navigational aid such as a buoy.

The ACA may impose restrictions in a protection zone on any activity that involves a risk that an object connected to the surface or attached to a ship (as defined in clause 2) will connect with the seabed, if a connection between the object and a submarine cable would be capable of damaging the cable. This will enable the ACA to impose restrictions on activities dangerous to submarine cables that may be developed in the future.

An activity which, if done near a submarine cable, involves a risk of damaging a cable may be specified in the regulations to be a restricted activity.
Clause 12 – Conditions

This clause allows the declaration of a protection zone to be made subject to any conditions the ACA considers appropriate.

Where a protection zone is declared with conditions, the declared conditions may include, for example, the provision of onshore signage relating to the protection zone or the provision of marine user education. The conditions imposed by way of a declaration may vary from zone to zone and within zones. The ACA is able to vary conditions at any time. Where a protection zone is declared with conditions, those conditions remain in force until modified or extinguished by the ACA, or until the protection zone declaration is revoked (see clause 23).

The purpose of this clause is to give the ACA some flexibility in administering the submarine cable protection regime. The nature of the conditions that the ACA may impose on a protection zone declaration is not limited; conditions may for example relate to matters raised when the Environment Secretary is consulted under clause 19.

Clause 13 – When a declaration takes effect

This clause allows the ACA to specify the time at which a protection zone declaration comes into effect.

Where a protection zone is declared for a cable or cables not yet installed, the declaration cannot come into effect at a time before the time the ACA is satisfied that the installation of the cable or cables will begin.

The purpose of this clause is to ensure that the restrictions, conditions and prohibitions made in relation to the protection zone do not unnecessarily apply before they have to, ie. before there is a cable in the water.

Clause 14 – Duration of declaration

This clause provides that a protection zone declaration continues in effect until revoked by the ACA regardless of whether or not there is an active cable in the protection zone. Revocation of a declaration of a protection zone is dealt with in Division 3 of Part 2 of proposed Schedule 3A.

Until the declaration of a protection zone is revoked, the offence provisions in Division 4 of Part 2 of proposed Schedule 3A will therefore continue to apply even if the cable is not operative.

The purpose of this clause is to require a formal decision by the ACA before the restrictions, conditions and prohibitions in a protection zone cease to apply. These
restrictions will not cease to apply, for example, merely because a cable is temporarily out of service.

**Subdivision B – Prerequisites to declaration of a protection zone**

**Clause 15 – ACA to develop a proposal for a protection zone**

This clause says that before the ACA declares a protection zone it must develop a proposal for the declaration of the zone. A proposal for the declaration of a protection zone may be made in relation to existing or proposed submarine cables of national significance. The proposal must include a statement of the nominal location of the cable or cables in Australian waters, details of the area of proposed protection zone where the maximum protection zone width or outer limit specified in clause 9 do not apply, as well as details of prohibited or restricted activities for the proposed protection zone.

This clause requires the ACA to specify enough detail of its proposal so that the advisory committee and the public will understand what is intended.

Subclause 15(3) provides that an ACA proposal for a protection zone is not a legislative instrument. This does not exempt an ACA proposal from the operation of the *Legislative Instruments Act 2003* because such a proposal would not fall under the definition of a legislative instrument in section 5 of that Act in any event. However, because such a proposal is an ‘instrument’ that is not expressly excluded by the Legislative Instruments Act or the *Legislative Instruments Regulations 2004*, it is the policy of the Office of Parliamentary Counsel to include a provision along the lines of subclause 15(3) to make the status of the instrument obvious on its face. Subclause 15(3) is for information only.

**Clause 16 – ACA to refer proposal to advisory committee**

This clause says that the ACA must refer any proposal for a protection zone to an advisory committee.

The ACA will be able to give an advisory committee written directions as to the way in which the committee is to carry out its functions and procedures to be followed in relation to meetings (see subsection 51(3) of the ACA Act).

An advisory committee may make recommendations to the ACA. If it does not make recommendations, the committee must give the ACA a statement of the opinion of each member of the committee about the proposal. Clause 20 requires the ACA to have regard to the recommendations or statements of opinion of the advisory committee. The advisory committee is established under section 51 of the ACA Act, and is likely to be an ad hoc committee, constituted on a case-by-case basis to examine a particular proposal. The membership of an advisory committee may vary from time to time.

Clause 49 deals with the composition of advisory committees.
This clause provides a formal mechanism that will allow representatives of stakeholder groups likely to be affected by a protection zone to examine and consider the proposal, and have their views taken into account by the ACA in its decision-making. This flows from the desire to fairly balance the needs of various users of the sea and seabed.

**Clause 17 – ACA to publish proposal**

This clause says that the ACA is required to publish a proposal developed for the declaration of a protection zone and invite public submissions on the proposal. The proposal must be published in the Commonwealth of Australia Gazette, on the ACA’s Internet website and in a newspaper with general circulation in each State and internal Territory, and in any affected external Territory. The ACA may publish a proposal at the same time that it refers the proposal to an advisory committee. Details to be published are outlined at clause 15.

This clause will allow members of the public to examine and consider a proposal, and make submissions that the ACA must have regard to in its decision-making.

**Clause 18 – Cable must be a submarine cable of national significance**

This clause says that a protection zone cannot be declared by the ACA in respect of one or more cables unless it is satisfied that the cable is or will be of national significance. Submarine cables of national significance are generally high capacity cables that link Australia to global communications systems and that are vital to the national interest. Using the criterion of national significance ensures that national information infrastructure is protected while the number of protected areas, and their effect on other users of the sea, is minimised.

For example, three submarine cables that are particularly important to the national economy and link Australia to global communications systems at present are the Australia-Japan cable which links Sydney with Japan and then the US, the Southern Cross cable which links Sydney with New Zealand and Fiji, then the US and the SEA-ME-WE3 cable which links Perth with Jakarta, Singapore and then Europe.

In the case of a decision relating to a submarine cable that is yet to be installed, the ACA must determine that the cable will be a cable of national significance before a protection zone is declared.

The ACA will have a discretion to determine what constitutes a cable of national significance. For example, the ACA may treat a particular cable as a cable of national significance if it is vital for national security, defence or other purposes.

Note that the definition of ‘submarine cable’ in clause 2 includes only cables that have as one of their purposes the connection of Australia with a place outside Australia. It therefore excludes, for example, those cables the only purpose of which is to connect one Australian State to another.
Clause 19 – Consultation with Environment Secretary

This clause says that a protection zone cannot be declared by the ACA in respect of one or more cables unless the ACA has consulted with the Environment Secretary on the proposal for the protection zone. The ACA is required to have regard to any advice or recommendations provided by the Environment Secretary in relation to the proposal.

The Environment Secretary is defined in clause 2 of proposed Schedule 3A to mean the Secretary of the Department responsible for the administration of the Environment Protection and Biodiversity Conservation Act 1999. This is currently the Secretary of the Commonwealth Department of the Environment and Heritage.

This clause and clause 21 provide a formal mechanism to ensure that environmental considerations are properly taken into account in protection zone decision-making.

Clause 20 – Matters the ACA must have regard to

This clause provides that the ACA must have regard to a number of matters when deciding whether to declare a protection zone in relation to one or more cables, which may be either existing or proposed cables. The matters to be considered include:

- the recommendations or statement of opinions of the advisory committee that has considered the proposal for the protection zone;
- any public submissions received on the proposal for the protection zone;
- the objective of facilitating the supply of carriage services to the public; and
- any other matters that the ACA considers relevant.

The ‘other matters’ that the ACA may consider relevant could include, for example, an agreement in place between a cable owner and other sea or seabed users, eg. a Memorandum of Understanding with local fishers, or an agreement to follow the terms of an international code when cables cross oil and gas pipelines.

Where the protection zone is proposed for a cable not yet installed, the matters to be considered also include:

- the impact of installing a submarine cable on the environment as defined in clause 2 (including heritage values of places);
- the relevant technical and economic aspects of the installation;
- whether the installation involves co-location with existing submarine cables; and
- the economic and social benefits that are likely to result from the installation of the cable.

These are in addition to the requirement that a protection zone may only be declared in respect of a cable of national significance (see clause 18).
Clause 21 – Environment and heritage considerations

This clause specifies the matters the ACA must have regard to when considering the impact of the installation of a proposed submarine cable on the environment under paragraph 20(d). It expands upon clause 19, which requires the ACA to consult with the Environment Secretary before declaring a protection zone in relation to one or more submarines cables. The known environmental effects of laying and operating submarine cables are small.

First, the ACA must have regard to whether the installation, maintenance or operation of the submarine cable:

- is inconsistent with Australia’s obligations under a listed international agreement as defined in clause 2; or
- could have an adverse effect on a listed threatened species (as defined in clause 2) or a threatened ecological community (as defined in clause 2), or impede the recovery of a listed threatened species or threatened ecological community; or
- could have an adverse effect on a listed marine species as defined in clause 2; or
- could have an adverse effect on the environment (as defined in clause 2), including the environment within a Commonwealth marine area (as defined in clause 2); or
- could have an adverse effect on cetaceans (as defined in clause 2); or
- could have an adverse effect on a listed migratory species as defined in clause 2; or
- could have an adverse effect on the National Heritage values of a place included in the National Heritage List as defined in clause 2; or
- could have an adverse effect on the ecological character of a declared Ramsar wetland as defined in clause 2; or
- could have an adverse effect on the world heritage values of a declared World Heritage property as defined in clause 2; or
- could have an adverse effect on a place that Australia is required to protect by the terms of a listed international agreement as defined in clause 2; or
- could have an adverse effect on an area that, under law of the Commonwealth, a State or a Territory, is reserved wholly or principally for marine conservation purposes (however described); or
- could have an adverse effect on an area that, under a law of the Commonwealth, a State or a Territory, is protected from significant environmental disturbance.

Second, the ACA must have regard to whether the submarine cable is to be installed at or near an area or thing that is of particular significance to Aboriginal persons, or Torres Strait Islanders, in accordance with their traditions.

Third, the ACA must have regard to such other matters as the ACA considers relevant.
Clause 22 – Deadline for final decision about protection zone

This clause says that if the ACA publishes a proposal for a protection zone in accordance with clause 17, the ACA’s decision whether or not to declare the protection zone must be made as soon as practicable, with the maximum timeframe being 12 months after the day on which the proposal is published.

It is envisaged that in the majority of cases the ACA’s protection zone decisions will be made within reasonable timeframes, however, given the number of prerequisite processes the ACA must undertake prior to making a protection zone decision, referral to an advisory committee, consideration of public submissions, consultation with the Environment Secretary and a number of additional environmental considerations, (see clauses 16 and 17 and 19 to 21) there may be some circumstances in which the decision making process requires the maximum 12 month timeframe.

Division 3 – Varying or revoking a declaration of a protection zone

Subdivision A – Variation or revocation

Clause 23 – ACA may vary or revoke a declaration of a protection zone

This clause allows the ACA to vary or revoke the declaration of a protection zone.

A declaration may be varied in several ways for a number of reasons. The area covered by a protection zone declaration may be varied because, for example, the ACA needs to widen a zone to accommodate a new cable or cables, within the maximum width specified by clause 9.

The activities prohibited or restricted within a zone, as set out in the declaration, may be varied. For example, the ACA may adjust a restriction to allow for emergent circumstances such as newly discovered fish stocks or new technology such as new methods of fishing.

A revocation or variation of a declaration will be a legislative instrument for the purposes of the Legislative Instruments Act 2003. An instrument varying or revoking a previously made declaration for a protection zone will therefore be required to be registered on the Federal Register of Legislative Instruments, tabled in both Houses of Parliament and will be subject to Parliamentary disallowance.

The ACA will be required to develop a variation or revocation proposal in relation to the protection zone under Subdivision B of Division 3 prior to the making of the variation or revocation.

A variation or revocation of a declaration for a protection zone may arise as a result of a decommissioning of a submarine cable by a carrier. Under clause 47 telecommunications
carriers are under an obligation to notify the ACA in writing as soon as practicable when a cable in a protection zone ceases to be used or is decommissioned.

A protection zone declaration would normally be revoked only when there are no longer any operating cables in the zone, and it is not proposed to install new cables in it.

**Clause 24 – Variation or revocation on ACA’s initiative or in response to request**

This clause says that a variation or revocation of a protection zone declaration may be made by the ACA on its own initiative or at the request of a person.

This clause allows the ACA to take account of changed circumstances in a protection zone, or changes in the interests or needs of users of the sea and seabed in a protection zone.

The clause allows any person to request the ACA to vary or revoke a declaration, in order to have their interests better protected. For example, petroleum explorers and producers may seek to vary the terms of restrictions on their activities within protection zones; and commercial or recreational fishers may seek to have a restricted activity permitted if they believe they can demonstrate that the activity poses no risk to the cables in the zone.

**Clause 25 – ACA to notify affected carrier of request to vary or revoke a declaration**

This clause says that if a person requests the ACA to vary or revoke a declaration of a protection zone, the ACA must, as soon as practicable and before the ACA develops a proposal, notify the carriers responsible for cables in the protection zone. It is intended that the notification would give details of the request to vary or revoke a protection zone declaration.

