SUBMISSION TO THE PRODUCTIVITY COMMISSION ON THE AUSTRALIAN AND NEW ZEALAND COMPETITION AND CONSUMER PROTECTION REGIMES

Date: 13 August 2004

EXECUTIVE SUMMARY

1 Telecom Corporation of New Zealand Limited ("Telecom New Zealand") welcomes the opportunity to make a submission to the Productivity Commission ("Commission") on harmonisation of the Australian and New Zealand competition and consumer protection regimes. As a truly trans-Tasman company with significant network assets in both jurisdictions, Telecom New Zealand believes it has a relevant and unique perspective and is certainly keen to be involved in the harmonisation debate.

2 Telecom New Zealand's submissions are in three parts:

2.1 Part 1, which introduces both Telecom New Zealand and Telecom New Zealand's view of the task which the Commission faces.

2.2 Part 2, which relates to the harmonisation of competition law regimes. For ease of reference, Part 2 is set out in a manner that broadly reflects the format and questions in the Commission's Issues Paper. Telecom New Zealand's key points relating to the competition regimes are set out below.

2.3 Part 3, which relates to harmonisation of consumer protection regimes. Telecom New Zealand's submission in respect of consumer protection legislation does not fit so easily with the format of the Commission's Issues Paper, and is set out in a manner that more logically presents Telecom New Zealand's points.

3 Telecom New Zealand's key submissions are summarised below.

Competition law regimes

4 Telecom New Zealand submits that competition legislation should be harmonised to the extent possible, but not to the detriment of one or other jurisdiction. In particular:

4.1 while the policy statements of each jurisdiction are broadly similar (both focus on protecting competition, not specific individuals), further harmonisation is desirable (paragraphs 25 – 29);

4.2 each regime would benefit from further aligning substantive competition laws (paragraphs 30 – 42). In particular:

(a) restrictive trade practices provisions should be more closely assigned to eliminate unnecessary differences between the regimes; and

(b) merger procedures should be aligned by both countries adopting both complimentary formal and informal clearance procedures.

4.3 harmonisation must not be used as a Trojan horse for industry-specific regulation. Industry-specific regulation is a response to the failure of competition. Invariably, there are market-specific reasons for why competition fails in respect of a particular industry. Those reasons differ from sector to sector and country to country, and require targeted responses based on localised market factors (paragraphs 43 - 46).

4.4 the risk of interpretative divergence in respect of harmonised rules could be reduced by enabling the courts to co-opt members from across the Tasman to sit on important competition law questions (paragraphs 47 – 52).

4.5 harmonisation should not result in a 'ratcheting-up' of enforcement processes and remedies by simply adopting the high-water mark from each jurisdiction (paragraphs 53 - 55).

5 In terms of harmonised competition policy generally, Telecom New Zealand broadly agrees with policy option 2 in the Commission's Issues Paper, as follows:

5.1 both jurisdictions should work more closely to co-ordinate institutional competition law frameworks;

5.2 domestic regulators should be retained to deal with domestic issues;

5.3 an ad hoc joint regulatory body, comprising members from each domestic regulator, could deal with truly trans-Tasman issues.

(paragraphs 58 – 65).

Consumer protection regimes

6 Consumer protection law should not be harmonised because:

6.1 the rationale for harmonisation is not applicable in the context of consumer protection in New Zealand and Australia; and

6.2 the arguments against harmonisation are compelling in the context of consumer protection in New Zealand and Australia.

(paragraphs 66 – 102).

General

7 The timetable for preparing submissions has been relatively brief, and Telecom New Zealand has not attempted to comment on all of the issues raised in the Issues Paper. While Telecom New Zealand's submission are

necessarily high-level, Telecom New Zealand would, of course, be happy to provide the Commission with any further details or answer any questions the Commission has in respect of its submission. Telecom New Zealand's contact details are included in the Submission Cover Sheet, which is attached as Appendix B to these submissions.

PART 1: INTRODUCTION

About Telecom

8 Telecom New Zealand is the parent company of the Telecom New Zealand group of companies, and owns AAPT Limited – Australia's third largest telecommunications provider. In this sense, Telecom New Zealand brings a special perspective to the Trans-Tasman harmonisation debate – it is one of the few truly "trans-Tasman companies" currently operating separate corporate entities on both sides of the Tasman under distinct regulatory and legal frameworks.

9 Telecom New Zealand is also the largest listed company trading in New Zealand , and is listed both on the ASX and NYSE. Telecom New Zealand owns and operates a public switched telephone network, a public data network and provides a full range of telecommunications products and services including a comprehensive range of internet, e-commerce, data and telecommunications solutions for residential customers and businesses, many of whom operate on both sides of the Tasman.

