Australian and New Zealand competition and consumer protection regimes

Submission by

Telstra Corporation Limited and TelstraClear Limited

to the Productivity Commission

13 August 2004

EXECUTIVE SUMMARY

Telstra Corporation Limited of Australia and TelstraClear Limited of New Zealand (together "Telstra") welcome this opportunity to comment on the Productivity Commission's July 2004 Issues Paper, "*Australian and New Zealand Competition and Consumer Protection Regimes*" ("Issues Paper").

Telstra strongly supports initiatives to further harmonise the generic competition laws of Australia and New Zealand.

Telstra believes that further trans-Tasman harmonisation falls into three distinct categories:

1. Substantive and procedural harmonisation

   While the competition laws of both jurisdictions already have a high degree of substantive harmonisation, Telstra has identified in this submission a number of material divergences in approach that could be addressed by further harmonisation initiatives.

2. Institutional harmonisation and coordination

   It is important that greater institutional harmonisation and co-ordination is now achieved between the Australian Competition & Consumer Commission ("ACCC") and the New Zealand Commerce Commission ("NZCC").

   In relation to telecoms, for example, the speed, quality and consistency of decisions could benefit from a greater pooling of expertise between the ACCC and NZCC.

   Telstra proposes greater institutional coordination between the ACCC and NZCC, particularly in highly technical specialised areas such as telecoms as envisaged by Professor Allan Fels.

   Telstra also submits that:

   - It would be beneficial if the regulators consulted with each other in relation to regulatory decisions that require a high degree of specialist expertise and knowledge, particularly in areas such as telecoms;
   - reviews of competition in various markets should be jointly conducted by the ACCC and NZCC to ensure greater pooling of expertise; and
   - there should be a positive obligation on both regulators to promote greater trans-Tasman harmonisation of competition regulation.

   Telstra suggests that institutional harmonisation and convergence should extend beyond the regulators to include policy formation, policy review and judicial entities. For example:

   - greater co-ordination should occur between the Productivity Commission, the New Zealand Law Commission, the respective Ministries and other relevant entities in relation to the review and development of competition law and policy in either nation; and
   - a trans-Tasman specialist appeals body could be established to consider appeals on regulatory decisions.

3. Harmonisation of sectoral regulation and competition policy

The most important point Telstra makes in this submission is that while *generic* law and regulation has been targeted for harmonisation, little attempt has yet been made by either Government to harmonise *sectoral* regulation or competition *policy*.

Australia's own experience suggests that harmonisation of sectoral regulation and competition policy is critical. Regulatory harmonisation and the National Competition Policy provided the impetus for the realisation of a single domestic market in Australia. Such domestic initiatives provide an important precedent for the future development of the trans-Tasman relationship.

Telstra therefore urges the Productivity Commission to recommend greater trans-Tasman harmonisation of competition *policy* and *sectoral* regulation as the next step towards greater trans-Tasman economic integration.

Telstra submits that the telecoms sector, in particular, would greatly benefit from such harmonisation.

Telstra submits that the *time is now right* for Australia and New Zealand to take these important steps with a view towards realising the vision of a trans-Tasman economic community.

Telstra Corporation Limited
TelstraClear Limited

13 August 2004

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Articles referred to in this submission can be obtained from Telstra on request. Please contact: tim.j.kuypers@team.telstra.com

1 INTRODUCTION

Telstra welcomes this opportunity to comment on the Productivity Commission's July 2004 Issues Paper.

Given Telstra's trans-Tasman business operations and regulatory experience, Telstra is well placed to comment on the various issues raised by the Productivity Commission:

- Telstra Corporation Limited is already well known to the Productivity Commission.

- TelstraClear Limited is Telstra's 100% owned New Zealand subsidiary. TelstraClear is now New Zealand's second largest full service telecommunications company and was created by the merger of TelstraSaturn Limited (a Telstra subsidiary) with CLEAR Communications Limited in December 2001. TelstraClear provides a full suite of fixed line telephony, cable television, Internet, data and mobile telephony services to New Zealand's consumers and businesses. TelstraClear also provides a seamless service to Telstra's trans-Tasman customers.

1.1 The vision

> "With most of the trade goals of CER met, the way ahead will be to foster closer economic integration through regulatory harmonisation, and the creation of a more favourable climate for trans-Tasman business collaboration. ... At the 3 March 2004 meeting between Prime Ministers Howard and Clark, ... [they] re-iterated their strong comitment to work towards the development of a single economic market[1]."

This quote from the Australian Department of Foreign Affairs and Trade underlines the need for the Governments of Australia and New Zealand to strive towards realising the vision of greater trans-Tasman economic integration. Telstra strongly supports initiatives to further harmonise the generic competition laws of Australia and New Zealand as an important step towards realising this vision.

Last year was the 20th anniversary of the initial trans-Tasman Closer Economic Relations ("CER") agreement. It remains important that momentum is not lost and that pro-active steps towards greater economic integration are continually taken. CER must be perceived as a dynamic arrangement, evolving to suit the needs of both nations.

Under the auspices of the CER initiative, Australia and New Zealand have one of the most open economic and trading relationships of any two countries in the world. Indeed, the World Trade Organisation has described CER as the "*world's most comprehensive, effective and multilaterally compatible free trade agreement*".[2]

From a New Zealand perspective, it is clear that the New Zealand public advocate greater economic integration with Australia. As the smaller of the two economies, the benefits to New Zealand are likely to be considerable. From an Australian perspective, Australian industries with New Zealand operations would also clearly benefit from greater economic integration, directly benefiting the Australian public. In effect, New Zealand adds a 20% increment to the Australian

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1 Department of Foreign Affairs and Trade - http://www.dfat.gov.au/geo/new_zealand/nz_country_brief.html