The notification process under this clause ensures that carriers likely to be affected by changes to a declaration of a protection zone are provided with information about requested changes in a timely manner.

**Clause 26 – Response to a request to vary or revoke a declaration**

This clause says that, in response to a request to vary or revoke a declaration of a protection zone by a person, the ACA must decide whether to develop a proposal for the variation or revocation of the declaration of the protection zone. If a decision is made to develop the proposal, the ACA must give the person a copy of its proposal. If the developed proposal differs from the request made by the person, the ACA must notify the person in writing of the reasons for the difference.

If the ACA decides not to develop a proposal to vary or revoke a declaration in response to a request from a person, it must then notify the person, in writing, providing reasons for its decision.
Allowing the ACA the power not to develop a variation or revocation proposal will ensure that frivolous, vexatious or inadequately supported requests can be dealt with in an appropriate way.

**Clause 27 – Decision not to vary or revoke a declaration after a request to do so**

This clause says that if the ACA, after developing a proposal to revoke or vary a declaration of a protection zone, decides not to vary or revoke the declaration in response to a request form a person, the ACA must notify the person in writing providing reasons for its decision.

The ACA must also inform the person requesting the variation or revocation of the outcome, giving reasons for the decision, in the following circumstances:

- where the ACA decides to vary the declaration but in a different way to the request of the person;
- where the ACA decides to vary the declaration rather than revoke it; and
- where the ACA decides to revoke the declaration rather than vary it.

**Clause 28 – When a variation or revocation takes effect**

This clause says that a variation or revocation of a protection zone declaration comes into effect at a time specified by the ACA. This is to allow the ACA discretion to determine when a variation or revocation should come into effect, depending on the individual circumstance of each case.

The effect of section 12 of the *Legislative Instruments Act 2003* is that the time specified by the ACA will be in the instrument of variation or revocation and this time must not be before the instrument is registered on the Federal Register of Legislative Instruments if the instrument would disadvantage any person apart from the Commonwealth or a Commonwealth authority.

**Clause 29 – Protection zone as varied must not exceed permitted area**

This clause says that the area of a protection zone as specified in subclauses 9(3) and (5) will continue to apply in relation to any protection zone varied by the ACA. The effect of this clause is that the maximum width of a protection zone, even with variations, will be one nautical mile on either side of the outermost cable and the maximum outer limit of a protection zone, even with variations, will be to the limit of Australia’s exclusive economic zone or to the edge of the continental shelf, whichever is the further. This will minimise the effect of protection zones on other uses of the seabed.
Subdivision B – Prerequisites to variation or revocation of declaration

Clause 30 – ACA to develop a variation or revocation proposal

This clause says that before the ACA varies or revokes a declaration of a protection zone it must develop a proposal to vary or revoke that declaration. The proposal will be in relation to the variation or revocation requested by a person or initiated by the ACA.

To ‘develop a proposal’ means that the ACA should provide enough detail of the proposed variation or revocation so that the advisory committee and the public can understand its intention and likely effects.

Subclause 30(2) provides that an ACA proposal to vary or revoke a protection zone declaration is not a legislative instrument. This does not exempt an ACA proposal from the operation of the Legislative Instruments Act 2003 because such a proposal would not fall under the definition of a legislative instrument in section 5 of that Act in any event. However, because such a proposal is an ‘instrument’ that is not expressly excluded by the Legislative Instruments Act or the Legislative Instruments Regulations 2004, it is the policy of the Office of Parliamentary Counsel to include a provision along the lines of subclause 30(2) to make the status of the instrument obvious on its face. Subclause 30(2) is for information only.

Clause 31 – ACA to refer proposal to advisory committee

This clause says that before varying or revoking a declaration for a protection zone, the ACA must refer its developed proposal to an advisory committee. The ACA will be able to give an advisory committee written directions as to the way in which the committee is to carry out its functions and procedures to be followed in relation to meetings (see subsection 51(3) of the ACA Act).

An advisory committee may make recommendations to the ACA. If it does not make recommendations, the committee must give the ACA a statement of the opinion of each member of the committee about the proposal. Clause 34 requires the ACA to have regard to the recommendations or statements of opinion of the advisory committee. The advisory committee is established under section 51 of the ACA Act, and is likely to be an ad hoc committee, constituted on a case-by-case basis to examine a particular proposal. The membership of an advisory committee may vary from time to time. Clause 49 deals with the composition of advisory committees.

This clause provides a formal mechanism that will allow representatives of stakeholders whose interests are likely to be affected by a protection zone, to examine and consider the proposal, and have their views taken into account by the ACA in its decision-making. This flows from the desire to fairly balance the needs of various users of the sea and seabed.
Clause 32 – ACA to publish proposal

This clause says that the ACA is required to publish a proposal developed for the variation or revocation of a declaration of a protection zone. The publication of the proposal must be accompanied by an invitation for public submissions on the proposal. Publication of the proposal must occur in the Commonwealth of Australia Gazette, the ACA’s Internet website and in a newspaper with general circulation in each State and internal Territory, and in any affected external Territory.

This clause will allow members of the public to examine and consider a proposal, and make submissions that the ACA must have regard to in its decision-making.

Clause 33 – Consultation with Environment Secretary

This clause says that the ACA must not vary or revoke a protection zone declaration in respect of one or more cables unless the ACA has consulted with the Environment Secretary on the proposal to vary or revoke the protection zone declaration. The ACA is required to have regard to any advice or recommendations provided by the Environment Secretary in relation to the proposal.

The Environment Secretary is defined in clause 2 of proposed Schedule 3A to mean the Secretary of the Department responsible for the administration of the Environment Protection and Biodiversity Conservation Act 1999. This is currently the Secretary of the Commonwealth Department of the Environment and Heritage.

This clause provides a formal mechanism to ensure that environmental considerations are properly taken into account in protection zone decision-making.

Clause 34 – Matters the ACA must have regard to

This clause says that the ACA must have regard to a number of matters when deciding whether to vary or revoke a declaration of a protection zone. The matters to be considered are:

- the recommendations or statement of opinions of the advisory committee that considered the proposal to vary or revoke a protection zone declaration;
- any public submissions received on the ACA’s developed proposal;
- the legitimate commercial interests of the owner of a submarine cable in the protection zone and the carrier responsible for the cable if the carrier is not the owner of that cable;
- any other matters the ACA considers relevant.

Clause 35 – Deadline for final decision about varying or revoking a protection zone

This clause says that if the ACA publishes a proposal for a variation or revocation of a declaration of a protection zone, a decision whether or not to vary or revoke the
protection zone must be made within 180 days after the day on which the proposal was published.

It is envisaged that in the majority of cases the ACA’s decisions about varying or revoking a protection zone will be made within reasonable timeframes, however, given the number of prerequisite processes the ACA must undertake prior to making these decisions, referral to an advisory committee, consideration of public submissions, consultation with the Environment Secretary and a number of additional considerations (see clauses 31 to 34) there may be some circumstances in which the decision making process requires the maximum 180 day timeframe.

This clause requires the ACA to make a variation or revocation decision within a reasonable time.

**Division 4 – Offences in relation to a protection zone**

This Division creates offences including damaging a submarine cable, or engaging in prohibited or restricted activities in a protection zone, and provides substantial criminal penalties for these offences. This is intended to create an effective deterrent to unnecessary disruption to the operation of submarine cables of national significance.

Clauses 10 and 11 outline activities which are prohibited or restricted within protection zones, including various kinds of fishing. Note that an offence may be committed if a vessel has fishing gear outside the hull, as well as if actual fishing operations are underway.

The penalties provided for the offences reflect the seriousness of the effects of damage to submarine cables of national significance.

These penalties are generally in line with those provided for prohibited activities under New Zealand’s *Submarine Cables and Pipelines Protection Act 1996*. The penalties are also broadly consistent with the heavy penalties under the *Environment Protection (Sea Dumping) Act 1981* for the deliberate disposal of waste into the sea.

Division 5 of this Part provides that a person who has suffered a loss because a submarine cable has been damaged or because another person has engaged in prohibited or restricted activities in a protection zone may recover civil damages.

Division 5 of Part 3 provides criminal penalties for offences relating to the installation of submarine cables without a permit.
Subdivision A – Damaging submarine cables

Clause 36 – Damaging a submarine cable

This clause says that it is an offence for a person to engage in conduct that results in damage to a submarine cable (or part of a cable) and the cable (or the part) is in a protection zone.

The term ‘engage in conduct’ is defined in clause 2 to mean to do an act or omit to do an act.

As a result of section 5.6 of the Criminal Code, intention will be the fault element for the physical element of conduct in paragraph 36(1)(a) and recklessness will be the fault element for the physical element of the result of the conduct in paragraph 36(1)(b). The prosecution will therefore first be required to prove that a person intentionally engaged in the conduct. Subsection 5.2(1) of the Criminal Code provides that a person has intention with respect to conduct if he or she means to engage in that conduct. In proving recklessness, the prosecution will need to prove that the person was aware of a substantial risk that the conduct would result in damage to a submarine cable and, having regard to the circumstances that were known to the person, it was unjustifiable to take that risk (see subsection 5.4(2) of the Criminal Code).

The maximum penalty for this offence is, in the case of an individual, 600 penalty units or 10 years’ imprisonment, or both, and, in the case of a body corporate, 3000 penalty units (see s. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $66,000 for an individual and $330,000 for a body corporate.

Strict liability applies in relation to paragraph 36(1)(c) ie. that the cable, or part of the cable, that is damaged is in a protection zone. As a result of section 6.1 of the Criminal Code, no fault elements will apply in relation to paragraph 36(1)(c). The prosecution will therefore not be required to prove intention, knowledge, recklessness or negligence in relation to paragraph 36(1)(c). The prosecution need only prove that the relevant physical element of the offence did occur, namely that the cable or part of the cable was in a protection zone.

The defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code will be available in relation to paragraph 36(1)(c). That is, a person will not be criminally responsible if, at or before the time of the conduct resulting in damage to the submarine cable, the person considered whether or not the conduct would occur in a protection zone but was under a mistaken but honest and reasonable belief about the location of the protection zone.
Clause 37 – Negligently damaging a submarine cable

This clause says that it is an offence for a person to engage in conduct that results in damage to a submarine cable or part of a submarine cable and the person is negligent to the fact that the conduct results in the damage and the cable or part of the cable is in a protection zone.

The term ‘engage in conduct’ is defined in clause 2 to mean to do an act or omit to do an act.

Section 5.5 of the Criminal Code provides that a person is negligent with respect to a physical element of an offence (in this case the result of conduct) if his or her conduct involves:

(a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
(b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

The maximum penalty for this offence is, in the case of an individual, 180 penalty units or 3 years imprisonment, or both, and, in the case of a body corporate, 900 penalty units (see s. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see section 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $19,800 for an individual and $99,000 for a body corporate.

Strict liability applies in relation to paragraph 37(1)(d) i.e. that the cable, or part of the cable, that is damaged is in a protection zone. As a result of section 6.1 of the Criminal Code, no fault elements will apply in relation to paragraph 37(1)(d). The prosecution will therefore not be required to prove intention, knowledge, recklessness or negligence in relation to paragraph 37(1)(d). The prosecution need only prove that the relevant physical element of the offence did occur, namely that the cable or part of the cable was in a protection zone.

The defence of honest and reasonable mistake of fact under section 9.2 of the Criminal Code will also be available in relation to paragraph 37(1)(d). That is, a person will not be criminally responsible if, at or before the time of the conduct resulting in damage to the submarine cable, the person considered whether or not the conduct would occur in a protection zone but was under a mistaken but honest and reasonable belief about the location of the protection zone.
Clause 38 – Defence to offences of damaging a submarine cable

This clause says that an offence under subclauses 36(1) and 37(1) will not occur if:

- the conduct resulting in the damage was necessary to save a life or ship (as defined in clause 2); or
- the conduct was necessary to prevent pollution; or
- the defendant took all reasonable steps to avoid the damage to the submarine cable; or
- the damage was caused by an owner or operator of a cable; or
- the damage was caused by a person acting on behalf of an owner or operator of the cable.

The offences under subclauses 36(1) and 37(1) require proof of recklessness as to the result of the conduct.

It could be argued that a defence that a person took all reasonable steps to avoid causing the damage is redundant, because, if there is evidence to that effect, the prosecution would find it difficult to prove recklessness.

The ‘reasonable steps’ defence has been included out of an abundance of caution to make it clear that a defendant should not be guilty of an offence if the defendant took all reasonable steps to avoid causing damage to a submarine cable.

This clause permits owners of cables or their agents to do things in relation to their own cables in protection zones that would otherwise be prohibited or restricted. For example, they may be permitted to anchor a cable-laying ship in a protection zone when laying a cable.

The evidential burden expressed in subsection 13.3(3) of the Criminal Code applies for the purpose of these defences. This means that a defendant must adduce or point to evidence that suggests a reasonable possibility that a matter specified in one or more of these defences exists or does not exist.

Clause 39 – Master or owner of ship used in offence of damaging a submarine cable

This clause says that an owner or master of a ship (as defined in clause 2) will commit an offence where:

- the owner or master permits another person to use the ship; and
- that other person commits an offence under clause 36 (which provides an offence in relation to damaging a submarine cable); and
- the ship is used in the commission of the offence; and
- the owner or master is reckless as to that fact.

