

## **Strengthening economic relations between Australia and New Zealand**

Submission by Telstra Corporation Limited and TelstraClear Limited to the Productivity Commissions' Joint Study, 31 May 2012.

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## 1. Introduction

This submission is made jointly by Telstra Corporation Limited of Australia and its wholly owned subsidiary TelstraClear Limited of New Zealand.

### ***Telstra and TelstraClear***

Telstra is Australia's leading telecommunications and information services company, providing 8.4 million fixed line and 12.2 million mobile services, including 2.4 million retail fixed broadband customers and more than 2.5 million mobile broadband customers.<sup>1</sup>

TelstraClear is the second largest fixed line telecommunications services provider in New Zealand. It uses its own infrastructure to offer voice, internet and digital TV services for residential customers in Wellington, Christchurch and Kapiti, and supports residential customers in the remainder of New Zealand using its own national fibre backhaul and local inputs from the incumbent wholesale provider Chorus.

### ***Trans-Tasman corporate services***

Both Telstra and TelstraClear serve corporate customers who require their telecommunications networks and services to be delivered to sites and employees on both sides of the Tasman. There is aggressive competition for the provision of trans-Tasman networks and services to corporate customers, with several Australian, New Zealand and international telecommunications providers routinely participating in customer tenders for such services.

### ***The role of telecommunications services***

Telecommunications services are a massive enabler for trans-Tasman business activity as well as interaction in education, science, the arts, health, and all facets of civil society. Telecommunications services play an indispensable enabling role in the development of relations between the two countries and their citizens.

### ***Focus on a SEM in telecommunications services***

Telstra and TelstraClear have reviewed the Issues Paper released by the Productivity Commissions and recognise that all the questions raised are important matters for study. In this submission, however, Telstra and TelstraClear wish to focus their comments on the need for a specific work program towards harmonisation of regulation dealing with telecommunications services and the creation of a Single Economic Market ("SEM") in telecommunications services. This proposal touches on several questions in the Issues Paper, for example Questions 7, 14, 23, 26, 31, 32, 34 and 35, but there is no single question for which the proposal for specific work towards a SEM in telecommunications services is directly on point. Accordingly, this proposal is set out not in answer to any specific question in the Issues Paper, but as a matter which Telstra and TelstraClear submit the Productivity Commissions should take into account.

## 2. The current CER position on telecommunications services

Telecommunications services are not expressly excluded from the coverage of services in ANZCERTA, but there has been no development of formal and binding bilateral commitments on telecommunications services and their regulation. This contrasts with the inclusion of specific chapters on telecommunications services in several of Australia and New Zealand's bilateral and multilateral trade agreements, for example Australia's free trade agreements (FTAs) with the United States, Singapore

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<sup>1</sup> For end financial year 2010-11. Fixed line and mobile statistics include wholesale services.

and Chile, and the FTA with ASEAN nations to which both New Zealand and Australia are parties (but in respect of which Australia and New Zealand have excluded the operation of the AANZFTA's telecommunications chapter bilaterally between the two countries).<sup>2</sup> The trade law academics Voon and Mitchell concluded in a 2006 journal article that "telecommunications has been left behind" in CER, and that in respect of telecommunications, "CER is now clearly lagging behind other FTAs, including some Australian FTAs."<sup>3</sup>

The absence of a specific telecommunications services chapter in CER is a historical artefact, as when the CER's Services Protocol was concluded in 1988 both countries still maintained legislated monopolies. The telecommunications services chapters included in more recent bilateral agreements have taken a 'WTO-plus' approach overall, building on the commitments in the Telecommunications Annex to the General Agreement on Trade and Services (GATS) and the Reference Paper on Telecommunications, which were concluded in the 1990s.<sup>4</sup>

In late 2006, two Australian parliamentary reports voiced concern over the treatment of telecommunications in CER. The House of Representatives Standing Committee on Legal and Constitutional Affairs explored the harmonisation of legal systems between Australia and New Zealand. It recommended "the legal harmonisation of the Australian and New Zealand telecommunications regulation frameworks with a view to fostering a joint telecommunications market". The Joint Standing Committee on Foreign Affairs Defence and Trade reviewed the CER and recommended that "telecommunications be placed on the CER Work Program at the earliest opportunity".<sup>5</sup>