10 Harmonising competition laws is an important issue for Telecom. Many of Telecom New Zealand's corporate customers are "trans-Tasman", based in Australia and operating a branch office in New Zealand. These trans-Tasman customers are likely to increase as more New Zealand head-offices migrate to Sydney, Melbourne and Brisbane. An aligned set of competition rules will enable these companies to service their New Zealand branches, and undertake business in New Zealand, in a manner consistent with their Australian practices.

Harmonisation

11 The basic principle inherent in competition law – namely, freedom to compete – does not always run parallel with the self-interest of individual businesses. As a consequence, in any country, no industry is likely to have a single attitude to any significant trade practices or merger control issues. There will always be tensions within an industry – between competitors, between supplier and customer, between incumbent and new entrant and between big business and small business.

12 Consumer protection provisions bring further tensions, to the extent that they involve a conscious departure from unfettered freedom to contract, to ensure that competition is not distorted by deception or other unfair practice.

13 While the need for fair trade practices, merger control and consumer protection measures is now generally accepted, a well-balanced competition law and its effective administration are not easily achieved. To put too much focus on the interests of the consumer or small business may

jeopardise the efficiency and growth of an industry. On the other hand, to have statutory prohibitions that are seemingly unenforceable or penalties that are ineffective, simply brings competition and consumer protection law into disrepute. It is crucial in that a constituency for such law be maintained both among business and in the general community.

14 The economic and commercial landscapes of both Australia and New Zealand have changed dramatically since the first variant of antipodean competition law appeared in 1974. Early annual reports of the (then) Australian Trade Practices Commission refer to "the web of anti-competition restrictions that lay across Australian industry". In New Zealand, meanwhile, a similar web was reinforced by heavy-handed government intervention and endured for another decade.

15 Since 1986, however, both countries have seen the pursuit of efficiency in the use of each nation's respective resources as the pivotal objective of its economic policy – with an effective competition regime being regarded as a vital lever of that policy. As a consequence, there has been a fundamental commonality of approach as between the Australian and New Zealand regimes. That is unsurprising, given the significant adoption of the (then) Trade Practice Act ("TPA") provisions into the Commerce Act; the substantial cross-jurisdictional influence in Commission and judicial decisions; and increasing trans-Tasman operations by businesses of both countries.

16 Where there are differences in the law – or the processes for its enforcement – the reasons for those differences tend to go back in history. For example, the policy decision was taken in New Zealand not to adopt express prohibitions on price discrimination or forcing. Similarly, in Australia, the decision was taken early to dispense with a formal clearance mechanism for mergers. The need to ensure an on-going constituency for the law has required on-going legislative changes in both countries.

17 Increasingly, that change has seen the convergence, rather than the divergence, of our respective statutes. In more recent times, any further differences have resulted from one country proceeding more quickly with change, rather than any deliberate desire to be different. For example, New Zealand's delayed adoption of the substantial lessening of competition test for mergers; and early introduction of the cease and desist order process.

18 In essence, the question being addressed by the Commission is to what extent that convergence can now be taken further in the pursuit of greater efficiency for both countries.

19 It is hard to argue against the ultimate extension of that proposition – that ideally there be a common regime operating in and between both countries, administered by a common body and enforced through the courts in common fashion. The practical difficulty, however, is to ensure that all the varying tensions as between differing interests can continue to be reconciled in the process. By way of example, with the telephony sectors, all of the tensions of the competing interests are present in both countries – but with some players taking different roles, and some additional players and the government having differing degrees of involvement. Harmonisation of competition and consumer protection rules should only proceed to the extent such tensions can be reconciled in a way that mutually benefits both countries.

20 Certainly, caution is required when dealing with consumer protection rules designed to fetter the ability of parties to contract freely – especially when those rules have been established over a number of years to reflect specific historic issues (such as bait selling, pyramid schemes, or requirements regarding the sale of motor vehicles). In Australia, the consumer protection question is compounded by the additional complexity of state specific consumer protection rules. In addition, any attempt to alter consumer protection legislation would be likely to raise the political ire of a number of consumer lobby groups in both countries, making the harmonisation process very contentious.

21 Put simply, Telecom New Zealand does not see sufficient merit in harmonising consumer protection laws. It would simply be too easy to get the balance wrong; the review process will become highly political; and having common consumer protection rules may be unlikely to result in any obvious benefits on either side of the Tasman. Certainly, a few large firms would have a reduced compliance burden; but against that, small firms and all consumers in at least one country would face the burden of change.