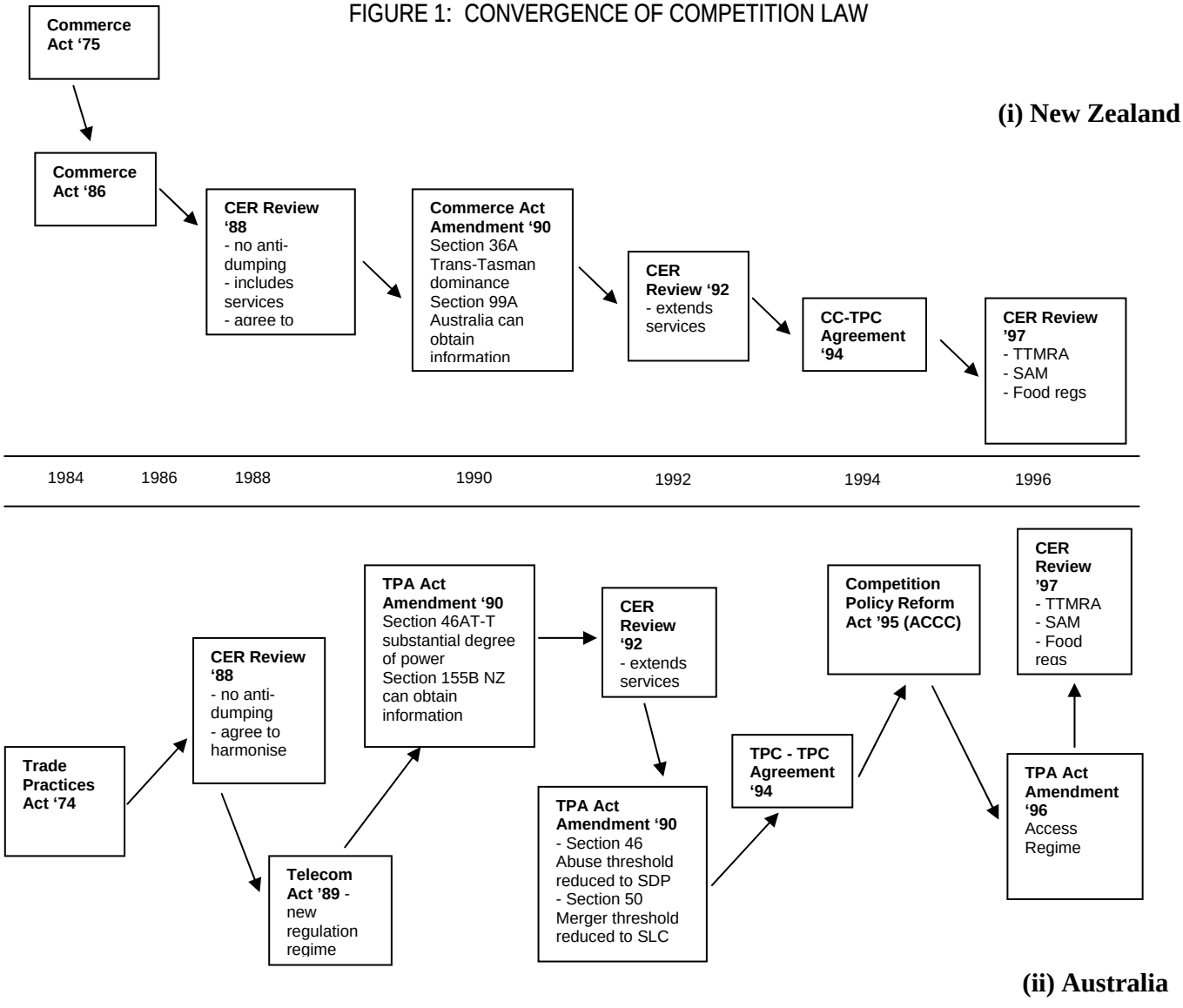
2 DFAT "Australian Department of Foreign Affairs and Trade Submission to the Productivity Commission Study into the Trans-Tasman Mutual Recognition Agreement", Submission by DFAT to the Productivity Commission, Canberra, 11 April 2003, p1 (Submission containing quote accessed on 11 August 2004).

domestic market. As consumers increasingly seek trans-Tasman solutions for their business needs, true trans-Tasman businesses will develop, rather than discrete Australian or New Zealand businesses with trans-Tasman operations.

1.2 Realising the vision - competition law

The extent of pre-existing harmonisation between the competition laws of Australia and New Zealand ranks among the closest of any two nations in the world, outside the supra-national competition law adopted by the European Community. Under the CER framework, Australia and New Zealand have made deliberate efforts to achieve harmonisation. The Productivity Commission will already be aware of many of these initiatives. They are usefully summarised in the following diagram from the NZCC addressing the period 1984 to 1996:[3]

FIGURE 1: CONVERGENCE OF COMPETITION LAW



Note: Progress towards the central time line represents convergence of laws.
Key: ACCC - Australian Competition and Consumer Commission; CER - Australia-New Zealand Closer Economic Relationship; C Act - Commerce Act 1996, NZ; CC - New Zealand Commerce Commission, SAM - Trans Tasman Single Aviation Market; SDP - Substantial degree of power in a market; SLC - substantial lessening of competition; TP/A - Trade Practices Act 1974, Australia; TPC - Trade Practices Commission; TT - Trans Tasman, TTMRA - Trans Tasman Mutual Recognition Arrangement

[3] Extracted from http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=42&Filename=AB101197.PDF

Notwithstanding such considerable pre-existing harmonisation of competition law, Telstra submits that there still remains scope for further reforms and Telstra has sought to identify them in this submission. Telstra believes that such harmonisation falls into three distinct categories:

(a) further substantive and procedural harmonisation of competition law;

(b) further institutional harmonisation and co-operation; and

(c) further harmonisation of sectoral regulation and competition *policy*.

Telstra considers that significant progress has been made in achieving substantive and procedural harmonisation. Moderate progress has been made towards institutional harmonisation and co-operation. However, little progress has been made towards harmonising sectoral regulation and competition policy.

Generally, the greatest economic benefits would arise from taking steps to achieve greater harmonisation in those areas in which little or only moderate progress has been made. Harmonisation is likely to exhibit diminishing marginal returns. As a result, the benefits from greater substantive harmonisation are likely to be lower than the considerable benefits to be obtained from further institutional harmonisation and co-operation.

More importantly, Telstra strongly advocates harmonisation of sectoral regulation and competition policy. This is an area to which little harmonisation effort has yet been directed.

Telstra proposes that the *time is now right* for Australia and New Zealand to take these important steps with a view towards realising the vision of a trans-Tasman economic community.

1.3 Harmonisation is a two-way exercise

It is important to note from the outset that harmonisation is a two-way exercise, offering each jurisdiction the opportunity for valuable learning.

Australia will benefit from harmonisation with New Zealand, particularly where New Zealand has adopted a regulatory approach which improves upon Australia's approach. As the larger of the two jurisdictions, Australia should not expect New Zealand to always conform to its approach. Australia has tended towards over-regulation by international standards - this is not necessarily the optimal approach.