### 3. Towards a SEM in telecommunications services

Recent developments in telecommunications regulatory policy and legislation in Australia and New Zealand mean that there are now far more similarities between the laws governing this sector than differences. Rather than work in isolation, the sector and countries would benefit from a pooling of expertise and know-how with a view to designing an improved and common regulatory framework whilst acknowledging local differences. For telecommunications service providers such as TelstraClear and Telstra, having to deal with similar but distinct regulatory regimes and agencies results in unnecessary duplication of resources.<sup>6</sup> For investors from either side of the Tasman and from third countries, the

<sup>2</sup> Singapore–Australia Free Trade Agreement, signed 17 February 2003, 2257 UNTS 103 (entered into force 28 July 2003) ch 10; Australia–United States Free Trade Agreement, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ch 12; Australia–Chile Free Trade Agreement, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009) ch 11; Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ch 8 Annex on Telecommunications.

<sup>3</sup> Tania Voon and Andrew Mitchell, *Achieving a Common Market for Telecommunications Services in Australia and New Zealand*, Australian Year Book of International Law Vol 26, p149, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1083002](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1083002)

<sup>4</sup> WTO, Agreement on Telecommunications Services (Fourth Protocol to the General Agreement on Trade in Services) (1997) 36 ILM 354, 367. For the Reference paper specifically, see [www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm)

<sup>5</sup> Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into Harmonisation of Legal Systems Within Australia and Between Australia and New Zealand* (2006), available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=laca/harmonisation/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/harmonisation/index.htm); Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *A Review of the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement* (2006), available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfadt/nz\\_cer/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/nz_cer/index.htm).

<sup>6</sup> Telstra and TelstraClear, "A Review of the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement", 21 April 2006, available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfadt/nz\\_cer/subs/sub6.pdf](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/nz_cer/subs/sub6.pdf)

immediate benefit of harmonisation would be a larger single market with lower cost in managing regulatory developments and risk.

In a SEM, both nations would retain sovereignty over key policy areas such as universal service, however sectoral competition law dealing with telecommunications services would be harmonised and duplication of regulatory activity would be minimised.

Clearly it will not always be appropriate to mirror regulations in both jurisdictions as regulations should respond in an effective and proportionate manner to local needs. Moreover, each nation's regulatory regime has a variety of strengths and weaknesses – and neither would wish to import the weaknesses of the other. The development of a SEM in telecommunications services does not prevent the retention by each nation of its own specific policy responses where justified by different national and regional circumstances.

A SEM in telecommunications services would, however, adopt as the default position that both countries should maintain a common regulatory framework; and that deviations from the framework would require justification on the basis of specific local conditions. A good first step towards this goal would be to develop a common understanding of the policy objectives for telecommunications and radiocommunications regulatory frameworks.

#### 4. Innovation benefits of a SEM in telecommunications services

There is evidence from recent trans-Tasman collaboration in the radiocommunications and science areas that industry participants, regulatory agencies and scientists can work together effectively to achieve innovation benefits that would not otherwise accrue to each country on its own:

- **Digital Dividend Band Plan:** Australian and New Zealand regulatory agencies and key industry players collaborated extensively over several years to develop and promote a strategic plan for Asia-Pacific use of the radio spectrum frequencies (in the 700 MHz frequency band) that are being freed up as part of the transition from analogue to digital television (known as the 'digital dividend'). This plan is designed to facilitate the economic deployment of the next generation of fast mobile broadband technology. As well as being supported by the Asia-Pacific region, the plan is also likely to be adopted by other countries in the Africa, Middle-East and Latin America regions. Australian and New Zealand representatives were jointly active in undertaking detailed analyses and drafting papers for regional meetings outlining the technical rationale and structural proposals, and for leading regional workshops of Asia-Pacific regulators that eventually led to the regional consensus on the proposed plan. This globally significant outcome is illustrative of how Australia and New Zealand can work collaboratively to leverage their creativity, international credibility and engineering capability. Building on this recent success, the two countries are continuing to work together on further developing and promoting improvements in the usage of other segments of the strategically important radio frequency spectrum resource, and continue to be actively involved – indeed, highly influential – in regional and global radio frequency planning debates.
- **SKA:** The recent decision of the International Square Kilometre Array (SKA) Organisation to award a major component of the project to Australia and New Zealand, incorporates the development of "phased array feed" fish-eye lens technology with the goal of using this technology in the African SKA deployment. As a senior scientist remarked, "Australian and New Zealand technology on an African telescope truly is a win-win scenario."<sup>7</sup>