22 That said, Telecom New Zealand does believe that businesses on both sides of the Tasman could benefit from harmonising aspects of their respective competition regimes. Competition rules are not subject to the same state-specific complexities as consumer protection rules in Australia, and there is already a high degree of alignment between the two regimes. Further harmonisation of competition would promote efficiencies by:

22.1 reducing compliance costs for trans-Tasman businesses; and

22.2 minimising parochial protections of local industries by subjecting businesses on both side of the Tasman to the same set of rules.

23 Harmonisation is likely to create tensions that will need to be worked through. There are, of course, historical differences between the regimes.

And those difference will, in all likelihood, pose the most problems to proponents of harmonisation. But those differences are not insurmountable, and should, in some instances, be maintained going forward.

24 However, harmonisation should not extend to industry-specific regulation. Industry-specific regulation is a response to the failure of competition. Invariably, there are market specific reasons why competition fails in respect of a particular industry. Those reasons differ from economy to economy, and require targeted responses based on localised market factors, reflected in domestic regulation.

PART 2: HARMONISING COMPETITION LAW

COMPETITION LEGISLATION

Policy Objectives

Key points

- The Acts have broadly similar policy statements and both make the fundamental economic assumption that it is the process of competition that is to be protected. However, further alignment of the policy statements is desirable

- Any policy shift in Australia from protecting *competition* towards protecting *specific competitors* will frustrate harmonisation and result in increased costs for trans-Tasman businesses

25 Currently, the policy statements underlying the Commerce Act and the TPA differ slightly. Section 2 of the TPA (which encompasses both competition and consumer protection legislation) focuses on enhancing the welfare of Australians through the promotion of competition and fair-trading and provision for consumer protection. The focus of section 1A of the Commerce Act is the promotion of competition in markets for the long-term benefit of consumers within New Zealand.

26 While there some slight differences, the policy underlying each Act is substantially similar. Importantly, each policy statement makes the fundamental economic assumption that it is the process of competition that is protected, *not competitors*.

27 The policy statements in each Act provide a touchstone for applying and interpreting specific provisions. In other words, the competition rules of each Act are analysed against the broad objective of protecting the process of competition. Telecom New Zealand's view is that further alignment of the policy statements underlying each Act will help facilitate an integrated trans-Tasman business environment. This is because it will ensure the interpretation and application of competition rules is based on the same legal and economic assumptions on both sides of the Tasman. In other words, both Acts will have the same starting point.

28 Conversely, a divergence of policy statements would have the opposite effect (even if identical substantive rules were adopted in each country). In this regard, Telecom New Zealand is particularly concerned by recent comments made by the leader of the Australian Labor Party. Mr Latham is reported to have said that "*In practice, I want the Trade Practices Act to*

become a Small Business and Consumer Protection Act…" This would require a dramatic shift away from the TPA's current policy of protecting competition, and towards the protection of specific persons – a step that would be out of alignment with most international competition law regimes.

29 In Telecom New Zealand's view, such disalignment of policy objectives would hinder trans-Tasman trade and investment and the harmonisation process, and is to be avoided. Certainly, it would be inappropriate to adopt such a shift in New Zealand, where businesses are fewer and smaller, and compete for fewer consumers.

Substantive laws and their application and interpretation

Key points

- Further alignment of the competition regimes in each jurisdiction would reduce compliance costs for businesses engaged in trans-Tasman activities
- In particular, each regime would benefit from aligning merger procedures by adopting both a formal and informal clearance procedure (along the lines of the current proposal in Australia)
- However, the application of harmonised rules must not prevent local regulators from taking account of local market factors

Discussion of differences in substantive laws

30 In many respects, the substantive laws of the New Zealand and Australian competition regimes are already closely harmonised. In particular, the key competition tests for restrictive trade practices and mergers in each Act are substantially similar, as are the underlying policy assumptions (discussed above). However, despite this current state of broad alignment there are a number of differences in the detail of each regime, which can lead to compliance inefficiencies for trans-Tasman businesses. Some of these differences are addressed (with varying degrees of success) in the Trade Practices Legislation Amendment Bill 2004 (Cth).

Restrictive Trade Practices ("RTP")

31 Despite having a similar competition test for RTP, other aspects of the RTP provisions in each Act are very different. Some of these differences have been consciously adopted for good reasons; others seem unnecessary. By way of example:

Third-line forcing

31.1 Unlike the TPA, the Commerce Act does not have specific third-line forcing provisions. In New Zealand, third-line forcing is simply dealt with under the general competition test.

Exclusionary provisions

31.2 The Commerce Act provides a "competition defence" to exclusionary provisions under section 29. The defence essentially shifts the burden of proving that the provision in question does not breach the competition test from the plaintiff to the defendant. Australia does not currently have a similar defence.