As a corollary to this point, Telstra suggests that Australia has a responsibility to maintain harmonisation. In circumstances where New Zealand has amended its competition laws to ensure consistency with Australia, it is not appropriate for Australia without appropriate consultation to then amend its competition laws in a manner that again creates divergence from New Zealand. Telstra is concerned that some of the recent proposals by the Senate Economic References Committee in the context of the Dawson reforms may have this unintended effect.

2 SUBSTANTIVE AND PROCEDURAL HARMONISATION

The competition laws of Australia and New Zealand already have a very high degree of substantive and procedural harmonisation.

A number of remaining significant differences, such as the absence of a formal merger clearance procedure in Australia, will be addressed once the amendments in Australia's *Trade Practices Amendment Bill 2004* ("TPA Amendment Bill") are enacted. The Dawson Committee was conscious of trans-Tasman harmonisation issues in its recommendations to the Australian Government.

However, Telstra has identified several key material divergences in approach that could be addressed by further harmonisation initiatives on either side of the Tasman. These are summarised below.

Before addressing these differences, Telstra has first briefly summarised the adverse effects of substantive and procedural differences in generic competition laws.

2.1 Adverse effect of substantive and procedural differences

Substantive and procedural differences in Australia and New Zealand's generic competition laws are likely to impose material transaction costs, result in regulatory externalities, and have adverse efficiency effects for the economies of each country. The Productivity Commission will already be aware of these issues and has summarised these issues in its Issues Paper. For example:

- *Material transactions costs:* Differences in competition regulation may impose material transactions and compliance costs on firms operating in both Australia and New Zealand as they are required to comply with the different domestic legislation and regulatory decisions of two national regulatory regimes and regulators in respect of the same subject matter. The same transaction, for example, may be scrutinised twice by two different regulators that each seek different undertakings and remedies. A lack of process to enable the regulators to learn from each other's decisions may also result in wasteful duplication of effort, further increasing transactions costs.

- *Adverse externality effects:* Externalities in regulatory decision-making arise where the decisions made by a regulator in one jurisdiction have positive or negative spillover effects on the other jurisdiction. This could arise if one jurisdiction made decisions that over-regulated or under-regulated relative to the optimal level of regulation for both. For example, New Zealand may permit conduct that did not adversely affect competition in New Zealand, but the effect of the conduct may be to adversely affect competition in Australia.

- *Adverse efficiency effects:* Over-regulation or under-regulation by one jurisdiction relative to the other may also distort efficient trade between Australia and New Zealand. This may encourage firms to arrange their international transactions inefficiently in order to minimise their regulatory risks.[4] While there are undoubted costs involved in harmonisation, Telstra believes that they are outweighed by the benefits. For example, the incentives for cross-border investment could be enhanced through reduced regulatory risk

[4] See S Picciotto "The Regulatory Criss-Cross: Interaction between Jurisdictions and The Construction of Global Regulatory Networks" in W Bratton (ed) *International Regulatory Competition and Coordination: Perspectives in Economic Regulation in Europe and the US* (OUP, New York 1996).

and transactions costs. The potential gains from increased investment and innovation and ultimately the resulting improvements in economic surplus are large. While the initial costs of harmonisation will undoubtedly exist and will be difficult to accurately approximate, there is little doubt that the costs will be exceeded by the gains in trade for both nations.

Telstra believes that greater harmonisation would address such issues. The same type of issues arise in the context of institutional and policy harmonisation, as noted later in this submission.

2.2 Divergence in approach - exclusionary provisions

Telstra proposes that the Australian approach in relation to exclusionary provisions could be harmonised with the approach adopted in New Zealand by Australia's adoption of a substantial lessening of competition defence into section 4D of the *Trade Practices Act 1974* ("TPA').

Australia's prohibition against exclusionary provisions is set out in section 4D of the TPA, which is referenced by section 45(2). Exclusionary provisions are *per se* illegal under the TPA, meaning they are not subject to a test based on their effect on competition. Under section 4D, there are two elements to the definition of exclusionary provisions, both of which must be satisfied for liability to be established as a *per se* breach.

The first element is set out in subsection 4D(1)(a) and requires that two or more of the persons who are parties to the relevant agreement must be in competition with each other. The second element is set out in subsection 4D(1)(b) and requires that the provision must have the purpose of preventing, restricting or limiting the supply of goods or services to, or the acquisition of goods or services from:

- particular persons or classes of persons; or
- particular persons or classes of persons in particular circumstances or on particular conditions.

New Zealand's prohibition against exclusionary provisions is set out in section 29 of the *Commerce Act 1986 (NZ)* ("Commerce Act") in virtually identical terms. However, unlike Australia, section 29(1)(A) of the Commerce Act provides a competition defence to exclusionary provisions. If the exclusionary provision does not have the purpose, or does not have or is not likely to have the effect, of substantially lessening competition in a market, then it does not contravene the Commerce Act. In this manner, New Zealand prohibits exclusionary provisions only when they have a detrimental effect on competition. In short, New Zealand does not utilise a *per se* approach. This has significant benefits in ensuring pro-competitive arrangements are not inadvertently prohibited.

There has long been concern that the *per se* prohibition of exclusionary provisions in Australia is unduly restrictive. Australia's *per se* approach runs a clear risk of inadvertently prohibiting pro-competitive conduct. The recent Dawson Review identified concern, for example, that some exclusionary arrangements can be pro-competitive, and recommended that a defence be introduced for arrangements that do not have the purpose, effect, or likely effect of substantially lessening competition. In effect, the Dawson Committee recommended that Australia's approach should be harmonised with the approach in New Zealand.

While the Australian Government initially indicated that it would accept the recommendation of the Dawson Committee, it has now reversed that decision. Rather, a limited defence for joint ventures has been introduced.

Telstra considers that the Australian Government's decision not to implement the Dawson Committee's recommendation will lead to inconsistency in the approach of Australian and New Zealand competition law to this issue.

2.3 Divergence in approach - Australian collective bargaining reforms

Telstra believes that Australia's proposed exemption for collective bargaining may lead to disharmony in the approaches of Australia and New Zealand. Steps should be taken to ensure greater harmonisation occurs.

The TPA Amendment Bill in Australia, once enacted, will introduce a new notification procedure for collective bargaining proposals to supplement the existing authorisation procedure in section 88 of the TPA. The new notification procedure will provide immunity from various provisions of the TPA to notifying parties 14 days after lodgement of the notification, unless the ACCC issues an objection notice. The procedure will make it much easier for small business to obtain immunity in respect of collective bargaining arrangements.