Telstra and TelstraClear believe that a SEM in telecommunications services would enable a larger market with fewer impediments to trans-Tasman collaboration, and this would foster innovation

<sup>7</sup> Brayn Gaensler, "Splitting the SKA- why a dual-site setup is a win for everyone", *The Conversation*, 26 May 2012, <http://theconversation.edu.au/splitting-the-ska-why-a-dual-site-setup-is-a-win-for-everyone-7273>

consistent with the examples provided above. In particular, the above examples illustrate that joint efforts can lead to benefits both within the SEM and to export of joint innovation with significant benefits. For example, the more countries and regions that adopt the Asia-Pacific 700 MHz band plan (essentially developed by Australia and New Zealand) the larger the scale of the market for devices using the band plan, and the greater the benefit to consumers in the domestic market.

## 5. The need for a comprehensive approach

The Australian and New Zealand governments have initiated a study into the market for trans-Tasman mobile roaming, as an *ad hoc* project seemingly outside of the CER Services Protocol.<sup>8</sup> In Telstra and TelstraClear's view, the roaming study should not be a standalone exercise but instead should be one work area within a more general process of progressing towards a trans-Tasman SEM in telecommunications services. Bilateral arrangements to regulate trans-Tasman wholesale roaming charges run the risk of triggering MFN obligations to suppliers from other countries which are unlikely to similarly regulate their telecommunications operators' wholesale rates. However, if such policy measures were adopted as part of a comprehensive program to address telecommunications services within CER, they would be covered by Article V of the GATS and thereby be immunised against undesirable flow-on MFN consequences. This analysis has been confirmed by a 2011 study conducted by the WTO Secretariat:

"[B]ilateral and regional arrangements among governments on international roaming to mutually reduce rates would not normally require operators to offer such reductions to third parties. Such arrangements could therefore risk placing the governments at odds with the GATS MFN obligation as well as non-discrimination provisions of the Annex on Telecommunications. It is possible that where such rate reductions are obtained within the context of an economic integration agreement, Article V of the GATS might provide cover."<sup>9</sup>

## 6. A message to a wider audience of trading partners

The Australian and New Zealand markets are amongst the most open to international competition in telecommunications services in the world

However, many Asian jurisdictions to which New Zealand and Australian suppliers wish to export their services, maintain closed telecommunications services markets which increases costs into those markets. Often the speed and quality of communications required into these developing Asian nations is not available because the relevant infrastructure has not been built.

Continued pressure by the Australian and New Zealand governments on their Asian trading partners to open their telecommunications markets is important to ensure that the information highways to those markets are constructed, and supplied competitively and at reasonable input cost. Actively working towards a SEM in telecommunications services within CER sends a message to our Asian trading partners.

## 7. Conclusion

Work towards a trans-Tasman SEM in telecommunications services is a medium-to-long term project which requires an initial phase of cost-benefit analysis. In section 5 of the Issues Paper the Productivity Commissions note that they are interested in views and evidence on areas which offer the greatest prospect for generating joint net benefits. Telstra and TelstraClear submit that it is likely that a SEM in telecommunications services would result in a more efficient use of regulatory expertise and resourcing conducive to designing a common regulatory framework that enables the supply of services on the same terms and conditions on both sides of the Tasman, increasing economies of scale for providers. Telstra and TelstraClear submit that further study of a SEM in telecommunications services should be

<sup>8</sup> See: [http://www.dbcde.gov.au/mobile\\_services/mobile\\_roaming/trans-tasman\\_mobile\\_roaming2](http://www.dbcde.gov.au/mobile_services/mobile_roaming/trans-tasman_mobile_roaming2)

<sup>9</sup> Council for Trade in Services, *International Mobile Roaming: Possible Implications for GATS* – Note by the Secretariat, S/C/W/337 (13 July 2011) para 24, available at: [http://www.wto.org/english/tratop\\_e/serv\\_e/sym\\_march12\\_e/document\\_wto\\_en.pdf](http://www.wto.org/english/tratop_e/serv_e/sym_march12_e/document_wto_en.pdf)

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proposed by the Productivity Commissions as an initial step for the Australian and New Zealand governments.