Enforcement and remedies

31.3 The Commerce Act provides the Commerce Commission with broad cease and desist powers, considered unnecessary in Australia due to the ability to seek interlocutory injunctions (see the discussion on enforcement and remedies in paragraph 53 - 55 below).

32 These sorts of differences can prove frustrating for trans-Tasman businesses, which are required to check that practices and business models comply with two separate and distinct regimes. Harmonisation provides an opportunity to eliminate some of the unnecessary differences between the regimes – to the extent it is both possible and sensible to do so in order to provide an even playing field for businesses on both sides of the Tasman. For example, Telecom New Zealand cannot see any reason to maintain a separate third-line forcing provision in the TPA.

33 It will also be important to ensure that harmonised RTP provisions are functional, and easily understood. For example, exclusionary provisions in each jurisdiction could be subsumed under the general competition test (allowing exclusionary provisions that had pro-competitive or neutral effects). Telecom New Zealand is also attracted to the relative simplicity of the New Zealand RTP regime, which is less convoluted than that of the TPA.

Mergers and acquisitions

34 Telecom New Zealand is also concerned about significant differences between the merger procedures in each country. These differences manifest in inefficiencies for businesses involved in mergers or acquisitions that have implications for markets on both sides of the Tasman.

35 Perhaps the most striking difference is the ability for Australian businesses to approach the ACCC in an informal manner to discuss a proposed merger, without the need for filing a formal clearance application or engaging in a (relatively) public process.

36 The obvious advantage of the informal procedure is the ability for businesses to "test" a proposed merger with the regulator on a confidential basis. A further advantage of the Australian approach is the ability of the regulator to accept behavioural undertakings – the Commerce Commission is restricted by statute to accepting only structural undertakings, which creates unnecessary rigidity around the structure of mergers here.

37 Telecom New Zealand would like to see the informal process adopted in New Zealand. That is not to say that the Commerce Commission's formal process does not have certain advantages. In particular, the 12-month immunity granted by a clearance in New Zealand, and the published reasons for granting or declining a clearance, provide certainty for businesses here. However, Telecom New Zealand strongly advocates the adoption of the informal process as a complementary procedure in this country.

38 The Dawson Committee has suggested that dual processes be adopted in Australia – a suggestion that has been adopted in the new Bill proposed by the Federal Government in Australia. Telecom New Zealand agrees with this approach. A dual process would essentially provide businesses with a choice: the certainty of the formal (public) procedure, or the flexibility of an informal (and confidential) procedure – particularly useful for acquisitions requiring a high degree of confidentiality. In addition, application and decision rules and timetables could easily be unified, as could enforcement mechanisms and penalties (which we address below).

Application of rules should recognise localised factors

39 While Telecom New Zealand sees merit in generalised harmonisation of domestic rules, harmonisation should not compromise the ability of each regulator to apply a particular rule in a manner consistent with localised market factors. This is particularly important in New Zealand where markets are more concentrated than those in Australia.

40 An example of the recognition of New Zealand's concentrated markets is the safe harbour threshold test applied by the Commerce Commission to acquisitions in New Zealand :

> *The Commission is of the view that an acquisition is unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:*
>
> - *the three-firm concentration ratio in the relevant market is below 70 percent and the market share of the combined entity is less than in the order of a 40 percent share; or*

- *the three-firm concentration ratio in the relevant market is above 70 percent and the market share of the combined entity is less than in the order of 20 percent.*

(Merger and Acquisition Guidelines, page 25)

41 The ACCC uses slightly wider "concentration thresholds" for Australia's more diffuse markets, despite applying a substantially similar merger test:

> *If the merger will result in a post-merger combined market share of the four (or fewer) largest firms (CR4) of 75 per cent or more and the merged firm will supply at least 15 per cent of the relevant market, the Commission will want to give further consideration to a merger proposal before being satisfied that it will not result in a substantial lessening of competition.*
>
> (Merger Guidelines, paragraph 5.95)

42 Each regulator has carefully considered the application of the substantial lessening of competition test in the context of the domestic markets to determine the most appropriate safe harbour thresholds for those markets. The ability to respond to localised market factors should not be hindered in a harmonised world, as this could result in an increase costs for domestic businesses.

Industry-specific regulation to be avoided

Key points
• Harmonisation of competition regimes should not be used as a Trojan horse for harmonising industry specific regulation

43 While there is merit in the harmonisation of generalised competition rules, it does not follow that harmonised rules should extend to industry-specific regulation. Telecom New Zealand's view is that any move in this direction is undesirable and inappropriate for the reasons set out below.