New Zealand does not have a specific notification procedure for collective bargaining arrangements similar to the notification procedure proposed for Australia. Rather, New Zealand will continue to rely on its authorisation procedure in section 58 of the Commerce Act. Increasingly, the focus of the authorisation process in New Zealand has been on efficiency gains[5]. Telstra understands that very few applications have been made to the NZCC seeking authorisation for small business collective bargaining.

Telstra suggests that the collective bargaining reforms to be introduced into the TPA will create disharmony between Australian and New Zealand competition laws. Telstra submits that steps should be taken to ensure consistency of approach between Australia and New Zealand on this issue. This could involve either New Zealand implementing similar reforms to the Commerce Act, or by Australia not amending the TPA in the manner contemplated.

2.4 Divergence in approach - Australian misuse of market power reforms

Telstra considers that two of Australia's three proposed amendments to its misuse of market power provision (section 46) may lead to disharmony in the approaches of Australia and New Zealand. Steps should be taken to ensure greater harmonisation occurs.

Australia's prohibition against misuse of market power is set out in section 46 of the TPA. Section 46 provides that a corporation with a substantial degree of power in a market should not take advantage of that power for a number of proscribed purposes.

New Zealand's prohibition against misuse of market power is set out in section 36 of the Commerce Act. Section 36 is now identical to section 46 of the TPA following amendments to the Commerce Act implemented by New Zealand in 2001. These reforms involved New Zealand reducing its market power threshold from "market dominance" to "substantial market power", thereby harmonising with Australia.

However, notwithstanding that New Zealand only recently harmonised its misuse of market power provision with the Australian version, Australia is now moving to amend its misuse of market power provision away from the harmonised position.

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[5] For example, in *Tru Tone Ltd v Festival Records Retail Marketing Ltd* (1988) 2 NZLR 351, it was stated that the Commerce Act "is based on the premise that society's resources are best allocated in a competitive market where rivalry between firms ensures maximum efficiency in the use of resources".

In particular, the recent Senate Economic References Committee in Australia proposed a range of amendments to section 46. Some of these amendments were partially accepted by the Government. The Government has indicated that it will move to implement the following three reforms to section 46:

- amend section 46 to ensure that the courts may consider below cost pricing when determining whether a corporation has misused its market power;

- amend section 46 to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power *in that or any other market*; and

- amend section 46 to state that, in assessing whether a corporation has a "substantial degree of power in a market", a court may take account of any market power the corporation has that results from contracts, arrangements or understandings with others.

Telstra notes that these three amendments will be implemented by the Government notwithstanding that the Dawson Committee had recommended against amendments to section 46.

Telstra submits that, with the exception of the second amendment identified above, Australia's proposed amendments will again lead to disharmony in the approaches of Australia and New Zealand competition laws. Steps should be taken to ensure consistency of approach by Australia and New Zealand on this issue. Again, this could involve New Zealand implementing similar reforms as in the Commerce Act, or by Australia not amending the TPA in the manner contemplated.

2.5 Divergence in approach - exclusive dealing

Telstra proposes that the Australian approach in relation to exclusive dealing could be harmonised with the approach adopted in New Zealand by repealing section 47 of the TPA and relying on section 45.

Australia's prohibition against exclusive dealing is set out in section 47 of the TPA. Section 47 is a complex provision intended to regulate various types of vertical restraint practices. Currently, all provisions of section 47 except third line forcing are subject to a substantial lessening of competition test via section 47(10). Following the enactment of the TPA Amendment Bill, third line forcing will also be subject to the substantial lessening of competition test in section 47(10).

In contrast, New Zealand has no equivalent of section 47. Rather, New Zealand regulates vertical restraints under its general "substantial lessening of competition" test in section 27 of the Commerce Act. New Zealand's section 27 is equivalent to Australia's section 45 of the TPA and the same test applies.

Telstra submits that the complex approach adopted in Australia is unnecessary. Ultimately, the relevant test under section 47 distils to a simple "substantial lessening of competition" test identical to that adopted in New Zealand, given the existence of section 47(10) of the TPA. Telstra therefore proposes that Australia should repeal section 47 and rely on section 45 alone, thereby adopting the much simpler technique for regulating vertical restraints used in New Zealand.

2.6 Divergence in approach - merger review methodology

Telstra proposes that the Australian and New Zealand merger review methodologies be harmonised so there is a single trans-Tasman merger review methodology which is followed by both the ACCC and NZCC.

The 2001 amendments to New Zealand's Commerce Act, in conjunction with the amendments to Australian merger laws contemplated by the TPA Amendment Bill, will ultimately result in merger review procedures which are very similar between Australia and New Zealand.

However, there remain some important differences in the methodologies applied by the ACCC and NZCC in the assessment of mergers. These differences are evident when comparing the Merger Review Guidelines of both regulators.

These differences in approach largely result from differences in historical procedure and differences in the level of detail proscribed by legislation. By way of example, Australia has detailed statutory criteria to guide the assessment of mergers in section 50(3) of the TPA, whereas New Zealand does not, leading to differences in methodology and emphasis. This means that while the NZCC proceeds from market definition directly to a comparison of a factual and counterfactual, the ACCC first proceeds through each of the statutory factors. The ACCC is likely to place more emphasis on the specific matters set out in the TPA.

These differences can result in frustration for firms seeking approvals in both jurisdictions and provides scope for the ACCC and NZCC to make inconsistent decisions.

Telstra considers that steps should be taken to ensure greater harmonisation of the methodologies adopted by the ACCC and NZCC in the assessment of mergers. Such harmonisation may require amendments to the TPA and/or Commerce Act to ensure the wording of the legislation is identical. More importantly, the Australian and New Zealand Merger Review Guidelines should be harmonised so there is a single trans-Tasman Merger Review Guideline which is followed by both the ACCC and NZCC.

2.7 Divergence in approach - essential facilities

Telstra proposes that the New Zealand approach could be harmonised with Australia by the enactment of an essential facilities access regime into the Commerce Act.

Australia's regime promoting access to essential facilities is contained in Part IIIA of the TPA. Part IIIA was enacted into the TPA in 1995 following the recommendations of the Hilmer Committee. The Productivity Commission will be familiar with those recommendations. Relevantly, the Hilmer Committee commented:

> *"…there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purposes of the general conduct rules. The telecommunications sector provides a clear example, as do electricity, rail and other key infrastructure industries. Where such a clear public interest exists, but not otherwise, the Committee supports the establishment of a legislated right of access, coupled with other provisions to ensure that efficient competitive activity can occur with minimal uncertainty and delay arising from concern over access issues…".*

The object of an access regime is usually to address instances where a vertically integrated operator can deny its competitors from accessing facilities or resources to which access is essential if they wish to compete in downstream markets.