The owner and master of a ship may each be liable in respect of the same offence.

The element of recklessness in the offence means that liability is imposed where the master or owner of the ship acted recklessly in permitting another person to use the ship
and engage in conduct that results in damage to a submarine cable or part of a submarine cable in a protection zone.

As a result of section 5.4 of the Criminal Code, recklessness will arise where the master or owner of the ship was aware of a substantial risk that the damage to the cable would occur and having regard to the circumstances known to the master or owner, it was unjustifiable to take the risk.

The maximum penalty for this offence is, in the case of an individual, 600 penalty units or 10 years’ imprisonment, or both, and, in the case of a body corporate, 3000 penalty units (see ss. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $66,000 for an individual and $330,000 for a body corporate.

Strict liability applies in relation to paragraph 39(1)(c) ie. that the person whom the owner or master of a ship has permitted to use the ship has committed an offence against clause 36 (which deals with damaging a submarine cable). As a result of section 6.1 of the Criminal Code, no fault elements will apply in relation to paragraph 39(1)(c). The prosecution need only prove that the relevant physical element of the offence did occur, namely that the person concerned committed an offence against clause 36.

Subdivision B – Engaging in prohibited or restricted activities

Clause 40 – Engaging in prohibited or restricted activities

This clause says that, in a protection zone, it is an offence for a person to engage in conduct that is prohibited (as set out in clause 10 and specified in the declaration) or contravenes a restriction (as set out in clause 11 and specified in the declaration). The term ‘engage in conduct’ is defined in clause 2 to mean to do an act or omit to do an act. The conduct of the person must occur in a protection zone for the offence to be committed.

This clause permits owners of cables or their agents to do things in relation to repairing or maintaining their own cables or installing a cable in accordance with a permit in a protection zone that would otherwise be prohibited or restricted. For example, they may be permitted to anchor a cable-laying ship in a protection zone and retrieve their damaged cable with a grapnel.

As a result of section 5.6 of the Criminal Code, intention will be the fault element for the physical element of conduct in paragraph 40(a). The prosecution will therefore be required to prove that a person intentionally engaged in the conduct. Subsection 5.2(1) of the Criminal Code provides that a person has intention with respect to conduct if he or she means to engage in that conduct. Subsection 5.2(3) of the Criminal Code provides that a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.
Recklessness will be the fault element for paragraphs 40(b) and (c). In proving recklessness, the prosecution will need to prove that the person was aware of a substantial risk that the conduct would occur in a protection zone, that the conduct was prohibited or restricted in the zone and, having regard to the circumstances that were known to the person, it was unjustifiable to take that risk (see subsection 5.4(2) of the *Criminal Code*).

It will also be necessary in each prosecution under clause 40 for the prosecution to establish that paragraphs 40(d) and (e) are satisfied.

The maximum penalty for this offence is, in the case of an individual, 300 penalty units or 5 years’ imprisonment, or both, and, in the case of a body corporate, 1500 penalty units (see s. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $33,000 for an individual and $165,000 for a body corporate.

Note that having fishing gear such as lines or nets over the side of a boat within a protection zone comes within the definitions of prohibited or restricted activity under clauses 10 and 11, and may constitute an offence, even if the boat is not actually engaged in a fishing operation at the time.

**Clause 41 – Aggravated offence of engaging in prohibited or restricted activities**

This clause says that it is an offence for a person to engage in conduct that is prohibited or contravenes a restriction in a protection zone and the conduct has been engaged in for commercial gain. The term ‘engage in conduct’ is defined in clause 2 to mean to do an act or omit to do an act. The conduct of the person must occur in a protection zone for the offence to be committed and the person must engage in the conduct with the intention of making a commercial gain.

This clause introduces a distinction between an activity conducted for commercial gain and other activities. The meaning of ‘commercial gain’ is intended to be interpreted broadly in the sense of producing an income or profit, and is to be distinguished from recreational or non-commercial activities. An activity conducted for commercial gain includes any activity that is part of the normal routine of a commercial enterprise, or of a ship or vessel being used by a commercial enterprise, eg. commercial fishing, or breaking a competitor’s submarine cable.

This clause permits owners of cables or their agents to do things in relation to repairing or maintaining their own cables or installing a cable in accordance with a permit in a protection zone that would otherwise be prohibited or restricted. For example, they may be permitted to anchor a cable-laying ship in a protection zone.

As a result of section 5.6 of the *Criminal Code*, intention will be the fault element for the physical element of conduct in paragraph 41(a) and (d). The prosecution will therefore be required to prove that a person intentionally engaged in the conduct. Subsection 5.2(1) of the *Criminal Code* provides that a person has intention with respect to conduct
if he or she means to engage in that conduct. Subsection 5.2(3) of the Criminal Code provides that a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. A person will therefore commit an aggravated offence if they have engaged in the prohibited or restricted conduct and they meant to engage in the conduct for commercial gain.

Recklessness will be the fault element for paragraphs 41(b) and (c). In proving recklessness, the prosecution will need to prove that the person was aware of a substantial risk that the conduct would occur in a protection zone, that the conduct was prohibited or restricted in the zone and, having regard to the circumstances that were known to the person, it was unjustifiable to take that risk (see subsection 5.4(2) of the Criminal Code).

It will also be necessary in each prosecution under clause 41 for the prosecution to establish that paragraphs 41(e) and (f) are satisfied.

The maximum penalty for this offence is, in the case of an individual, 420 penalty units or 7 years’ imprisonment, or both, and, in the case of a body corporate, 2100 penalty units (see s. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $46,200 for an individual and $231,000 for a body corporate.

Clause 42 – Defence to offences of engaging in prohibited or restricted activities

This clause says that clauses 40 and 41 (which make it an offence to engage in prohibited or restricted activities) do not apply if:

- the conduct was necessary to save a life or ship (as defined in clause 2); or
- the conduct was necessary to prevent pollution; or
- the defendant took all reasonable steps to avoid engaging in the conduct.

The evidential burden expressed in subsection 13.3(3) of the Criminal Code applies for the purpose of these defences. This means that a defendant must adduce or point to evidence that suggests a reasonable possibility that a matter specified in one or more of these defences exists or does not exist.

Clause 43 – Alternative verdict if aggravated offence not proven

This clause says that where there is a trial for an aggravated offence of engaging in prohibited or restricted activities, the defendant may be found not guilty of an offence against clause 41 if the arbiter of fact is not satisfied that the defendant engaged in the activity with the intention of commercial gain and is otherwise satisfied that an offence against clause 40 has been committed. In the circumstances, a finding of not guilty in relation to clause 41 and a finding of guilty of an offence against clause 40 may arise so long as principles of procedural fairness have been adhered to.

An offence against clause 41 may not be established if the prosecution cannot establish that the person has engaged in the prohibited or restricted activity with the intention of
deriving a commercial gain out of the activity. Where intention cannot be proved the aggravated offence will not arise although the accused may be found guilty of an offence under clause 40.

Clause 44 – Master or owner of ship used in offence of engaging in prohibited or restricted activities

This clause says that an owner or master of a ship (as defined in clause 2) commits an offence if:

- the owner or master permits another person to use the ship; and
- that other person commits an offence under clause 40 (which makes it an offence to engage in prohibited or restricted activities in a protection zone) or clause 41 (which makes it an aggravated offence to engage in prohibited or restricted activities in a protection zone for commercial gain); and
- the ship is used in the commission of the offence; and
- the owner or master is reckless as to that fact.

The owner and master of a ship may each be liable in respect of the same offence.

The element of recklessness in the offence means that liability is imposed where the master or owner of the ship acted recklessly in permitting another person to use the ship and engage in conduct that is prohibited or restricted in a protection zone.

As a result of section 5.4 of the Criminal Code, recklessness will arise where the master or owner of the ship was aware of a substantial risk that the other person would engage in a prohibited or restricted activity and having regard to the circumstances known to the master or owner, it was unjustifiable to take the risk.

Where the person permitted to use the ship commits an offence against clause 40, the maximum penalty for the offence under clause 44 is, in the case of a master or owner who is an individual, 300 penalty units or 5 years’ imprisonment, or both, and, in the case of master or owner that is a body corporate, 1500 penalty units (see ss. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence in these circumstances is therefore $33,000 for an individual and $165,000 for a body corporate.

Where the person permitted to use the ship commits an offence against clause 41, the maximum penalty for the offence under clause 44 is, in the case of a master or owner who is an individual, 300 penalty units or 5 years’ imprisonment, or both, and, in the case of a master or owner that is a body corporate, 2100 penalty units (see ss. 4B(1) and (3) of the Crimes Act). A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum monetary penalty currently applying to this offence is therefore $46,200 for an individual and $231,000 for a body corporate.

Strict liability applies in relation to paragraph 44(1)(c) ie. that the person whom the owner or master permitted to use the ship committed an offence against clause 40 or 41.
As a result of section 6.1 of the *Criminal Code*, no fault elements will apply in relation to paragraph 44(1)(b). The prosecution need only prove that the relevant physical element of the offence did occur, namely that person concerned committed an offence against clause 40 or 41.

**Division 5 – Miscellaneous**

**Clause 45 – Person may claim damages**

This clause gives a statutory right to damages to a person who suffers direct or indirect loss or damage because a submarine cable in a protection zone is damaged by the conduct of another person or because that other person has engaged in prohibited or restricted activities in a protection zone. A claim for loss or damage may be against the other person or anyone involved in the damage or prohibited or restricted activities in a protection zone.

For the purposes of this clause a person will be taken to be involved in a contravention if the person has:
- aided, abetted, counselled or procured the contravention; or
- induced, whether by threats or promises or otherwise, the contravention; or
- been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- conspired with others to effect the contravention.

It would usually be the case that owners of submarine cables would suffer direct loss or damage. However, this clause also permits a person who suffers an indirect loss to recover damages. This may include, for example, any customer of the cable owner who can demonstrate loss because the cable has been damaged and telecommunications have been disrupted.

This provision is considered a significant deterrent to cable damage because it does not limit the right to civil damages, and is in addition to the criminal penalties provided under Division 4 of Part 2 of proposed Schedule 3A to the Telecommunications Act. Note that damages can be claimed in respect of conduct regardless of the outcome of any criminal prosecution for the same conduct.

An action for damages under clause 45 may be commenced in the Federal Court within 6 years after the day on which the person concerned suffered direct or indirect loss or damage.

**Clause 46 – Indemnity for loss of anchor etc.**

This clause is based on s. 9 of the *Submarine Cables and Pipelines Protection Act 1963*. It says that the owner of a ship (as defined in clause 2) will be entitled to be indemnified for the loss of an anchor, net or fishing gear belonging to the ship that is sacrificed in order to avoid damage to a submarine cable in a protection zone where, at the time of the
sacrifice, no person on the ship was engaged in a prohibited or restricted activity in the protection zone. The carrier responsible for the submarine cable must indemnify the loss.

The Federal Court has jurisdiction to hear any civil proceeding instituted under this clause.

Clause 47 – ACA to notify relevant authorities of declaration, variation etc of protection zone

This clause says that if a protection zone is declared, varied or revoked the ACA must notify a number of listed authorities as soon as practicable after the decision to declare, vary or revoke has been made. The authorities listed are the Australian Fisheries Management Authority, the Australian Hydrographic Service; the Australian Maritime Safety Authority and the authority administering the business carried on at the relevant port or ports of a State or the Northern Territory.

Any declaration, variation or revocation of a protection zone is a legislative instrument for the purposes of the Legislative Instruments Act 2003, which must be tabled in both Houses of Parliament and is subject to Parliamentary disallowance. Legislative instruments must be registered on the Federal Register of Legislative Instruments.

It is not considered necessary to require the ACA to publish protection zone decisions further. However, the ACA may also notify other bodies of a protection zone declaration, variation or revocation, for any reason it sees fit. This may include any member of an advisory committee or any other interested party.

Clause 48 – Notice if carrier decommissions a submarine cable

This clause says that where a declaration of a protection zone in relation to a submarine cable has been made and the cable is decommissioned or no longer used, the carrier responsible for the cable must notify the ACA in writing of the decommissioning or cessation of use of the cable as soon as practicable. The obligation to notify the ACA does not arise where the submarine cable is temporarily out of commission.

Clause 49 – Composition of advisory committee

This clause says that an advisory committee established by the ACA for the purpose of making recommendations on a proposal for a protection zone declaration, variation or revocation (see clauses 16 and 31) must not consist of more than 12 members. The ACA will have a wide discretion in relation to the persons who should be members of an advisory committee. Without limiting this discretion, an advisory committee established for the purposes of proposed Schedule 3A might include representatives of the Commonwealth, interested States or the Northern Territory, interested Commonwealth, State or Territory authorities or instrumentalities, interested industries or interest groups.
In this clause, ‘interested’ means 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.