44 While industry-specific regulation is outside the Commission's terms of reference, the temptation might be to see harmonised industry-specific regulation as a mechanism to facilitate an integrated trans-Tasman business environment. The reality, however, is that industry regulation is driven by localised economic factors, and is not appropriate at an international level. Recourse should only ever be had to industry specific regulation where, and to the extent that, competition fails. The failure of competition invariably differs from economy to economy, and can only be

assessed properly in the local market. Industry specific responses to the failure of competition are necessarily specific.

45 By way of example, the extent of network regulation (such as telecommunications) differs considerably from country to country. That is because network economics are driven by population density – the level of regulation and the manner of its implementation is a direct response to the density and demographics of local populations. By and large, those markets where competition fails are infrastructural – transmission of gas or electricity, ports and airports, rail, telco networks, where it is simply not practical or pragmatic to duplicate a facility because such infrastructure is limited by geography. A drive to harmonise competition and consumer protection policies should not be utilised as a Trojan horse for harmonised industry-specific regulation of any kind.

46 It is fundamental that industry specific regulation is driven by the market to which it relates. Regulation suitable for one market is unlikely to suit another. Unless and until industries operate in the context of a single trans-Tasman market, industry-specific market regulation must occur separately, in order to avoid the introduction of unnecessary inefficiencies. Any attempt to rationalise industry-specific regulation would be extremely complex, and would be unlikely to result in any obvious benefits on either side of the Tasman.

Institutional arrangements

Key points
• The risk of interpretative divergence in respect of harmonised rules should be minimised by enabling the courts to co-opt members from across the Tasman to sit on important competition law questions

47 Perhaps the greatest lack of institutional cooperation, coordination and integration is between the Courts in each jurisdiction. In particular, divergent interpretations of similar rules by judges on each side of the Tasman has the potential to defeat the policy makers' intentions.

48 The risk of trans-Tasman judicial inconsistency to interpreting a similar rule is illustrated by the NZ Court of Appeal's approach to market power (section 36 of the Commerce Act) in *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2001) 10 TCLR 247 (recently overturned by the Privy Council, 14 July 2004, PC6/2004). In the Court of Appeal, Gault J demonstrated a reluctance to utilise the 'counter-factual' approach to the market power question – an approach established as

fundamental by a line of recent cases in Australia, and by the Privy Council in *Telecom New Zealand v Clear* [1995] 1 NZLR 385.

49 While the Privy Council decision in *Carter Holt* has realigned the interpretation of section 36 in New Zealand with Australian market power jurisprudence, the risk of future divergence remains; the new Supreme Court (comprising 2 of the 3 members of the Court of Appeal in *Carter Holt*) is not bound by the Privy Council decision and may have another opportunity to revert to its former interpretation. This sort of interpretative divergence would result in uncertainty for trans-Tasman businesses, and is to be avoided to the extent possible.

50 The Issues Paper asks whether "a single entity responsible for administering and/or enforcing competition… regimes in Australia and New Zealand" would be preferable to current arrangements (page 26). While such a body would solve the problem of interpretative divergence, it would inevitably be a "blunt instrument". The risk is that such a body would fail to understand the nuances of local markets when deciding domestic issues.

51 In Telecom New Zealand's view, the better approach is to facilitate and encourage greater cooperation and coordination between the domestic Courts in each jurisdiction. The Issues Paper notes that the Trans-Tasman Working Group on Court Proceeding and Regulatory Enforcement is working towards further procedural cooperation between the court systems of the two countries (page 23). This cooperation might extend to the "recognition of judgements in civil and regulatory matters and regulatory enforcement" (Ruddock 2004).

52 It would be a short step to enabling the trans-Tasman exchange of members to sit in respect of "hard-cases", involving significant questions of competition law. This approach would facilitate an exchange of ideas between the Courts of each country, and help minimise interpretative divergence. Extended judicial cooperation between the domestic courts in respect of the "hard-cases" will be particularly important for New Zealand jurisprudence, which has traditionally relied heavily on Australian case law. While the reverse has not been true historically, this could change if there is a concerted shift towards harmonising trans-Tasman competition rules.

Enforcement processes, sanctions and remedies

Key points

- Harmonisation should not result in a 'ratcheting-up' of enforcement processes and remedies by simply adopting the high-water mark from each jurisdiction

53 Any alignment of enforcement tools and remedies will need to be carefully considered in a harmonised world. As with other provisions, increased penalties and/or enforcement tools should not be adopted simply because they exist in one or other jurisdiction. This "high-water mark" approach would effectively "ratchet-up" enforcement mechanisms, which could result in unnecessary costs for businesses on both sides of the Tasman.