As the Productivity Commission will be aware, Part IIIA of the TPA establishes a two-part process for access to essential facilities. The first part of the process, known as declaration, deals with a determination as to whether the facility is "essential". The second part of the process provides for arbitrated access when the parties are unable to agree on access arrangements and pricing.

In contrast, New Zealand has not incorporated an essential facilities access regime into the Commerce Act. Rather, New Zealand has continued to rely on the application of section 36 of the Commerce Act, being New Zealand's general misuse of market power provision. [6]

The problems arising from reliance on section 36 alone in New Zealand are well documented.[7] Prior to the enactment of New Zealand's *Telecommunications Act 2001*, these problems were particularly acute in the New Zealand telecommunications industry. The absence of any essential facilities regime has attracted widespread criticism.

While New Zealand has now enacted an access regime via the *Telecommunications Act 2001*, Telstra notes that New Zealand has not yet adopted a generic essential facilities access regime to address the same issues in other sectors. In addition, disharmonies exist in the appeal rights available under the essential facilities regime and the two telecommunications specific access regimes.

Telstra submits that absence of a generic access regime in New Zealand is a serious oversight. Since the enactment of the Commerce Act, both structural change and market liberalisation in New Zealand have heightened the need for access to bottleneck facilities. It is therefore important that the New Zealand Government clearly recognises the importance of market and regulatory failures occurring in the context of access to essential facilities, and takes steps to promote access.

Telstra is concerned, for example, that an absence of understanding of these essential facilities issues is impeding the effective implementation of the new *Telecommunications Act 2001* access regime in New Zealand.

The introduction of a generic essential facilities regime in New Zealand would have the added benefit of increasing the NZCC's knowledge and expertise in relation to the implementation and administration of pre-existing sectoral access regimes, including the new regime under the *Telecommunications Act 2001 (NZ).*

3 INSTITUTIONAL HARMONISATION AND COORDINATION

While significant progress has been made in terms of substantive and procedural harmonisation of competition laws between Australia and New Zealand, only moderate progress has been made towards institutional harmonisation and co-operation.

Telstra submits that greater economic benefits are likely to arise from taking steps to achieve greater harmonisation in areas where only little or moderate progress has been made. Institutional harmonisation and co-ordination is one such area.

Telstra ranks the achievement of greater institutional harmonisation and co-ordination as *significantly more important* than further initiatives to harmonise substantive competition laws.

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6 While New Zealand could seek to regulate access issues via its price control regime in Part VI of the Commerce Act, price controls would be a relatively blunt policy instrument to apply in an essential facilities context.

7 See, for example, discussion in M Taylor & M Webb "Light-handed Regulation of Telecommunications in New Zealand: Is Generic Competition Law Sufficient?" (1999) 2 *International Journal of Communications Law & Policy* 42; T Gilbertson "Beginning of the End of Light-handed Telecommunications Regulation in New Zealand" (2001) 7 *Computer and Telecommunications Law Review* 1; J Small, "Regulation and Competition Law for Networks in New Zealand," Paper for the Centre for Research in Network Economics and Communications Policy Conference, Auckland, September 1999.

3.1 Greater pooling of specialist expertise

Greater institutional co-ordination and integration on a trans-Tasman basis is likely to realise material efficiency gains by realising trans-Tasman regulatory synergies, particularly economies of scope and scale.[8] Greater trans-Tasman pooling or integration of regulatory resources will enable both regulators to have access to a broader range of expertise, particularly in technology-intensive industries such as telecommunications. Greater co-ordination will reduce wasteful duplication of effort.

Additional benefits from greater institutional harmonisation and co-ordination also arise consistent with those identified earlier in this submission.

Telstra believes that the resourcing of the NZCC could be improved by greater sharing of expertise and resources with the ACCC. Such pooling of expertise and resources would help reduce the corresponding risk of regulatory error and increase the speed, quality and consistency regulatory decisions. The welfare costs of regulatory error, in particular, can be substantial.

In recent years it has been well documented that the NZCC has operated under significant resource constraints.[9] These resource constraints can have a direct impact on decision-making, particularly in specialist areas such as telecommunications.

In the 2002/2003 financial year, for example, the NZCC had a budget of NZ$16 million and achieved a budget deficit of NZ$0.28 million. The NZCC annual report for 2002/2003 notes that this understates a structural deficit of around NZ$500,000. The NZCC commented in particular:

> "*The Commission's generic enforcement and adjudication roles under the Commerce and Fair Trading Acts are an area under considerable financial pressure and the Commission completed the year with a deficit against the budget. The Commission has concerns about the extent of the structural deficit that is emerging in the general market regulation area. The Commission intends to prepare a business case in the next financial year for an increase to this appropriation….*"

The NZCC also commented:

> *"The Commission is conscious of the expenditure pressure in this area and manages its resources as efficiently as possible. The ongoing pressure arises from the costs associated with increasing output delivery expectations relating to the complexity of issues coming before the Commission under both the Commerce and Fair Trading Acts, the number of authorisation applications for both market behaviour arrangements and market structure mergers and acquisitions, and greater involvement in international activities."*
>
> *"The Commission is very conscious that it cannot continue to absorb deficits under its General Market appropriation and is exploring options for reducing expenditure and increasing revenue."*[10]

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8 Economies of scale in regulation exist where an increase in inputs results in a more than proportional increase in outputs. Economies of scope in regulation can exist where a regulator producing various outputs, for example decisions on competition laws, can do so at a cheaper rate than if two or more regulators were producing their decisions separately.

9 J Small, *Regulation and Competition Law for Networks in New Zealand*, Paper for the Centre for Research in Network Economics and Communications Policy Conference, Auckland, September 1999, para 3.1

10 The *Commerce Commission: Briefing for Incoming Ministers,* March 2004, indicates a review of the NZCC's baseline will be conducted in 2004-2005. This confirms that resourcing of the NZCC is an ongoing issue which is yet to be addressed satisfactorily.

Telstra believes that such resource constraints in New Zealand increase the scope for sub-optimal decision making. Insufficient resources can also lead to delays in decision-making which alone can have material adverse effects, particularly in the context of time-sensitive commercial activities.

By contrast, in 2002-2003 the ACCC had a budget of around $73 million. While the ACCC has also suffered an operating loss for the past two financial years, the ACCC is financially sound, having received increased Australian Government funding of $77 million over the next four years.