Members of the advisory committee may, for example, include representatives of: the telecommunications industry; the fishing industry; a body or association representing persons engaged in recreational fishing; the petroleum or gas industry; the mining industry; the shipping industry; an environmental body or association, or the Great Barrier Reef Marine Park Authority if a proposal included an area within the Great Barrier Reef Marine Park. The membership of an advisory committee is likely to vary between one application and another, and over time.

**Part 3 – Permits to install submarine cables**

**Division 1 – Simplified outline**

**Clause 50 – Simplified outline**

This clause gives a simplified outline of Part 3 of proposed Schedule 3A. This Part governs the issue of permits to install submarine cables in a protection zone or in Australian waters as defined in clause 2 (other than Australian waters that are in a protection zone or that are coastal waters). It also makes it an offence to install a submarine cable without a permit or breach the conditions of a permit where granted. A carrier that installs a submarine cable in a protection zone in accordance with a permit granted under this Part will be exempt from certain State and Territory laws.

The National Bandwidth Inquiry identified a lack of explicit authorisation to install submarine cables as one of the problems of the current regulatory framework, along with insufficient protection of cables once they are in place. The Inquiry recommended that more explicit authorisation to install submarine cables be included in legislative provisions.

Proposed subclause 6(4A) of Schedule 3 to the Telecommunications Act (see item 4 of Schedule 1 to the Bill) makes it clear that a submarine telecommunications cable as defined in clause 2 cannot be a low-impact facility, and is therefore not covered by Schedule 3.

This Part provides for the ACA to issue permits to carriers to install submarine cables, both in declared protection zones (*protection zone installation permits*) and in Australian waters outside a protection zone and outside coastal waters (*non-protection zone installation permits*). It deals with the grant and refusal of permits, the payment and refund of charges, matters the ACA must have regard to before it makes a decision about a permit, conditions applying to the installation of submarine cables, offences in relation to the installation of submarine cables, and the requirement for carriers to comply with the terms of a permit in installing a submarine cable.
Division 2 – Protection zone installation permits

Clause 51 – Application for a permit to install a submarine cable in a protection zone

This clause allows a carrier to apply to the ACA for a permit to install one or more submarine cables in a protection zone. The permit referred to in this Division is known as a protection zone installation permit.

The penalties for damaging submarine cables in protection zones, and the streamlined administrative arrangements for installing cables in protection zones, will encourage cable owners to locate new cables in protection zones where possible, and minimise their effect on other users of the sea and seabed.

Unless otherwise declared by the ACA, a protection zone will run from the mean low-water mark on the coast for a distance of 200 nautical miles or to the edge of Australia’s continental shelf, whichever is the further. The low-water mark is the height of the lowest ebb tide. Mean low water is a recognised tidal datum. The issued permit will allow installation of one or more submarine cables in a declared protection zone.

Clause 52 – Form of application etc.

This clause requires a carrier's application for a protection zone installation permit to be in writing and in the form approved by the ACA.

The kind of information the ACA is likely to require includes the nominal location of the proposed cable, and relevant technical and economic aspects of the installation.

Clause 53 – Application to be accompanied by charge

This clause requires an application for a protection zone installation permit to be accompanied by the charge (if any) imposed on the application by a determination under section 53 of the ACA Act.

Section 53 of the ACA Act allows the ACA to make determinations by written instrument fixing charges for any matter in relation to which expenses are incurred by the ACA under the Telecommunications Act and specifying the persons by whom, and the times when, the charges are payable.

It is intended that the cost to the ACA of administering permits under the submarine cable regulation and protection regime to be established under this Bill will be recovered from the telecommunications industry.
**Clause 54 – Withdrawal of application**

This clause allows an application for a protection zone installation permit to be withdrawn and a fresh application submitted. This will give carriers applying for a permit a certain amount of flexibility in relation to the application process.

**Clause 55 – Further information**

This clause allows the ACA to ask an applicant for further information in relation to an application for a protection zone installation permit and to refuse to consider the application until the requested information is provided.

**Clause 56 – Grant or refusal of permit**

This clause allows the ACA, after considering the application for a protection zone installation permit, to either grant or refuse to grant the permit. The grant of a permit will authorise the installation of the cable or cables specified in the application.

If an application is granted, the ACA may make the permit subject to specified conditions in relation to the installation of the cable or cables in a protection zone. Conditions may include, for example, a requirement that the cable be buried or otherwise specially protected against damage for a specified part of its length, or may expand on conditions contained in the Telecommunications Code of Practice.

The purpose of this clause is to give the ACA some flexibility in administering the submarine cable protection regime. The nature of the conditions that the ACA may impose on a protection zone declaration is not limited; conditions may for example relate to matters raised when the Environment Secretary is consulted under clause 70.

Such special conditions should not unduly impact on the operational efficiency of the cable or the ability to maintain the cable, and should have the effect of improving the standards of submarine cable installation over time (within technological and site-specific limitations).

These conditions may vary from zone to zone and within zones. Conditions may be varied by the ACA at any time, and would remain in force until modified or extinguished by the ACA.

If an application for a protection zone installation permit is refused, the ACA will be required to notify the applicant in writing of the decision and the reasons for the refusal.

An ACA decision to refuse to grant a protection zone installation permit, or to grant such a permit subject to conditions, will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).
Clause 57 – Automatic refusal

This clause provides that an application by a carrier for a protection zone installation permit will be deemed to have been refused if the ACA has not granted or refused the permit by the deadline day. The deadline day will generally be the 20th business day after the day the application was made.

If the ACA requests further information from the carrier under clause 55 and the request has been complied with, the deadline day will be the tenth business day after the ACA’s request has been complied with.

If the ACA has requested further information from the carrier and the request has not been complied with, the deadline day will be the tenth business day after the end of the period specified by the ACA in its request.

Clause 57 is intended to impose a discipline on the ACA to deal quickly with an application for a protection zone installation permit. If there is a deemed refusal under clause 57, the ACA will be required to refund any applicable application charge under clause 58. This will provide an incentive for the ACA to be efficient in assessing an application.

Clause 58 – Refund of application charge if automatic refusal

This clause requires the ACA, on behalf of the Commonwealth, to refund any charge that a carrier has paid under clause 53 if an application for a protection zone installation permit is automatically refused under clause 57. The Consolidated Revenue Fund will be appropriated for any refunds made. This will provide an incentive for the ACA to be efficient in assessing an application.

Clause 59 – Duration of permit

This clause allows a protection zone installation permit to remain in force for 18 months. The 18-month period of the permit commences the day it is granted. An applicant may seek an extension of a permit under clause 61. There is no limit on the number of extensions that may be granted.

Clause 60 – Surrender of permit

This clause allows a carrier to surrender a protection zone installation permit at any time by notifying the ACA in writing.

A carrier may surrender the permit, for example, where it has been granted an installation permit and no longer wishes to install the cable, or wishes to install the cable in a different location.
Clause 61 – Extension of permit

This clause allows a carrier holding a protection zone installation permit to apply to the ACA to extend the duration of the permit for a further 180 days.

A carrier seeking such an extension will be required to give the ACA written reasons for seeking the extension. A carrier must seek an extension before the protection zone installation permit expires.

If the ACA refuses an application to extend a permit, it must give the carrier its reasons for refusal in writing. An ACA decision to refuse to extend the duration of a protection zone installation permit will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).

Under section 53 of the ACA Act, the ACA will be able to charge a fee in relation to an extension to a protection zone installation permit.

Note that there is no limit to the number of extensions that can be granted, but a fee will be payable in each case.

Clause 62 – Suspension or cancellation of permit

This clause allows the ACA to suspend or cancel a protection zone installation permit by written notice to the holder of the permit. To suspend or cancel a permit, the ACA must be satisfied that the carrier holding the permit has breached a condition of the permit or has not complied with any conditions in the Telecommunications Code of Practice applying to the installation of submarine cables.

This clause gives the ACA authority to enforce compliance with the terms of its installation permits and with the Telecommunications Code of Practice.

Clause 15 of Schedule 3 to the Telecommunications Act allows the Minister to make a Code of Practice setting out conditions that carriers must comply with when they are installing and maintaining facilities. Item 5 of Schedule 1 to the Bill allows the Minister to include conditions in a Code of Practice that carriers must comply with when they are installing submarine cables in accordance with a permit under Part 3 of proposed Schedule 3A.

The ACA must give the holder of a permit 30 days’ written notice of its intention to suspend or cancel the permit before it does so. The grounds upon which the suspension or cancellation is based must be given in the notice.

The ACA must give the permit holder the opportunity to submit to the ACA any matters for consideration, and must take into account any matters submitted and any remedial action taken, before deciding whether to suspend or cancel the permit.
If, following the ACA’s consultation with the permit holder, the ACA decides to suspend or cancel the permit, the ACA’s decision will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).

Clause 63 – Exemption from State and Territory laws

This clause provides that certain State and Territory laws do not apply when a submarine cable is installed in accordance with a protection zone installation permit.

When installing a submarine cable in accordance with a protection zone installation permit, carriers will be exempt from State and Territory laws dealing with:

- the assessment of the environmental effects of engaging in the activity;
- the protection of places or items of significance to Australia’s national or cultural heritage (except insofar as the law provides for the protection of places or items of significance to the cultural heritage of Aboriginal persons or Torres Strait Islanders);
- the powers and functions of a local government body;
- the supply of fuel and power, including the supply and distribution of extra-low voltage power systems (except insofar as the law deals with the supply of electricity at a voltage that exceeds that used for ordinary commercial or domestic requirements); or
- a matter specified in regulations made under the Telecommunications Act.

Carriers’ exemption from certain State and Territory laws will not prevent other State and Territory laws from operating, so far as they are capable of operating concurrently with proposed Schedule 3A, nor will it exempt carriers from State and Territory taxes.

This clause allows a carrier that wishes to install a submarine cable in a protection zone to deal with a single government regulatory authority, reducing the complexity of the legislative framework identified by the National Bandwidth Inquiry.

Note that exemption for State and Territory laws does not extend to the installation of a submarine cable outside a protection zone. In these cases, applicable State and Territory laws will continue to apply.

Division 3 – Non-protection zone installation permits

This Division provides explicit authority for carriers to install submarine cables in Australian waters outside a protection zone and outside coastal waters, which are within the jurisdiction of States and Territories. Within coastal waters (ie. up to 3 nautical miles from shore), applicable State and Territory laws will continue to apply.

Proposed subclause 6(4A) of Schedule 3 to the Telecommunications Act (see item 4 of Schedule 1 to the Bill) makes it clear that a submarine telecommunications cable cannot be a low-impact facility, and is therefore not covered by Schedule 3.
Clause 64 – Application for a permit to install a submarine cable in Australian waters (otherwise than in a protection zone or coastal waters)

This clause allows a carrier to apply to the ACA for a permit to install one or more submarine cables in Australian waters (as defined in clause 2) outside a protection zone and outside coastal waters (as defined in clause 2). The permit referred to in this Division is known as a non-protection zone installation permit.

Within coastal waters up to 3 nautical miles from shore that are outside a protection zone, carriers will still be required to comply with State and Territory laws applicable to the installation of submarine cables.

Clause 65 – Form of application etc.

This clause requires a carrier's application for a non-protection zone installation permit to be in writing and in the form approved by the ACA.

The kind of information the ACA is likely to require includes the nominal location of the proposed cable, and relevant technical and economic aspects of the installation. In addition, carriers may be required to supply information to assist the ACA to satisfy its obligations under clauses 71 and 72.

Clause 66 – Application to be accompanied by charge

This clause provides an application for a non-protection zone installation permit to be accompanied by the charge (if any) determined by the ACA under section 53 of the ACA Act.

Section 53 of the ACA Act allows the ACA to make determinations by written instrument fixing charges for any matter in relation to which expenses are incurred by the ACA under the Telecommunications Act and specifying the persons by whom, and the times when, the charges are payable.

It is intended that the cost to the ACA of administering permits under the submarine cable regulation and protection regime to be established under this Bill will be recovered from the telecommunications industry.

Clause 67 – Withdrawal of application

This clause allows an application for a non-protection zone installation permit to be withdrawn and a fresh application submitted. This will give carriers applying for a permit a certain amount of flexibility in relation to the application process.
Clause 68 – Further information

This clause allows the ACA to ask an applicant for a non-protection zone installation permit for further information in relation to the application and to refuse to consider the application until the requested information is provided.

Clause 69 – Grant or refusal of permit

This clause allows the ACA, after considering an application for a non-protection zone installation permit, consulting with the Environment Secretary and other relevant persons about the application under clause 70, and considering the matters specified in clause 71, either to grant or refuse to grant the permit. The grant of a permit will authorise the installation of the cable or cables specified in the application.

If an application is granted, the ACA may make the permit subject to specified conditions that relate to the installation of the cable or cables. Conditions may include, for example, a requirement that the cable be buried or otherwise specially protected against damage for part of its length, or may expand on conditions contained in the Telecommunications Code of Practice.

Such special conditions should not unduly impact on the operational efficiency of the cable or the ability to maintain the cable, and should have the effect of improving the standards of submarine cable installation over time (within technological and site-specific limitations).

These conditions may vary from zone to zone and within zones. Conditions could be varied by the ACA at any time, and would remain in force until modified or revoked by the ACA.