54 In particular, there are a number of recent proposals in Australia relating to enforcement and penalties that may not suit the New Zealand business environment, including:

54.1 a recent drive by the small business lobby towards the criminalisation of anti-competitive conduct by "cartels" – currently being considered by the Federal Government;

54.2 the Federal Government's proposal to introduce a prohibition on indemnifying officers, employees and agents for the cost of defending proceedings for breach (in New Zealand this prohibition is limited to price fixing); and

54.3 the ACCC's recent drive for tougher merger laws and enforcement provisions to combat energy mergers.

55 A predilection for cherry-picking enforcement tools and remedies should be avoided. The correct approach is to create a carefully considered "toolkit", which reflects the suitability of each tool and remedy for each jurisdiction. In some instances, harmonisation could be achieved by removing a particular tool or penalty from one or other Act. For example, the Commerce Commission has never utilised its cease and desist powers. It would certainly be inappropriate for Australia to adopt similar powers simply because they exist here – especially given their historic lack of use. Rather, harmonisation could be achieved by removing the cease and desist provisions from the Commerce Act.

Current forms of cooperation, coordination and integration

Key points
• There are currently a number of existing mechanisms for coordination and cooperation between the two institutions

56 An important example of existing mechanisms for cooperation and coordination is section 36A of the Commerce Act and section 46A of the TPA, which operate to extend misuse of market power to trans-Tasman markets and domestic markets across the Tasman (although there are some differences in the wording of the respective sections). Section 98H of

the Commerce Act also contains powers for the Commission to require persons resident in Australia to furnish information to relation to section 36A (recognised for the purposes of the TPA in section 155B of that Act). However, as far as Telecom New Zealand is aware, these sections have yet to be utilised.

57 The Cooperation and Coordination Agreement between the Australian Trade Practices Commission and Commerce Commission (July 1994) also contemplates significant cooperation and coordination between the regulators in the areas of information sharing, enforcement and other activities. While Telecom New Zealand is unaware of the extent to which the respective regulators interact, there already appears to be scope for a significant degree of institutional coordination under the terms of the Agreement.

POLICY OPTIONS

Key points

- Both jurisdictions should work more closely to co-ordinate institutional competition law frameworks
- Domestic competition issues should be determined by domestic regulators
- An ad hoc joint regulatory body, comprising members from each domestic regulator, could deal with truly trans-Tasman issues.

The big picture

58 In terms of further harmonising competition laws, Telecom New Zealand broadly agrees with policy option 2 identified in the Issues Paper. In Telecom New Zealand's view, the best way to achieve greater harmonisation while maximising benefits for trans-Tasman businesses is as follows:

58.1 both jurisdictions should work more closely to co-ordinate institutional competition law frameworks;

58.2 domestic regulators should be retained to deal with domestic issues;

58.3 an ad hoc joint regulatory body, comprising members from each domestic regulator, could deal with truly trans-Tasman issues.

General harmonisation

59 As discussed in paragraphs 30 - 42 above, there are currently a number of differences between the substantive laws of the two competition regimes

that hinder a unified trans-Tasman business environment. Harmonising competition laws will not be easy. While the key tests in each Act are broadly aligned, there are significant differences between the detail and procedural requirements of each Act. Further general alignment of decision-making procedures, application processes, timetables, and enforcement regimes would address a number of the costs faced by firms outlined on page 14 of the Issues Paper.

Retention of domestic regulators

60 Importantly, Telecom New Zealand firmly believes that local regulators should continue to determine competition issues that are confined to domestic markets. Domestic issues should be determined by persons with knowledge of local market factors, and familiarity with local policies that may impact on those market factors. The imposition of a single regulator, unfamiliar with local businesses and localised market factors, could result in an increase in costs for businesses on both sides of the Tasman – not to mention an undesirable loss of judicial (and legislative) sovereignty in New Zealand.

Joint body for truly trans-Tasman issues

61 A new ad hoc joint body should be limited to determining those few matters principally involving truly trans-Tasman matters. Such a body would not need to meet often and could comprise members from both domestic regulators. Truly trans-Tasman markets obviously would include trans-Tasman services – like passenger air services, airfreight and shipping. Similarly, trans-Tasman markets would include services that are "borderless", owing to modern technology.

62 Goods traded on both sides of the Tasman might be more problematic, but there are no obvious reasons why ordinary market definition principles should not apply. The composition of the body could, when required, comprise additional industry experts from both sides of the Tasman, where a particular issue required local knowledge. The joint body could also initially convene to determine whether an issue required its involvement, or whether it was properly determined by one or other domestic regulator.