As noted by Landrigan and Warren, optimal competition policy is a policy which minimises the sum of administrative costs and error costs.[11] Error costs represent the efficiency costs to society of incorrect decisions by competition regulators that result in under- or over-regulation relative to the optimal policy[12]. Regulators generally have discretion as to whether to intervene in the market, and in doing so must ensure they neither under-regulate (by preventing legitimate competitive behaviour) nor over-regulate (by permitting anti-competitive behaviour). The complexity of competition law issues, particularly in the telecommunications sector, means that such decisions are often difficult and require a high degree of specialist expertise. An absence of adequate funding may result in sub-optimal decisions with significant resulting welfare effects.

The welfare costs of inefficient regulation have been identified[13] as significant in jurisdictions such as Australia[14], Canada[15] and the United States[16]. The Productivity Commission will be well aware of these issues.

To overcome the risk of resulting regulatory error in specialist areas such as telecommunications, Telstra proposes that the ACCC and NZCC should pool their expertise and resources. By way of illustration, Telstra has identified below a number of steps that could be adopted with this in mind.

3.2 Greater institutional amalgamation

Telstra proposes greater institutional amalgamation between the ACCC and NZCC, particularly in highly technical specialist areas such as telecoms.

The ACCC and the NZCC signed a bilateral cooperation and coordination agreement in July 1994.[17] Under the agreement, the regulators can exchange and provide information about investigations, research activities, speeches, journal articles, compliance education programs, amendments to relevant legislation and human resource development and corporate resource issues. The assistance envisaged under the agreement includes: providing access to information; preparing witness statements, conducting formal interviews and obtaining information and documents on behalf of the other agency; and coordination of enforcement activities when the

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11 M Landrigan & T Warren, "Administrative Costs and Error Costs in Market Conduct Regulation: Two Case Studies" (2000) 7(3) *Competition and Consumer Law Journal* 224

12 M Landrigan and T Warren "Administrative Costs and Error Costs in Market Conduct Regulation: Two Case Studies" (2000) 7(3) *Competition and Consumer Law Journal* 224.

13 M Taylor "Looking to the Future: Towards the Exclusive Application of Competition Law?" (2004) 5:2 *Business Law International* 172 at 181.

14 In 1996, the OECD calculated that the net efficiency costs of excessive regulation in Australia were between 9 and 19 per cent of real GDP per capita.

15 In 1996, Milhar calculated that the net efficiency costs of excessive regulation in Canada were roughly 12 per cent of real GDP per capita

16 In 1992, Hopkins calculated that the net efficiency costs of excessive regulation in the USA were roughly 9.5 per cent of real GDP per capita

17 *Co-operation and Co-ordination Agreement Between the Australian Trade Practices Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer* Laws, July 1994

agencies agree that would be beneficial in a particular case. At present the regulators also cooperate in a number of other areas (e.g., occasional staff and technical exchanges).

However, such co-operation and co-ordination between the ACCC and NZCC could potentially extend much further. Professor Allan Fels has suggested for example, that: [18]

> "…*a more formal arrangement could take the form of a New Zealand Commissioner becoming an ex-officio member of the ACCC, and similarly, an Australian sitting, ex-officio, on the New Zealand Commission; increased staff transfer; and an enhanced exchange of information…This could be especially valuable in the regulatory areas of both Acts (that is, for access and pricing matters) where direct experience of others' laws and practices would be very useful.*"

As Professor Allan Fels expressly recognises, telecoms regulation, access regimes and access pricing is an area that would most benefit from this approach, consistent with Telstra's submission above.

Telstra strongly endorses those views. The ACCC has had longer experience than the NZCC in administrating telecoms regulatory issues. There are very obvious synergies in telecoms regulation on a trans-Tasman basis.

Telstra proposes that as part of further enhancement of the CER agreement, institutional amalgamation between the ACCC and the NZCC should be seriously considered, particularly in highly technical specialist areas such as telecoms. This could involve, for example:

- express requirements for the ACCC and NZCC to consult with each other in relation to regulatory decisions that require a high degree of specialist expertise and knowledge, particularly in relation to telecommunications;
- express requirements for each regulator to have regard to the decisions of the other with a view to ensuring regulatory harmonisation;
- express requirements to ensure that reviews of competition in various markets are jointly conducted by the ACCC and NZCC to ensure greater pooling of expertise, particularly in relation to the telecoms sector; and
- as contemplated by Professor Allan Fels, closer ties between the ACCC telecoms team and the NZCC telecoms team so that staff are shared between the regulators, resulting in an immediate pooling of expertise and resources.

These examples are illustrative and would need to be assessed in greater detail to determine their feasibility. However, Telstra believes that the benefits of such steps could be considerable.

3.3 Adoption of a Trans-Tasman appellate body

Telstra also proposes that a trans-Tasman specialist appeals body should be established to consider appeals on regulatory decisions.

There has been much recent comment on this issue, as recognised by the Productivity Commission in its discussion paper. Telstra presumes that other submissions to the Productivity Commission

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[18] Speech to the New Zealand Institute of Economic Research "Building a Modern Trade Practices Act: A Trans-Tasman Analysis", 18 September 2002, Wellington.

are likely to explore the development of a trans-Tasman appellate body in considerable detail. Telstra believes the benefits of such an appellate body may be significant and will go a long way towards achieving greater harmonisation of regulatory decisions.

The issue is clearly topical and relevant. Qantas chairman, Margaret Jackson, has been quoted in relation to the Qantas/Air New Zealand alliance, for example, that, "*The proposal [for the alliance] is just the most recent example of cumbersome, lengthy and expensive process that business currently has to endure. We don't need two competition regimes. We need one process. And one umpire".*[19]

There are clear precedents for the establishment of a trans-Tasman specialist appeals body. Under the "Trans-Tasman Mutual Recognition" legislation in both Australia and New Zealand, for example, the jurisdictions agreed to the creation of a Trans-Tasman Occupations Tribunal. This has occurred by enabling members of the New Zealand Tribunal to be involved in a review of appeals from the Australian Tribunal, and vice versa. Section 35(3) of the *Trans-Tasman Mutual Recognition Act 1997 (Cth)* provides:

> *"For the purposes of a review of a decision referred to in subsection 33(1) of this Act, the President of the Australian Tribunal may, in the exercise of the power under paragraph 20(1A)(b) of the Administrative Appeals Tribunal Act 1975, direct that the persons who are to constitute the Australian Tribunal for the purposes of that review include:*
>
> *(a) the Chairperson of the New Zealand Tribunal; or*
>
> *(b) a person included on the panel maintained under the New Zealand Act who is nominated by the Chairperson of the New Zealand Tribunal for the purposes of that review."*

In the trade practices context, both Australia and New Zealand amended their competition legislation in 1990 to include provisions addressing trans-Tasman market power. Section 46A of the TPA applies to misuse of market power by a corporation with a substantial degree of power in a trans-Tasman market. New Zealand similarly amended its section 46.