The ACA, after considering an application for a non-protection zone installation permit, may refuse to grant the permit. If an application is refused, the ACA must notify the applicant in writing of the refusal and the reasons for the refusal.

An ACA decision to refuse to grant a non-protection zone installation permit, or to grant such a permit subject to conditions, will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).

Clause 70 – Consultation before the ACA makes a decision about a permit

This clause provides that the ACA must not grant a non-protection zone installation permit unless it has undertaken consultation in relation to the application for the permit with the Environment Secretary and with any other person the ACA considers relevant.

The term ‘Environment Secretary’ is defined in clause 2 to mean the Secretary of the Department administrating the Environment Protection and Biodiversity Conservation
Act 1999, currently the Secretary of the Commonwealth Department of the Environment and Heritage.

The outcomes of consultation with the Environment Secretary or other persons may affect the conditions subject to which the ACA grants a protection zone installation permit.

Clause 71 – Matters the ACA must have regard to before it makes a decision about a permit

This clause provides that, in deciding whether to grant a non-protection zone installation permit, the ACA must have regard to:

- the objective of facilitating the supply of efficient, modern and cost-effective carriage services to the public;
- the impact of the installation on the environment (as defined in clause 2), including the heritage values of places);
- any relevant technical and economic aspects of the installation;
- whether the installation involves co-location of the submarine cable with another submarine cable or cables; and
- any other matters the ACA considers relevant.

The requirement to consider the possibility of co-locating a new cable with existing cables is intended to encourage the installation of future cables in existing protection zones. This will concentrate cables in limited areas and minimise the impact of the cables on the environment, sea and seabed. An application to install a cable outside a protection zone and outside coastal waters may not be approved if co-location of the cable with another cable in an existing protection zone is feasible.

Clause 72 – Environmental and heritage considerations

This clause specifies the matters the ACA must have regard to when considering the impact of the installation of a proposed submarine cable on the environment under paragraph 71(b). It expands upon clause 70, which requires the ACA to consult with the Environment Secretary before deciding whether to grant a non-protection zone installation permit in relation to one or more submarine cables. The known environmental effects of laying and operating submarine cables are small.

First, the ACA must have regard to whether the installation, maintenance or operation of the submarine cable:

- is inconsistent with Australia’s obligations under a listed international agreement as defined in clause 2; or
- could have an adverse effect on a listed threatened species (as defined in clause 2) or a threatened ecological community (as defined in clause 2), or impede the recovery of a listed threatened species or threatened ecological community; or
- could have an adverse effect on a listed marine species as defined in clause 2; or
• could have an adverse effect on the environment (as defined in clause 2), including the environment within a Commonwealth marine area (as defined in clause 2); or
• could have an adverse effect on cetaceans (as defined in clause 2); or
• could have an adverse effect on a listed migratory species as defined in clause 2; or
• could have an adverse effect on the National Heritage values of a place included in the National Heritage List as defined in clause 2; or
• could have an adverse effect on the ecological character of a declared Ramsar wetland as defined in clause 2; or
• could have an adverse effect on the world heritage values of a declared World Heritage property as defined in clause 2; or
• could have an adverse effect on a place that Australia is required to protect by the terms of a listed international agreement as defined in clause 2; or
• could have an adverse effect on an area that, under law of the Commonwealth, a State or a Territory, is reserved wholly or principally for marine conservation purposes (however described); or
• could have an adverse effect on a place that Australia is required to protect by the terms of a listed international agreement as defined in clause 2; or
• could have an adverse effect on an area that, under a law of the Commonwealth, a State or a Territory, is protected from significant environmental disturbance.

Second, the ACA must have regard to whether the submarine cable is to be installed at or near an area or thing that is of particular significance to Aboriginal persons, or Torres Strait Islanders, in accordance with their traditions.

Third, the ACA must have regard to such other matters as the ACA considers relevant.

Clause 73 – Time limit on decision about a permit

This clause requires the ACA to decide to grant or refuse to grant a non-protection zone installation permit within 180 days after the day the application for the permit was made.

The ACA may extend, or further extend, this initial 180-day period by not more than 90 days. An extension of time must be accompanied by a written notice from the ACA to the applicant notifying them why the ACA has been unable to make a decision within the initial or previously extended time period under this clause.

If the ACA has requested further information under clause 68, the ‘clock stops’ for the purposes of this clause, until the requested information is received.

This clause requires the ACA to make a decision on a non-protection zone installation permit within a reasonable time.
Clause 74 – Duration of permit

This clause allows a non-protection zone installation permit to remain in force for 18 months. The 18-month period of the permit commences on the day it is granted. An applicant may seek an extension of a permit under clause 76.

Clause 75 – Surrender of permit

This clause allows a carrier holding a non-protection zone installation permit to surrender the permit at any time by notifying the ACA in writing.

A carrier may surrender the permit, for example, where it has been granted an installation permit and no longer wishes to install the cable.

Clause 76 – Extension of permit

This clause allows a carrier holding a non-protection zone installation permit to apply to the ACA to extend the duration of the permit for a further 180 days.

A carrier seeking such an extension will be required to give the ACA reasons in writing for seeking the extension. A carrier must seek an extension before the non-protection zone installation permit expires.

If the ACA refuses an application to extend a permit, it must give the carrier its reasons for refusal in writing. An ACA decision to refuse to extend the duration of a non-protection zone installation permit will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).

Under section 53 of the ACA Act, the ACA will be able to charge a fee in relation to an extension of a non-protection zone installation permit.

There is no limit to the number of extensions that can be granted, but a fee will be payable in each case.

Clause 77 – Suspension or cancellation of permit

This clause allows the ACA to suspend or cancel a non-protection zone installation permit by giving written notice to the holder of the permit. To suspend or cancel a permit, the ACA must be satisfied that the carrier holding the permit has breached a condition of the permit or has not complied with any conditions in the Telecommunications Code of Practice applying to the installation of submarine cables.

This clause gives the ACA authority to enforce compliance with the terms of its installation permits and with the Telecommunications Code of Practice.
Clause 15 of Schedule 3 to the Telecommunications Act allows the Minister to make a Code of Practice setting out conditions to be complied with by carriers in installing and maintaining facilities. Item 5 of Schedule 1 to the Bill allows the Minister to include conditions in a Code of Practice to be complied with by carriers installing submarine cables in accordance with a permit to install submarine cables under Part 3 of proposed Schedule 3A.

The ACA must give the holder of a permit 30 days’ written notice of its intention to suspend or cancel a permit before it does so. The grounds upon which the suspension or cancellation is based must be given in the notice.

The ACA must give the permit holder the opportunity to submit to the ACA any matters for consideration, and must take into account any matters submitted and any remedial action taken, before deciding whether to suspend or cancel the permit.

If, following the ACA’s consultation with the permit holder, the ACA decides to suspend or cancel the permit, the ACA’s decision will be able to be reviewed by the AAT following a process of internal reconsideration by the ACA (see Part 29 of the Telecommunications Act and item 7 of Schedule 1 to the Bill).

**Division 4 – Conditions applicable to the installation of submarine cables**

Division 4 of Part 3 of proposed Schedule 3A to the Telecommunications Act sets out certain conditions that will be applicable to the installation of submarine cables in accordance with that Schedule. The *Telecommunications Code of Practice 1997* may impose conditions in addition to those in Division 4 of Part 3 of this Schedule (see item 5 of Schedule 1 to the Bill).

This Division applies to submarine cables installed by carriers both in declared protection zones (under protection zone installation permits) and in Australian waters outside a protection zone and outside coastal waters (under non-protection zone installation permits).

**Clause 78 – Application of this Division**

Clause 78 provides that Division 4 applies to the installation of a submarine cable by a carrier, or another person on behalf of the carrier, in a protection zone or in Australian waters (as defined in clause 2), other than coastal waters of a State or Territory. Installations in coastal waters that are not in a protection zone will come under the jurisdiction of relevant State or Territory planning authorities and it is not proposed to apply the conditions in Division 4 in such waters.
Clause 79 – Installation to do as little damage as practicable

This clause requires a carrier installing a submarine cable in a protection zone or in Australian waters other than coastal waters of a State or Territory in accordance with a permit granted by the ACA to take all reasonable steps to cause as little detriment, inconvenience and damage as is practicable.

Clause 80 – Management of installation activities

This clause requires a carrier to ensure that all reasonable steps are taken to ensure that the installation of a submarine cable in a protection zone or in Australian waters (other than coastal waters) accords with good engineering practice, protects the safety of persons and property, and protects the environment.

Clause 81 – Compliance with industry standards

This clause requires a carrier to ensure that the installation of a submarine cable in a protection zone or in Australian waters (other than coastal waters) is done according to any standard recognised by the ACA as a standard for use in the telecommunications industry that relates to the installation and is likely to reduce the risks to the public in relation to safety if it is complied with.

Part 6 of the Telecommunications Act gives the ACA the power to determine industry standards in certain circumstances and to require compliance with them.

Clause 82 – Compliance with international agreements

This clause requires a carrier to ensure that the installation of a submarine cable in a protection zone or in Australian waters (other than coastal waters) is undertaken in a manner consistent with Australia’s obligations under a relevant listed international agreement (as defined in clause 2).

Clause 83 – Conditions specified in the regulations

This clause requires a carrier to ensure that the installation of a submarine cable in a protection zone or in Australian waters (other than coastal waters) complies with conditions that are specified in the regulations.

Division 5 – Offences in relation to installation of submarine cables

This Division creates offences including installing a submarine cable without a permit from the ACA, breaching a condition of a permit, and failing to comply with a direction from the ACA to remove an unlawfully-installed cable.

Note that Division 4 of Part 2 provides criminal penalties for offences relating to activities in protection zones.
Note also that Division 5 of Part 2 enables a person who has suffered loss or damage because a submarine cable has been damaged or because another person has engaged in prohibited or restricted activities in a protection zone to recover civil damages.

Clause 84 – Installing a submarine cable without a permit

This clause provides that it is an offence to install or cause to be installed a submarine cable where the cable is installed in a protection zone or in Australian waters (other than in a protection zone or coastal waters) and the person installing the cable does not have a permit authorising the installation of a cable issued under clause 56 or clause 69.

Note that enforcement of laws relating to the installation of cables in coastal waters outside a protection zone and within the jurisdiction of States or Territories is a matter for those jurisdictions.

For the purposes of the offence, ‘install’, in relation to a submarine cable, will have a meaning that corresponds to the definition of ‘installation’ in clause 2 (see Acts Interpretation Act 1901, s. 18A, which provides that in any Act, unless the contrary intention appears, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings).

The word ‘install’, in relation to a submarine cable, in clause 84 will therefore include:

(a) to lay the cable on or beneath the seabed; and
(b) to attach the cable to any other cable or thing; and
(c) to carry out any other activity that is ancillary or incidental to the installation.

As a result of section 5.6 of the Criminal Code, intention will be the fault element for the physical element of the conduct of installing a submarine cable without a permit. The prosecution will therefore be required to prove that a person intentionally engaged in the conduct in question. Subsection 5.2(1) of the Criminal Code provides that a person has intention with respect to conduct if he or she means to engage in that conduct.

Strict liability applies in relation to paragraph 84(1)(b) ie. that the cable is installed in a protection zone or in Australian waters that are not in a protection zone and that are not coastal waters. As a result of section 6.1 of the Criminal Code, no fault elements will apply in relation to paragraph 84(1)(b). The prosecution will therefore not be required to prove intention, knowledge, recklessness or negligence in relation to paragraph 84(1)(b). The prosecution need only prove that the relevant physical element of the offence did
occur, namely that the cable is installed in a protection zone or in Australian waters that are not in a protection zone and that are not coastal waters.

The defence of honest and reasonable mistake of fact under section 9.2 of the *Criminal Code* will be available in relation to paragraph 84(1)(b). That is, a person will not be criminally responsible if, at or before the time of the conduct resulting in damage to the submarine cable, the person considered whether or not the conduct would occur in a protection zone or non-protection zone but was under a mistaken but honest and reasonable belief about the location of the protection zone and the non-protection zone.

Subclause 84(3) provides that the offence will not apply to a person who installs a submarine cable on behalf of a carrier, if the carrier has a permit authorising the installation of the cable.

The evidential burden expressed in subsection 13.3(3) of the *Criminal Code* applies for the purpose of this defence. This means that a defendant must adduce or point to evidence that suggests a reasonable possibility that a matter specified in the defence exists or does not exist.

**Clause 85 – Breaching conditions of a permit**

This clause provides that it is an offence for a carrier to install a submarine cable in a protection zone or in Australian waters (other than in a protection zone or coastal waters) if the carrier, or person acting on behalf of the carrier, installing the cable engages in conduct that breaches a condition of a permit issued under clause 56 or clause 69.

The term ‘engage in conduct’ is defined in clause 2 to mean to do an act or omit to do an act.

As a result of section 5.6 of the *Criminal Code*, intention will be the fault element for the physical element of the conduct of installing a submarine cable in contravention of the conditions of a permit. The prosecution will therefore be required to prove that a person intentionally engaged in the conduct in question. Subsection 5.2(1) of the *Criminal Code* provides that a person has intention with respect to conduct if he or she means to engage in that conduct.