63 There will be some initial costs associated with the adoption of a joint body. Considerable amendment would be required to the current competition laws of each jurisdiction. For a start, the functions, powers and procedures (such as applications and timetables for decisions) of the joint body would need to be adopted in both Acts.

64 There are also difficult questions around the operation of a joint body, which Telecom New Zealand does not attempt to address in the current submissions. In particular, the right to appeal decisions from the joint

regulator would give rise to special problems. For example, should it be restricted to a joint appellate body, whose decisions would be binding?

65 Of course, it will be important to ensure that unified rules applied by a joint body do not unfairly prejudice New Zealand businesses. For example, the procedure for authorisations in each jurisdiction are broadly similar: public benefits are weighed against detriments (despite a difference in methodology between the regimes). However, if in a joint body determined that Australian net benefits (or detriments) consistently outweighed New Zealand net detriments (or benefits), then harmonisation could result in consistently detrimental consequences to New Zealand. The cost to New Zealand of this approach would outweigh the relative gains from harmonisation: Telecom New Zealand's view is that if harmonisation of competition rules cannot be effected in a manner that benefits both parties it is to be avoided.

PART 3: CONSUMER PROTECTION LEGISLATION

Introduction

66 Telecom New Zealand does not consider that the same arguments in favour of harmonisation in relation to competition legislation apply in the consumer protection area. Telecom New Zealand submits that New Zealand and Australian consumer protection measures do not need to be harmonised because:

66.1 The rationale for harmonisation is not applicable in the context of consumer protection legislation in New Zealand and Australia (as distinct from competition legislation); and

66.2 The arguments against harmonisation are compelling in the context of consumer protection in New Zealand and Australia.

67 Telecom New Zealand's view (as expressed above) is that there is a clear distinction between business (competition) and consumer (consumer protection) law. Any approach to the concept of harmonisation should recognise this. The biggest impact of harmonising consumer protection laws would fall on consumers. Telecom New Zealand submits that the status quo enables consumers to effectively participate in consumer protection, and that harmonisation-driven change would result in policy and decision making being removed from the community. Additionally, the overriding objectives of the consumer protection legislation are already the same. In other words, the same starting point has already been established in both jurisdictions (in contrast to competition legislation).

The rationale for harmonisation is not applicable

Key point
• The general aims of harmonisation would not be promoted in the area of consumer legislation

68 Harmonisation may lead to greater market efficiency, but is not an aim in and of itself. Telecom New Zealand submits that harmonisation should be promoted where it leads to:

68.1 reduction of barriers to multiple market participation;

68.2 greater effectiveness of regulation designed to remedy market failures; and

68.3 reductions in the cost to governments of making and administering regulatory measures.

69 In the context of consumer protection legislation, Telecom New Zealand's view is that the rationale for harmonisation is not present. This is because consumer legislation is not a barrier to participation, there is no need to enhance the effectiveness of regulation in Australia and New Zealand, and efficiency gains have already been realised. Telecom New Zealand's submissions on these three matters follow.

Consumer legislation is not a barrier to participation

Key points
• The coverage of consumer protection legislation is already substantially similar in New Zealand and Australia • Existing differences are stylistic only • Information is readily available and transferable

70 Consumer legislation is not a barrier to participation because coverage is substantially similar, differences are largely stylistic, and information is readily transferable.

Coverage is substantially similar

71 Consumer protection law is very similar in New Zealand and Australia. The New Zealand Fair Trading Act 1986 ("FTA") is based on the Australian Trade Practices Act 1974 ("TPA").

72 The TPA has very wide application and extends to a number of matters not addressed in the FTA. However, these matters are largely provided for in New Zealand in other legislation, principally the Consumer Guarantees Act 1993 ("CGA") and the Unsolicited Goods and Services Act 1975 ("UGSA"), and through the common law.

73 In any event, because of the broad language adopted in sections 9 – 15 of the FTA, matters that are not specifically covered in New Zealand legislation can be dealt with under the FTA or are governed by the common law. Consequently, Telecom New Zealand's view is that there are no "gaps" to be filled.

74 For example the TPA provides for:

74.1 Implied terms and warranties in consumer transactions (Part V Division 2 TPA). The provisions are similar to the CGA.

74.2 Direct right of action for consumers against the manufacturer or importer of goods (Part V 2A TPA). In New Zealand this is provided for in the CGA.

74.3 Liability of manufacturers and resellers of defective goods (Part VA TPA). In New Zealand this is provided for in the CGA.