To ensure that this "trans-Tasman misuse of market power" jurisdiction would operate effectively, both jurisdictions enacted ancillary amendments to their respective statutes to address evidence, judicial procedure and the enforcement of foreign judgements. In New Zealand, the *Law Reform (Miscellaneous Provisions) Act 1990* amended New Zealand's Judicature Act 1908, *Reciprocal Enforcement of Judgements Act 1934* and *Evidence Act 1908*. In Australia, the *Trade Practices (Misuse of Trans-Tasman Market Power) Act 1990* amended the *Federal Court of Australia Act 1976* and the *Commonwealth Evidence Act 1905.* These amendments effectively prevented Australian and New Zealand firms from claiming they were outside the jurisdiction of the relevant court or regulatory authority of the other nation. These laws also enabled the courts of Australia and New Zealand to sit in each other's jurisdictions in respect of competition law cases.

Telstra also understands that a common court of competition jurisdiction has previously been considered by both Australia and New Zealand.[20]

In summary, in Telstra's view, a trans-Tasman appellate body could and should be developed.

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19 Speech to the Australia New Zealand Leadership Forum, Wellington, May 2004

20 Warren Pengilly, *Trans-Tasman Feuding: Amending antidumping and Trade Practices Act legislation as part of CER harmonisation: will it work?*, (1990) 6(4) Australian and New Zealand Trade Practices Law Bulletin, 25

3.4 Greater co-ordination of competition policy

As discussed in further detail in section 4 of this submission, Telstra also considers that institutional harmonisation should extend beyond the regulators and judicial entities to include policy review activities. Telstra notes that the benefits of harmonisation would be undermined if Australia and New Zealand institutions failed to co-ordinate their respective competition policy review and development activities, leading to legislative amendments that created disharmony. The amendments to the TPA recently recommended by the Senate Economic References Committee are illustrative.

Telstra therefore proposes that it is important that there should be greater institutional co-operation and co-ordination of competition policy matters. Ideally, reviews should be undertaken on a trans-Tasman basis. Another benefit of such an approach is that it would enable greater sharing of resources and specialist expertise for policy-making between the two jurisdictions.

In this regard, Telstra welcomes the Productivity Commission's study of the potential for greater cooperation, coordination and integration in relation to competition regimes as an important positive step in this direction.

Telstra suggests that entities that could co-ordinate their reviews in this area, for example, could include:

- the Australian Department of Communications, Information Technology and the Arts;
- the New Zealand Ministry of Economic Development;
- the Australian Department of Treasury;
- the New Zealand Treasury;
- the Productivity Commission; and
- the New Zealand Law Commission.

Telstra notes, in particular, that there have already been limited attempts by Australia and New Zealand to address the risk of further law reforms creating disharmony. A limited notification mechanism has been established. Article 11 of the 2002 MOU provides as follows:

> *"Each Government will keep the other Government informed of proposed reforms in the business law area. Further, each Government will give the other the opportunity to be involved in the others reform process at an early stage."*

However, this obligation should be significantly strengthened and procedures implemented to harmonise policy development in the competition law and policy area. Telstra has elaborated further on this issue in the next section of this submission.

4 HARMONISATION OF SECTORAL REGULATION AND COMPETITION POLICY

While *generic* law and regulation has been targeted for harmonisation, only minimal attempts have so far been made by the Australian and New Zealand Governments to harmonise *sectoral*

regulation and competition *policy*. This is an important oversight which is directly relevant to this Productivity Commission review.

The terms of reference for this Productivity Commission study seek to identify options for achieving greater cooperation, coordination and integration of the general competition and consumer protection policy and law. Telstra submits that recognition of this relationship between competition *law* and competition *policy* is of great importance for the achievement of a successful trans-Tasman business environment.

Competition law and sectoral regulation are inherently inter-linked. The appropriate level of sectoral competition regulation is determined by competition policy. Competition law is the principal instrument of competition policy.

Telstra submits that the Productivity Commission should take the opportunity to recommend that initiatives are taken beyond mere harmonisation of competition *law*, to include greater trans-Tasman harmonisation of competition *policy*. Telstra further submits that the economic benefits arising from greater harmonisation of sectoral competition regulation are likely to significantly outweigh any gains from further harmonisation of generic competition law alone. Harmonisation of competition policy and sectoral regulation should be an important future strategic objective in the trans-Tasman context.

Telstra believes that the *time is now right* for Australia and New Zealand to take important steps towards greater harmonisation of sectoral regulation and competition policy as an important next step in the evolution of the trans-Tasman economic relationship.

4.1 The Australian experience illustrates the benefits of such harmonisation

The Australian experience clearly illustrates the benefits of greater harmonisation of sectoral regulation and competition policy. The Productivity Commission will be well aware of Australia's experience in this regard given the number of Productivity Commission reports produced on this subject matter over the years. In effect, regulatory harmonisation provided an important foundation for the realisation of a single domestic market in Australia. Such initiatives greatly improved Australian economic integration while reducing inter-State transaction costs and compliance costs on a sector-by-sector basis.

As the Productivity Commission will be aware, Australian economic development was greatly assisted by the creation and implementation of a National Competition Policy in Australia in 1995. This arose largely out of the detailed recommendations contained in the Hilmer Report of August 1993. Many of the comments made by the Hilmer Committee in that Report can be applied equally to the current state of the trans-Tasman economic relationship. Telstra considers that historic Australian domestic inter-State initiatives provide an important precedent and analogy for the future development of the trans-Tasman relationship.

The importance of greater regulatory harmonisation to the trans-Tasman economic relationship has already been well recognised. The benefits of regulatory harmonisation were expressly recognised when both nations entered into the *Memorandum of Understanding on Harmonisation of Business Law* in 1988, as updated in 2000 ("MOUs"). Regulatory harmonisation is expressly contemplated by both MOUs.

As a result, a high degree of trans-Tasman business law harmonisation has already been achieved in such areas as competition law, consumer protection law, taxation law, company law, and securities law. Various inter-governmental agreements have now resulted in the adoption of uniform laws and regulation in a variety of different sectors. This has already realised very

significant economic benefits to Australian and New Zealand enterprises engaged in trans-Tasman business operations, as the Productivity Commission itself comments.