The maximum penalty for this offence will be 100 penalty units. A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum penalty currently applying to this offence is therefore $11,000.

A permit may contain conditions specific to the installation of a particular submarine cable. For example, the ACA may require the cable to be trenched or buried within a specified distance of the landing point.

A carrier in breach of a condition of an installation permit under this clause will also be in breach of its licence conditions (see ss. 61, 68 and cl. 1 of Schedule 1 of the
Telecommunications Act) and potentially liable to pecuniary penalties under Part 31 of the Telecommunications Act. However, the effect of section 572 of the Telecommunications Act is that criminal proceedings cannot be brought against a carrier solely on the basis that they are in breach of their licence conditions.

Clause 86 – Failing to comply with ACA direction to remove an unlawfully installed cable

This clause provides that the ACA may direct a carrier to remove a submarine cable in a number of circumstances. These are:

- where, after the commencement of proposed Schedule 3A, the carrier has installed or caused to be installed a submarine cable in a protection zone or in Australian waters without a permit authorising the installation; or
- where, after the commencement of proposed Schedule 3A, the carrier installing or causing to be installed a submarine cable in a protection zone or in Australian waters is undertaking the installation without a permit authorising the installation.

A carrier that fails to comply with a direction by the ACA to remove a cable in these circumstances will be guilty of an offence. The maximum penalty for this offence will be 200 penalty units. A penalty unit is currently worth $110 (see s. 4AA of the Crimes Act). The maximum penalty currently applying to this offence is therefore $22,000.

Failing to comply with an ACA direction under this clause will also be a breach of a carrier’s licence conditions (see ss. 61, 68 and cl. 1 of Schedule 1 of the Telecommunications Act). The carrier concerned will therefore potentially be liable for pecuniary penalties under Part 31 of the Telecommunications Act. However, the effect of section 572 of the Telecommunications Act is that criminal proceedings cannot be brought against a carrier solely on the basis that they are in breach of their licence conditions.

Part 4 – Compensation

Clause 87 – Compensation

This clause is based on clause 42 of Schedule 3 to the Telecommunications Act. It provides for a carrier to pay compensation to a person who suffers financial loss or damage in relation to property because of anything done by a carrier under the powers conferred on it under proposed Schedule 3A.

Clause 88 – Compensation for acquisition of property

This clause inserts a constitutional ‘safety net’ provision to deal with the possibility that a court may find that the actions of a carrier under proposed Schedule 3A, or rights conferred on a carrier under that Schedule in relation to a submarine cable, may result in an invalid acquisition of property from a person within the meaning of section 51(xxxi) of the Constitution. In such circumstances, the carrier (rather than the Commonwealth)
will be required to pay the person a reasonable amount of compensation as agreed between the person and the carrier or, failing agreement, a reasonable amount of compensation determined by a court of competent jurisdiction.

There is a degree of uncertainty about the operation of section 51(xxxi) of the Constitution. It is possible that in certain circumstances a court may find that the activities of a carrier exercising the powers and immunities provided under proposed Schedule 3A to the Telecommunications Act, or the existence of rights conferred on a carrier under Schedule 3A in relation to a submarine cable, amount to an ‘acquisition of property’, and that compensation on ‘just terms’ has not been provided.

In the absence of clause 88, if a court were to find that there has been an acquisition of property otherwise than on just terms, the Commonwealth may be liable to pay compensation under section 591 of the Telecommunications Act. Section 591 provides a constitutional safety net to permit people whose property has been acquired by the operation of the Telecommunications Act otherwise than on just terms to claim compensation from the Commonwealth.

The effect of this clause is to ensure that, in the event that installation and maintenance work being done by carriers under Schedule 3A, or the operation of Schedule 3A itself, gives rise to an acquisition of property, the carriers will bear the risk of liability and the cost of compensation rather than the Commonwealth.

In assessing compensation under this clause, any other compensation or damages obtained by the person from the carrier arising from the same event, or any other remedy given in a proceeding arising from the same event, must be taken into account.

Subclause 88(3) makes it clear that clause 88 is not intended to limit the operation of clause 87, which provides for a carrier to pay compensation to a person who suffers financial loss or damage in relation to property because of anything done by a carrier under the powers conferred on it under proposed Schedule 3A.

Part 5 – Miscellaneous

Clause 89 – Review of operation of this Schedule

This clause requires the ACA to review the operation of proposed Schedule 3A to the Telecommunications Act, dealing with the protection of submarine cables, within 5 years of the commencement of the Schedule. The resulting review report must be given to the Minister, who must cause a copy of the report to be laid before each House of Parliament within 15 sitting days of receiving the report. Note that this review is of the operation of the protection regime as a whole established under this Bill, not the operation of any protection zone declaration.
Item 7 – At the end of clause 1 of Schedule 4

Schedule 4 to the Telecommunications Act specifies the kinds of decisions that are reviewable by the AAT following a process of internal reconsideration by the ACA.

This item adds to the list of reviewable decisions the following:

- a decision under clause 56 of proposed Schedule 3A to refuse to grant a protection zone installation permit, or to grant such a permit subject to conditions;
- a decision under clause 61 of proposed Schedule 3A to refuse to extend the duration of a protection zone installation permit;
- a decision under clause 62 of proposed Schedule 3A to suspend or cancel a protection zone installation permit;
- a decision under clause 69 of proposed Schedule 3A to refuse to grant a non-protection zone installation permit, or to grant such a permit subject to conditions;
- a decision under clause 76 of proposed Schedule 3A to refuse to extend the duration of a non-protection zone installation permit; and
- a decision under clause 77 of proposed Schedule 3A to suspend or cancel a non-protection zone installation permit.

This clause clarifies the nature of decisions that are subject to merits review. Note that decisions under clauses 4, 10, 11 and 23 are not merits-reviewable, but are made by way of a legislative instrument for the purposes of the Legislative Instruments Act 2003.

Part 2 – Amendments required if the Australian Communications and Media Authority Act 2005 commences before this Act

Part 2 of Schedule 1 to the Bill contains amendments which will be required if the proposed Australian Communications and Media Authority Act 2005 (the ACMA Act) commences before the Bill, as enacted. The ACMA Act, if enacted, will deal with the proposed merger of the ACA and the Australian Broadcasting Authority to form the ACMA. However, if Part 1 of Schedule 1 to the Bill commences before the establishment of the ACMA, the amendments in Part 2 of Schedule 1 will not commence at all (see item 3 of the table in clause 2 of the Bill). In that case, the proposed Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005 will make the appropriate amendments from 1 July 2005 or an earlier date to be proclaimed.

Telecommunications Act 1997

Item 8 – Clause @1 of Schedule 3A

Clause 1 of proposed Schedule 3A to the Telecommunications Act provides a simplified outline to that Schedule, which deals with the protection of submarine cables.

If the ACMA Act commences before the Bill, as enacted, item 8 will omit references to ‘ACA’ in clause 1 and substitute references to ‘ACMA’. 
Item 9 – Subclause 2(1) of Schedule 3A (definition of advisory committee)

Subclause 2(1) of proposed Schedule 3A to the Telecommunications Act defines the term ‘advisory committee’ for the purposes of that Schedule as an advisory committee established under section 51 of the ACA Act.

If the ACMA Act commences before the Bill, as enacted, item 9 will replace this definition with a definition referring to an advisory committee established under the corresponding provision of the ACMA Act (proposed section 58 of that Act).

Item 10 – Subclause 2(1) of Schedule 3A (definition of protection zone)

Subclause 2(1) of proposed Schedule 3A to the Telecommunications Act defines the term ‘protection zone’ as a protection zone declared by the ACA under clause 4 of that Schedule.

If the ACMA Act commences before the Bill, as enacted, item 10 will omit the reference in this definition to ‘ACA’ and substitute a reference to ‘ACMA’.

Item 11 – Clause 3 of Schedule 3A

Clause 3 of proposed Schedule 3A to the Telecommunications Act provides a simplified outline to Part 2 of that Schedule which deals with protection zones in relation to a submarine cable installed in Australian waters.

If the ACMA Act commences before the Bill, as enacted, item 11 will omit references to ‘ACA’ in clause 3 and substitute references to ‘ACMA’.

Item 12 – Subclause 4(1) of Schedule 3A
Item 13 – Subclause 4(2) of Schedule 3A (including the note)

Clause 4 of proposed Schedule 3A to the Telecommunications Act provides that the ACA may, after satisfying the consultation and other requirements of Subdivision B of Division 2 of Part 2 of that Schedule, declare a protection zone in relation to one or more submarine cables, or one or more submarine cables that are proposed to be installed, in Australian waters.

If the ACMA Act commences before the Bill, as enacted, items 12 and 13 will omit references to ‘ACA’ in clause 4 and substitute references to ‘ACMA’. The heading to clause 4 and the note to subclause 4(2) will also be altered by omitting references to ‘ACA’ and substituting references to ‘ACMA’.
Item 14 – Paragraph 5(a) of Schedule 3A

Paragraph 5(a) of proposed Schedule 3A to the Telecommunications Act provides that a declaration of a protection zone may be made on the ACA’s initiative.

If the ACMA Act commences before the Bill, as enacted, item 14 will omit the reference to ‘ACA’s’ from paragraph 5(a) and substitute a reference to ‘ACMA’s’. The heading to clause 5 will also be altered by omitting the reference to ‘ACA’s’ and substituting a reference to ‘ACMA’s’.

Item 15 – Subclause 6(1) of Schedule 3A
Item 16 – Subclause 6(2) of Schedule 3A
Item 17 – Subclause 6(2) of Schedule 3A

Clause 6 of proposed Schedule 3A to the Telecommunications Act provides that, in response to a request to declare a protection zone by a person, the ACA may decide to develop a proposal for a protection zone, and if the ACA so decides it must then give the person a copy of its proposal. If the ACA decides not to develop a proposal for a protection zone, in response to a request to declare a protection zone, it must then notify the requesting person in writing providing reasons for the ACA’s decision.

If the ACMA Act commences before the Bill, as enacted, items 15 and 16 will omit references to ‘ACA’ from subclauses 6(1) and (2) and substitute references to ‘ACMA’. The references to ‘ACA’ in the headings to subclauses 6(1) and (2) will also be substituted with references to ‘ACMA’. Item 17 will omit the reference to ‘ACA’s’ from subclause 6(2) and substitute a reference to ‘ACMA’s’.

Item 18 – Subclause 7(1) of Schedule 3A
Item 19 – Subclause 7(1) of Schedule 3A
Item 20 – Subclause 7(2) of Schedule 3A

Clause 7 of proposed Schedule 3A to the Telecommunications Act provides that if the ACA develops a protection zone proposal in response to a request from a person but subsequently decides not to declare a protection zone, the ACA must notify the person in writing providing reasons for its decision. If the ACA develops a protection zone proposal in response to a request from a person but then declares a protection zone that is different from the proposed protection zone, the ACA must provide the person with a copy of the declaration.

If the ACMA Act commences before the Bill, as enacted, items 18 and 19 will omit references to ‘ACA’ and ‘ACA’s’ from subclauses 7(1) and substitute references to ‘ACMA’ and ‘ACMA’s’. Item 20 will omit references to ‘ACA’ from subclause 7(2) and substitute references to ‘ACMA’.
Item 21 – Subclause 9(1) of Schedule 3A

Subclause 9(1) of proposed Schedule 3A to the Telecommunications Act provides for the area of a protection zone unless the ACA specifies otherwise.

If the ACMA Act commences before the Bill, as enacted, item 21 will omit the reference in subclause 9(1) to ‘ACA’ and substitute a reference to ‘ACMA’.

Item 22 – Subclause 12(1) of Schedule 3A

Subclause 12(1) of proposed Schedule 3A to the Telecommunications Act allows the declaration of a protection zone to be made subject to any conditions the ACA considers appropriate.

If the ACMA Act commences before the Bill, as enacted, item 22 will omit the reference in subclause 12(1) to ‘ACA’ and substitute a reference to ‘ACMA’.

Item 23 – Subclause 13(1) of Schedule 3A

Item 24 – Subclause 13(2) of Schedule 3A

Clause 13 of proposed Schedule 3A to the Telecommunications Act allows the ACA to specify the time at which a protection zone declaration comes into effect. Where a protection zone is declared for a cable or cables not yet installed, the declaration cannot come into effect at a time before the time the ACA is satisfied that the installation of the cable or cables will begin.

If the ACMA Act commences before the Bill, as enacted, items 23 and 24 will omit references to ‘ACA’ in subclauses 13(1) and (2) and substitute references to ‘ACMA’.

Item 25 – Subclause 14(1) of Schedule 3A

Subclause 14(1) of proposed Schedule 3A to the Telecommunications Act provides that a declaration of a protection zone continues in effect until the ACA revokes it.

If the ACMA Act commences before the Bill, as enacted, item 25 will omit the reference in subclause 14(1) to ‘ACA’ and substitute a reference to ‘ACMA’.

Item 26 – Subclause 15(1) of Schedule 3A

Subclause 15(1) of proposed Schedule 3A to the Telecommunications Act requires the ACA to develop a proposal for a submarine cable protection zone before declaring the zone.