The benefits of further harmonisation were further recognised in June 1992, when Australia and New Zealand entered into negotiations to extend Australian domestic mutual recognition arrangements to New Zealand.[21] The mutual recognition model in Australia was itself based on mutual recognition arrangements adopted by the European Union. These arrangements were central to the creation of a single European market within which goods would circulate freely in conditions of undistorted competition.[22]

As the Productivity Commission is aware, the *Trans-Tasman Mutual Recognition Agreement* ("TTMRA") was signed by the Australian Governments in 1996. Relevantly, this agreement now enables New Zealand to fully participate in the deliberations and decisions of the Council of Australian Governments on matters affecting the operation of the agreement.

The experience with the adoption of the TTMRA, and New Zealand's participation within the mutual recognition and COAG framework, clearly demonstrates that the Australian domestic experience can be readily transferred to the Australian-New Zealand intergovernmental relationship. TTMRA was viewed as a natural extension of CER and a catalyst towards greater harmonisation of standards and regulations between Australian and New Zealand with a view to achieving greater regulatory harmonisation.[23]

4.2 The telecommunications sector should be an early target for such harmonisation

In considering the harmonisation of competition law, Telstra submits that the Productivity Commission should be mindful of the need to also harmonise instances where Australia and New Zealand have diverged in the application of competition law to particular sectors. The telecommunications sector is 0ne of the most important examples.

The telecommunications sector in Australia has its own competition regime set out within Part XIB and XIC of the TPA. New Zealand's regime is set out in the *Telecommunications Act 2001 (NZ)* and contains significant differences in approach.

The telecommunications sector would benefit greatly from further harmonisation of competition law, competition policy and sectoral regulation. There is considerable scope for such reform. It would easily fit within current harmonisation work programmes under the 2000 MOU.

By way of example:

- The telecommunications sector is critically important to the economic development of both Australia and New Zealand, particularly given the remote geographic positioning of Australasia relative to global markets. It has been estimated that accelerated broadband penetration, for example, will increase GDP in Australia by $12-$30 billion and proportionate growth in New Zealand could similarly be expected.

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21 Q Hay, M Taylor & D Webb "Trans-Tasman Mutual Recognition: A New Dimension in Australia-New Zealand Legal Relations" [1997] 1 *International Trade Law and Regulation* 6.

22 An analysis of the background to, and benefits of, trans-Tasman mutual recognition is set out in the following article: Q Hay, M Taylor & D Webb "Trans-Tasman Mutual Recognition: A New Dimension in Australia-New Zealand Legal Relations" [1997] 1 *International Trade Law and Regulation* 6.

23 K Guerin "Regulatory Harmonisation - Issues for New Zealand" New Zealand Treasury Working Paper 01/01, New Zealand Treasury, Wellington, 2001.

- Over the last several years, there has been a substantial investment by telecommunications providers from each nation in the other nation's telecommunications sector. Most notably, this has included Telstra's current 100% investment in TelstraClear in New Zealand, and Telecom New Zealand's current 100% investment in AAPT in Australia. A range of telecommunications providers, including Vodafone, have operations in both nations. Firms with trans-Tasman operations comprise around 80% of the total industry.

4.3 A harmonised trans-Tasman regulatory regime would be beneficial

In Telstra's view, harmonisation of sectoral competition regulation will realise material benefits to both economies for the same reasons as identified above in relation to generic competition regulation.

Ideally, differences in regulatory approach should not be maintained unless there are clear net benefits to either or both countries arising from such differences. For example, New Zealand may chose tougher regulation in the short-term in certain markets if competition has developed to a lesser extent in those markets.

Historically, for example, New Zealand has tended to under-regulate its telecommunications markets relative to international practice. As the Productivity Commission may be aware, New Zealand liberalised its telecommunications sector at a much earlier stage than Australia, in the late 1980s. New Zealand was one of the first jurisdictions in the world to do so. In the absence of international precedent, New Zealand adopted a model of "light handed regulation" which is now regarded as one of the most extreme examples of that approach in the world.[24] New Zealand relied almost purely on the existence of generic competition law to regulate the telecommunications sector, and decided against the enactment of significant *ex ante* sectoral regulation.

New Zealand's historical "light handed" approach was widely criticised and is now generally regarded as having failed to deliver the desired market outcomes.[25] New Zealand eventually abandoned that approach in December 2001 with the enactment of the *Telecommunications Act 2001 (NZ).*

The new telecommunications regime in New Zealand draws heavily on the Australian model and makes a number of important steps towards greater harmonisation of sectoral regulation and competition policy consistent with Telstra's comments above. However, while New Zealand has moved towards Australia's model, New Zealand's implementation of its new legislation has still been subjected to criticism. Arguably, New Zealand is still continuing to "under-regulate" by international standards.

While Australia's regulatory approach is more mainstream in international terms, Australia has tended towards over-regulation by international standards.[26] The Productivity Commission, for example, has recommended that certain regulation in Australia should be rolled back where competition has developed.

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24 M Taylor "Looking to the Future: Towards the Exclusive Application of Competition Law?", Paper presented to the Communications and Competition Law Conference, International Bar Association, Budapest, Hungary, 19-20 May 2003.

25 "Competition Policy in Telecommunications" Background Paper, International Telecommunications Union, Document CPT/04, United Nations, Geneva, 18 November 2002, page 18, box 4.1.

26 Productivity Commission, Telecommunications Competition Regulation, Report No. 16, December 2001.

4.4 Possible recommendations

Existing work programmes towards business law harmonisation under the 2000 MOU could easily be extended to include harmonisation of competition policy and sectoral regulation. The 2000 MOU already contemplates that new harmonisation initiatives could be added to its Annex. Article 10 of the 2000 MOU, for example, provides as follows:

> *"In addition to the items specified in the work programme, when either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to the development of the trans-Tasman relationship, the two Governments will consult with a view to resolving the impediment, whether or not the area of law is already included in the programme and regardless of the priority accorded to the matter at the time."*

It is notable in this regard that legislation affecting electronic transactions, and consumer protection in electronic commerce, are both the subject of existing business law harmonisation initiatives under the Annex to the 2000 MOU. Both issues overlap with the broader issues of telecommunications sector regulation.

Telstra proposes that Australia and New Zealand could enter into an Addendum to the 2002 MOU, specifically addressing harmonisation of telecommunications regulation. Each nation could make certain commitments with the aim of achieving harmonisation to a pre-determined timetable. These commitments should be negotiated between the respective Governments based on an agreed approach to harmonisation.