If the ACMA Act commences before the Bill, as enacted, item 26 will omit the references in subclause 15(1) to ‘ACA’ and substitute references to ‘ACMA’. The heading to clause
15 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 27 – Subclauses 16(1) and (3) of Schedule 3A**

Clause 16 of proposed Schedule 3A to the Telecommunications Act requires the ACA to refer a proposal for a submarine cable protection zone to an advisory committee.

If the ACMA Act commences before the Bill, as enacted, item 27 will omit the references in subclauses 16(1) and (3) to ‘ACA’ and substitute references to ‘ACMA’. The heading to clause 16 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 28 – Subclause 17(1) of Schedule 3A**

**Item 29 – Paragraph 17(2)(b) of Schedule 3A**

Clause 17 of proposed Schedule 3A to the Telecommunications Act requires the ACA to publish a proposal for a submarine cable protection zone and invite public submissions about the proposal.

If the ACMA Act commences before the Bill, as enacted, items 28 and 29 will omit the references in subclause 17(1) and paragraph 17(2)(b) to ‘ACA’ and substitute references to ‘ACMA’. The heading to clause 17 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 30 – Clause 18 of Schedule 3A**

Clause 18 of proposed Schedule 3A to the Telecommunications Act provides that the ACA must not declare a submarine cable protection zone unless the ACA is satisfied that the cable or cables in question is or will be of national significance.

If the ACMA Act commences before the Bill, as enacted, item 30 will omit the references to ‘ACA’ in clause 18 and substitute references to ‘ACMA’.

**Item 31 – Subclauses 19(1) and (2) of Schedule 3A**

Clause 19 of proposed Schedule 3A to the Telecommunications Act requires the ACA to consult with the Environment Secretary before declaring a submarine cable protection zone.

If the ACMA Act commences before the Bill, as enacted, item 31 will omit the references to ‘ACA’ in subclauses 19(1) and (2) and substitute references to ‘ACMA’.
Item 32 – Clause 20 of Schedule 3A

Clause 20 of proposed Schedule 3A to the Telecommunications Act sets out the matters to which the ACA must have regard in deciding whether to declare a submarine cable protection zone.

If the ACMA Act commences before the Bill, as enacted, item 32 will omit the references to ‘ACA’ in clause 20 and substitute references to ‘ACMA’. The heading to clause 20 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

Item 33 – Clause 21 of Schedule 3A

Clause 21 of proposed Schedule 3A to the Telecommunications Act specifies the environment and heritage considerations to which the ACA must have regard if a proposed protection zone relates to a submarine cable that is not yet installed.

If the ACMA Act commences before the Bill, as enacted, item 33 will omit the references to ‘ACA’ in clause 21 and substitute references to ‘ACMA’.

Item 34 – Clause 22 of Schedule 3A

Clause 22 of proposed Schedule 3A to the Telecommunications Act deals with the deadline for the ACA’s final decision about whether or not to declare a protection zone.

If the ACMA Act commences before the Bill, as enacted, items 34 and 35 will omit references to ‘ACA’ and ‘ACA’s’ in clause 22 and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 35 – Clause 22 of Schedule 3A

Clause 22 of proposed Schedule 3A to the Telecommunications Act deals with the deadline for the ACA’s final decision about whether or not to declare a protection zone.

If the ACMA Act commences before the Bill, as enacted, items 34 and 35 will omit references to ‘ACA’ and ‘ACA’s’ in clause 22 and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 36 – Subclauses 23(1) and (2) of Schedule 3A (including the notes)

Clause 23 of proposed Schedule 3A to the Telecommunications Act provides that the ACA may vary or revoke a declaration of a protection zone after complying with the consultation and other requirements of Subdivision B of Division 3 of Part 2 of that Schedule.

If the ACMA Act commences before the Bill, as enacted, item 36 will omit references to ‘ACA’ in subclauses 23(1) and (2) and in the notes to those subclauses and substitute references to ‘ACMA’. The heading to clause 23 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.
Item 37 – Paragraph 24(a) of Schedule 3A

Paragraph 24(a) of proposed Schedule 3A to the Telecommunications Act provides that a variation or revocation of a declaration of a submarine cable protection zone may be made on the ACA’s own initiative.

If the ACMA Act commences before the Bill, as enacted, item 37 will omit the reference to ‘ACA’s’ in paragraph 24(a) and substitute a reference to ‘ACMA’s’. The heading to clause 24 will also be altered by omitting ‘ACA’s’ and substituting ‘ACMA’s’.

Item 38 – Clause 25 of Schedule 3A

Clause 25 of proposed Schedule 3A to the Telecommunications Act requires the ACA to notify an affected carrier of any request to vary or revoke a submarine cable protection zone declaration.

If the ACMA Act commences before the Bill, as enacted, item 38 will omit references to ‘ACA’ in clause 25 and substitute references to ‘ACMA’. The heading to clause 25 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

Item 39 – Subclauses 26(1) and (2) of Schedule 3A

Item 40 – Subclause 26(2) of Schedule 3A

Clause 26 of proposed Schedule 3A to the Telecommunications Act specifies how the ACA is to deal with a request to vary or revoke a declaration of a submarine cable protection zone.

If the ACMA Act commences before the Bill, as enacted, items 39 and 40 will omit references to ‘ACA’ and ‘ACA’s’ in subclauses 26(1) and (2) and substitute references to ‘ACMA’ and ‘ACMA’s’. The headings to subclauses 26(1) and 26(2) will also be altered by omitting ‘ACA’ and substituting ‘ACMA’.

Item 41 – Clause 27 of Schedule 3A

Item 42 – Clause 27 of Schedule 3A

Clause 27 of proposed Schedule 3A to the Telecommunications Act provides that if the ACA, after developing a proposal to revoke or vary a declaration of a protection zone, decides not to vary or revoke the declaration in response to a request from a person, the ACA must notify the person in writing providing reasons for its decision.

If the ACMA Act commences before the Bill, as enacted, items 41 and 42 will omit references to ‘ACA’ and ‘ACA’s’ in clause 27 and substitute references to ‘ACMA’ and ‘ACMA’s’.
**Item 43 – Clause 28 of Schedule 3A**

Clause 28 of proposed Schedule 3A to the Telecommunications Act provides that a variation or revocation of a declaration of a protection zone takes effect at the time specified by the ACA.

If the ACMA Act commences before the Bill, as enacted, item 43 will omit the reference to ‘ACA’ in clause 28 and substitute a reference to ‘ACMA’.

**Item 44 – Subclause 30(1) of Schedule 3A**

Subclause 30(1) of proposed Schedule 3A to the Telecommunications Act provides that before the ACA varies or revokes a declaration of a protection zone, the ACA must develop a proposal to vary or revoke the declaration.

If the ACMA Act commences before the Bill, as enacted, item 44 will omit references to ‘ACA’ in subclause 30(1) and substitute references to ‘ACMA’. The heading to clause 30 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 45 – Subclauses 31(1) and (3) of Schedule 3A**

Clause 31 of proposed Schedule 3A to the Telecommunications Act requires the ACA to refer a proposal for the variation or revocation of a protection zone declaration to an advisory committee.

If the ACMA Act commences before the Bill, as enacted, item 45 will omit references in subclauses 31(1) and (3) to ‘ACA’ and substitute references to ‘ACMA’. The heading to clause 31 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 46 – Subclause 32(1) of Schedule 3A**

Clause 32 of proposed Schedule 3A to the Telecommunications Act requires the ACA to publish a proposal to vary or revoke the declaration of a submarine cable protection zone and invite public submissions about the proposal.

If the ACMA Act commences before the Bill, as enacted, items 46 and 47 will omit references to ‘ACA’ in subclause 32(1) and paragraph 32(2)(b) and substitute references to ‘ACMA’. The heading to clause 32 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

**Item 47 – Paragraph 32(2)(b) of Schedule 3A**
Item 48 – Subclauses 33(1) and (2) of Schedule 3A

Clause 33 of proposed Schedule 3A to the Telecommunications Act requires the ACA to consult the Environment Secretary before varying or revoking a declaration of a protection zone.

If the ACMA Act commences before the Bill, as enacted, item 48 will omit references to ‘ACA’ in subclauses 33(1) and (2) and substitute references to ‘ACMA’.

Item 49 – Clause 34 of Schedule 3A

Clause 34 of proposed Schedule 3A to the Telecommunications Act specifies the matters to which the ACA must have regard in deciding whether to vary or revoke a declaration of a protection zone.

If the ACMA Act commences before the Bill, as enacted, item 49 will omit references to ‘ACA’ in clause 34 and substitute references to ‘ACMA’. The heading to clause 34 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

Item 50 – Clause 35 of Schedule 3A

Clause 35 of proposed Schedule 3A to the Telecommunications Act specifies the deadline for the ACA’s final decision about varying or revoking a protection zone declaration.

If the ACMA Act commences before the Bill, as enacted, item 50 will omit references to ‘ACA’ in clause 35 and substitute references to ‘ACMA’.

Item 51 – Subclause 47(1) of Schedule 3A
Item 52 – Subclause 47(1) of Schedule 3A

Subclause 47(1) of proposed Schedule 3A to the Telecommunications Act requires the ACA to notify relevant authorities of any declaration, variation or revocation of a protection zone.

If the ACMA Act commences before the Bill, as enacted, items 51 and 52 will omit references to ‘ACA’ and ‘ACA’s’ in subclause 47(1) and substitute references to ‘ACMA’ and ‘ACMA’s’. The heading to clause 47 will also be altered by omitting the reference to ‘ACA’ and substituting a reference to ‘ACMA’.

Item 53 – Clause 48 of Schedule 3A

Clause 48 of proposed Schedule 3A to the Telecommunications Act provides that where a declaration of a protection zone in relation to a submarine cable has been made and the cable is decommissioned or no longer used, the carrier responsible for the cable must
notify the ACA in writing of the decommissioning or cessation of use of the cable as soon as practicable. The obligation to notify the ACA does not arise where the submarine cable is temporarily out of commission.

If the ACMA Act commences before the Bill, as enacted, item 53 will omit the reference to ‘ACA’ in clause 48 and substitute a reference to ‘ACMA’.

**Item 54 – Subclause 49(2) of Schedule 3A**

**Item 55 – Subclause 49(3) of Schedule 3A (definition of interested)**

Clause 49 of proposed Schedule 3A to the Telecommunications Act provides that an advisory committee established by the ACA for the purpose of making recommendations on a proposal for a protection zone declaration, variation or revocation must not consist of more than 12 members, including representatives of interested States, authorities, instrumentalities, industries and groups.

If the ACMA Act commences before the Bill, as enacted, item 54 will omit references to ‘ACA’ in subclause 49(2) and in the definition of ‘interested’ in subclause 49(3) and substitute references to ‘ACMA’.

**Item 56 – Clause 50 of Schedule 3A**

Clause 50 of proposed Schedule 3A to the Telecommunications Act provides a simplified outline of Part 3 of that Schedule which deals with permits to install submarine cables.

If the ACMA Act commences before the Bill, as enacted, item 56 will omit the reference to ‘ACA’ in clause 50 and substitute a reference to ‘ACMA’.

**Item 57 – Clause 51 of Schedule 3A**

Clause 51 of proposed Schedule 3A to the Telecommunications Act provides that a carrier may apply to the ACA for a permit to install one or more submarine cables in a protection zone.

If the ACMA Act commences before the Bill, as enacted, item 57 will omit the reference to ‘ACA’ in clause 51 and substitute a reference to ‘ACMA’.

**Item 58 – Paragraph 52(b) of Schedule 3A**

Paragraph 52(b) of proposed Schedule 3A to the Telecommunications Act provides that an application for a protection zone installation permit must be in a form approved in writing by the ACA.

If the ACMA Act commences before the Bill, as enacted, item 58 will omit the reference to ‘ACA’ in paragraph 52(b) and substitute a reference to ‘ACMA’.
Item 59 – Clause 53 of Schedule 3A

Clause 53 of proposed Schedule 3A to the Telecommunications Act provides that an application for a protection zone installation permit must be accompanied by a charge (if any) imposed on the application by a determination under section 53 of the ACA Act.

If the ACMA Act commences before the Bill, as enacted, item 59 will omit the reference to section 53 of the ACA Act and substitute a reference to the corresponding section (section 60) of the ACMA Act.

Item 60 – Subclauses 55(1) and (2) of Schedule 3A

Clause 55 of proposed Schedule 3A to the Telecommunications Act allows the ACA to request an applicant for a protection zone installation permit to provide further information about the application.

If the ACMA Act commences before the Bill, as enacted, item 60 will omit the references to ‘ACA’ in subclauses 55(1) and (2) and substitute references to ‘ACMA’.

Item 61 – Subclause 56(1) of Schedule 3A

Item 62 – Subclause 56(2) of Schedule 3A

Item 63 – Subclauses 56(3) and (4) of Schedule 3A

Item 64 – Subclause 56(4) of Subclause 3A

Clause 56 of proposed Schedule 3A to the Telecommunications Act deals with the ability of the ACA to grant or refuse to grant a protection zone installation permit.

If the ACMA Act commences before the Bill, as enacted, items 61 to 64 will omit references in clause 56 to ‘ACA’ and ‘ACA’s’ and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 65 – Subclause 57(1) of Schedule 3A

Item 66 – Subclauses 57(2), (3) and (4) of Schedule 3A

Item 67 – Subclause 57(5) of Schedule 3A (definition of business day)

Clause 57 of proposed Schedule 3A to the Telecommunications Act provides that an application by a carrier for a protection zone installation permit will be deemed to have been refused if the ACA has not granted or refused the permit by the relevant deadline day.

If the ACMA Act commences before the Bill, as enacted, items 65 to 67 will omit references in clause 57 to ‘ACA’ and substitute references to ‘ACMA’.
Item 68 – Clause 58 of Schedule 3A

Clause 58 of proposed Schedule 3A to the Telecommunications Act provides for a refund of the application charge for a protection zone installation permit where the application is deemed to have been refused by the ACA.

If the ACMA Act commences before the Bill, as enacted, item 68 will omit references to ‘ACA’ in clause 58 and substitute references to ‘ACMA’.

Item 69 – Clause 60 of Schedule 3A

Clause 60 of proposed Schedule 3A to the Telecommunications Act allows the holder of a protection zone installation permit to surrender the permit to the ACA at any time.

If the ACMA Act commences before the Bill, as enacted, item 69 will omit the reference in clause 60 to ‘ACA’ and substitute a reference to ‘ACMA’.

Item 70 – Subclauses 61(1) and (2) of Schedule 3A
Item 71 – Subclause 61(3) of Schedule 3A
Item 72 – Subclause 61(3) of Schedule 3A

Clause 61 of proposed Schedule 3A to the Telecommunications Act allows the holder of a protection zone installation permit to apply to the ACA to extend the duration of the permit.

If the ACMA Act commences before the Bill, as enacted, items 70 to 72 will omit references to ‘ACA’ and ‘ACA’s’ in clause 61 and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 73 – Subclause 62(1) of Schedule 3A
Item 74 – Paragraph 62(2)(a) of Schedule 3A
Item 75 – Paragraph 62(2)(a) of Schedule 3A
Item 76 – Paragraph 62(2)(b) of Schedule 3A
Item 77 – Paragraph 62(2)(c) of Schedule 3A
Item 78 – Paragraph 62(2)(c) of Schedule 3A

Clause 62 of proposed Schedule 3A to the Telecommunications Act allows the ACA to suspend or cancel a protection zone installation permit in certain circumstances.

If the ACMA Act commences before the Bill, as enacted, items 73 to 78 will omit references to ‘ACA’ and ‘ACA’s’ in clause 62 and substitute references to ‘ACMA’ and ‘ACMA’s’.
Item 79 – Clause 64 of Schedule 3A

Clause 64 of proposed Schedule 3A to the Telecommunications Act allows a carrier to apply to the ACA for a permit to install one or more submarine cables in Australian waters that are not in a protection zone and that are not coastal waters of a State or the Northern Territory.

If the ACMA Act commences before the Bill, as enacted, item 79 will omit the reference to ‘ACA’ in clause 64 and substitute a reference to ‘ACMA’.

Item 80 – Paragraph 65(b) of Schedule 3A

Paragraph 65(b) of proposed Schedule 3A to the Telecommunications Act provides that an application for a non-protection zone installation permit must be in the form approved by the ACA.

If the ACMA Act commences before the Bill, as enacted, item 80 will omit the reference to ‘ACA’ in paragraph 65(b) and substitute a reference to ‘ACMA’.

Item 81 – Clause 66 of Schedule 3A

Clause 66 of proposed Schedule 3A to the Telecommunications Act provides that an application for a non-protection zone installation permit must be accompanied by the charge (if any) imposed on the application by a determination under section 53 of the ACA Act.

If the ACMA Act commences before the Bill, as enacted, item 81 will omit the reference in clause 66 to section 53 of the ACA Act and substitute a reference to the corresponding section (section 60) of the ACMA Act.

Item 82 – Subclauses 68(1) and (2) of Schedule 3A

Clause 68 of proposed Schedule 3A to the Telecommunications Act allows the ACA to request the applicant for a non-protection zone installation permit for further information about the application.

If the ACMA Act commences before the Bill, as enacted, item 82 will omit references to ‘ACA’ in subclauses 68(1) and (2) and substitute references to ‘ACMA’.
Item 83 – Subclause 69(1) of Schedule 3A
Item 84 – Subclause 69(2) of Schedule 3A
Item 85 – Subclauses 69(3) and (4) of Schedule 3A
Item 86 – Subclause 69(4) of Schedule 3A

Clause 69 of proposed Schedule 3A to the Telecommunications Act deals with the ability of the ACA to grant or refuse to grant an application for a non-protection zone installation permit.

If the ACMA Act commences before the Bill, as enacted, items 83 to 86 will omit references in clause 69 to ‘ACA’ and ‘ACA’s’ and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 87 – Clause 70 of Schedule 3A

Clause 70 of proposed Schedule 3A to the Telecommunications Act provides that the ACA must not grant a non-protection zone installation permit unless it has consulted with the Environment Secretary and any other persons the ACA considers relevant in relation to the application for the permit.

If the ACMA Act commences before the Bill, as enacted, item 87 will omit references to ‘ACA’ in clause 70 and substitute references to ‘ACMA’. The heading to clause 70 will also be altered by omitting ‘ACA’ and substituting ‘ACMA’.

Item 88 – Clause 71 of Schedule 3A

Clause 71 of proposed Schedule 3A to the Telecommunications Act specifies the matters to which the ACA must have regard in deciding whether to grant a non-protection zone installation permit.

If the ACMA Act commences before the Bill, as enacted, item 88 will omit references to ‘ACA’ in clause 71 and substitute references to ‘ACMA’. The heading to clause 71 will also be altered by omitting ‘ACA’ and substituting ‘ACMA’.

Item 89 – Clause 72 of Schedule 3A

Clause 72 of proposed Schedule 3A to the Telecommunications Act specifies the environment and heritage considerations to which the ACA must have regard in considering the impact of the installation of a submarine cable on the environment in relation to an application for a non-protection zone installation permit.

If the ACMA Act commences before the Bill, as enacted, item 89 will omit references to ‘ACA’ in clause 72 and substitute references to ‘ACMA’.
Item 90 – Subclauses 73(1) and (2) of Schedule 3A
Item 91 – Paragraph 73(2)(b) of Schedule 3A
Item 92 – Subclause 73(3) of Schedule 3A

Clause 73 of proposed Schedule 3A to the Telecommunications Act imposes a time limit on the ACA’s decision to grant, or refuse to grant a non-protection zone installation permit.

If the ACMA Act commences before the Bill, as enacted, items 90 to 92 will omit references to ‘ACA’ in clause 73 and substitute references to ‘ACMA’.

Item 93 – Clause 75 of Schedule 3A

Clause 75 of proposed Schedule 3A to the Telecommunications Act provides that the holder of a non-protection zone installation permit may, at any time, surrender the permit by written notice given to the ACA.

If the ACMA Act commences before the Bill, as enacted, item 93 will omit the reference to ‘ACA’ in clause 75 and substitute a reference to ‘ACMA’.

Item 94 – Subclauses 76(1) and (2) of Schedule 3A
Item 95 – Subclause 76(3) of Schedule 3A
Item 96 – Subclause 76(3) of Schedule 3A

Clause 76 of proposed Schedule 3A to the Telecommunications Act allows the holder of a non-protection zone installation permit to apply to the ACA to extend the duration of the permit.

If the ACMA Act commences before the Bill, as enacted, items 94 to 96 will omit references to ‘ACA’ and ‘ACA’s’ in clause 76 and substitute references to ‘ACMA’ and ‘ACMA’s’.

Item 97 – Subclause 77(1) of Schedule 3A
Item 98 – Paragraph 77(2)(a) of Schedule 3A
Item 99 – Paragraph 77(2)(a) of Schedule 3A
Item 100 – Paragraph 77(2)(b) of Schedule 3A
Item 101 – Paragraph 77(2)(c) of Schedule 3A
Item 102 – Paragraph 77(2)(c) of Schedule 3A

Clause 77 of proposed Schedule 3A to the Telecommunications Act allows the ACA to suspend or cancel a non-protection zone installation permit in certain circumstances.

If the ACMA Act commences before the Bill, as enacted, items 97 to 102 will omit references to ‘ACA’ and ‘ACA’s’ in clause 77 and substitute references to ‘ACMA’ and ‘ACMA’s’.
Item 103 – Paragraph 81(b) of Schedule 3A

Paragraph 81(b) of proposed Schedule 3A to the Telecommunications Act requires a carrier to ensure that the installation of a submarine cable is done in accordance with any standard that is recognized by the ACA as a standard for use in the telecommunications industry.

If the ACMA Act commences before the Bill, as enacted, item 103 will omit the reference to ‘ACA’ in paragraph 81(b) and substitute a reference to ‘ACMA’.

Item 104 – Subclauses 86(1) and (3) of Schedule 3A

Clause 86 of proposed Schedule 3A to the Telecommunications Act allows the ACA to direct a carrier to remove a submarine cable if it has been installed without a permit.

If the ACMA Act commences before the Bill, as enacted, item 104 will omit references to ‘ACA’ in subclauses 86(1) and (3) and substitute references to ‘ACMA’. The heading to clause 86 will also be altered by omitting ‘ACA’ and substituting ‘ACMA’.

Item 105 – Subclause 89(1) of Schedule 3A

Subclause 89(1) of proposed Schedule 3A to the Telecommunications Act requires the ACA to review the operation of that Schedule within 5 years after its commencement.

If the ACMA Act commences before the Bill, as enacted, item 105 will omit the reference to ‘ACA’ in subclause 89(1) and substitute a reference to ‘ACMA’.

Schedule 2 – Other measures

Item 1 – Clause 2 of Schedule 3 (definition of environment)

Item 1 of Schedule 2 to the Bill repeals the existing definition of the term ‘environment’ in Schedule 3 to the Telecommunications Act and replaces it with the definition of the term in the Environment Protection and Biodiversity Conservation Act 1999.

The effect of this change so far as Schedule 3 to the Telecommunications Act is concerned will be to require the ACA to include ‘heritage values of places’ in its consideration of the environmental aspects of proposed terrestrial installation activities under Schedule 3 to the Telecommunications Act.

Item 2 – At the end of Schedule 3

Item 2 of Schedule 2 to the Bill inserts a new Part 3 in Schedule 3 to the Telecommunications Act. Schedule 3 to the Telecommunications Act gives carriers certain powers to enter on land and install a telecommunications facility on the land or maintain a facility that is situated on the land.
New Part 3 of Schedule 3 consists of 2 new clauses: clause 62 dealing with compensation for acquisition of property for the purposes of Schedule 3 and clause 63 which deals with the application of new Part 3.

**Part 3 – Compensation for acquisition of property**

**Clause 62 – Compensation for acquisition of property**

This clause applies to actions of a carrier in entering on land to inspect it, installing facilities on the land and maintaining facilities on the land, in pursuance of the powers and immunities allowed to carriers under Schedule 3 to the Telecommunications Act. It also applies to the existence of rights conferred on a carrier under, or because of, Schedule 3 in relation to a building, structure or facility owned or operated by a carrier.

This clause is inserted because of the degree of uncertainty about the operation of section 51(xxxi) of the Constitution. It is possible that in certain circumstances a court may find that the activities of a carrier exercising the powers and immunities provided under Schedule 3, or the existence of rights conferred on a carrier under or because of Schedule 3, amount to an ‘acquisition of property’, and that compensation on ‘just terms’ has not been provided.

As the law currently stands, if a court were to find that there has been an acquisition of property otherwise than on just terms, the Commonwealth may be liable to pay compensation under section 591 of the Telecommunications Act. Section 591 provides a constitutional safety net to permit people whose property has been acquired otherwise than on just terms by the operation of that Act to claim compensation from the Commonwealth.

The effect of this clause is to ensure that, in the event that a court were to find that installation and maintenance work being done by carriers under Schedule 3, or the operation of Schedule 3 itself, would result in an acquisition of property, the relevant carrier would bear the risk of liability and the cost of compensation rather than the Commonwealth.

The amount of compensation will be able to be agreed between the carrier and the person whose property has been acquired. Failing agreement, a court of competent jurisdiction may determine a reasonable amount of compensation.

In assessing compensation under this clause, any other compensation or damages obtained by the person from the carrier arising from the same event, or any other remedy given in a proceeding arising from the same event, must be taken into account.

The clause does not limit the operation of clause 42 of Schedule 3, which requires a carrier to pay reasonable compensation to a person who suffers financial loss or damage
because of anything done by a carrier under Schedule 3 in relation to the person’s property.

In this clause, the term ‘acquisition of property’ will have the same meaning as in section 51(33)(i) of the Constitution.

**Clause 63 – Application of this Part**

This clause is an application provision for the purposes of proposed clause 62 of Schedule 3 to the Telecommunications Act.

It provides for clause 62 to have a prospective operation (from the commencement of Schedule 2 to the Bill). Clause 2 of the Bill provides that Schedule 2 commences on the day after the Bill, when enacted, receives Royal Assent.