75 Additionally, the TPA prohibits unconscionable conduct generally and unconscionable conduct in connection with business transactions (Part IVA TPA). In New Zealand, unconscionable conduct is governed by the common law (equity), where a New Zealand-specific body of case law has developed. In New Zealand the test for unconscionable conduct centres on the deliberate exploitation of the disability of a weaker party by a stronger party. The law in relation to unconscionability sits comfortably alongside a number of New Zealand statutes which codify the law in New Zealand in relation to contractual matters. That body of case law, along with the contractual statutes, has led to commercial certainty in New Zealand. It is not necessary to make any change; the result of change would be commercial uncertainty. Because of New Zealand's unique contract-focussed legislation, Telecom New Zealand's view is that incongruity would result from codification of the law in relation to unconscionability in consumer protection legislation. In any event, the legislation in Australia has not displaced the body of pre-existing Australian case law (in particular *Commercial Bank of Australia Ltd v Amadio* (1983) 46 ALR 402); the statute is not exhaustive and both the common law and the statute should generally be pleaded in any action.

76 Attached as Appendix A to these submissions are some specific examples of:

76.1 Provisions which are enacted in the TPA but have no direct equivalent in the FTA, yet the result remains the same due to the scope of the FTA and the relevant body of case law;

76.2 Provisions which are enacted in the FTA which are contained in Australian legislation other than the TPA;

76.3 Matters which are covered by New Zealand legislation, which are not replicated in Australia, but which are minor.

Differences are stylistic

77 The differences between the Australian and New Zealand legislation are largely stylistic and formalistic. Australia has chosen to adopt very detailed legislation. In comparison New Zealand has chosen to enact shorter pieces of broader legislation dealing with particular issues.

78 These differences represent no more than a different approach to legislating. In Telecom New Zealand's view, they do not create barriers to understanding or application of the law.

Information is readily transferable

79 The difference in approach does not create a barrier to trade because information and advice about both Australian and New Zealand consumer protection measures are readily available and transferable.

80 Both Australian and New Zealand case law is well understood and readily accessible.

81 The jurisprudence and academic commentary originating in New Zealand and Australia is frequently used to assist parties and courts in both countries. This mutual assistance is advantageous, in Telecom New Zealand's submission, as it increases the quality of decision-making and depth of understanding in both New Zealand and Australia.

There is no need to enhance the effectiveness of regulation

82 Harmonisation can enhance the effectiveness of regulation, and is called for where there is an identifiable need to make uniform rights and obligations on a cross border basis. An obvious example is intellectual property, particularly copyright, patent, and trademark matters (not: not passing off, confidence or fair trading). Particularly with respect to copyright, patent, and trade mark matters there is a need for harmonisation to ensure that the investment or innovation is not undermined by "leaks" across borders and/or cost producing discontinuities in enforcement regimes.

83 Harmonisation may also be important to effectively prohibit activities which undermine the operation of markets such as fraud, deception, or cartelisation.

84 However, Telecom New Zealand submits that matters such as these do not arise in the context of consumer protection because (by and large) the consumers are "fixed" within a jurisdiction. Therefore, the point at which regulation needs to be effective is also fixed.

Efficiency gains have already been realised

85 Harmonisation can lead to economies of scale in making law because there is no need to "reinvent the wheel".

86 Efficiency gains may also arise through the shared academic and judicial considerations of the law that can then be shared between the jurisdictions.

87 However, in Telecom New Zealand's view, the present situation in New Zealand and Australia gives both countries all these benefits without having the additional costs and difficulties associated with formal integration. Consumer protection legislation in the two countries (and the body of case law in each country) is now well established (and, in relation to case law, transferable as necessary). In the area of consumer protection, harmonisation would itself involve a "reinvention of the wheel".

88 In addition, before it is appropriate (if ever) to harmonise Australian and New Zealand legislation the issue of intra-Australian harmonisation should be resolved between the Australian States.

Australian harmonisation is logical first step

Key points
• Harmonisation in Australia should be achieved before any attempt to harmonise trans-Tasman consumer protection regimes

89 Australian consumer protection measures are contained in both Federal and State legislation. State legislation is equivalent to Part V of the TPA and broadly mirrors the FTA.

90 In Australia, the Commonwealth writ does not cover all activities, the major exemption being the activities of individuals intra-State. Part V of the TPA is reproduced throughout Australia by State laws but, if an individual is proceeded against in respect of intra-State conduct, the section of the fair trading legislation under which proceedings are taken will vary depending upon the State involved.

91 Generally the TPA applies to a "corporation" rather than to "any person". This is for constitutional reasons. However, parts of the TPA are given an extended application. Pursuant to section 6(2) of the TPA, references to a corporation are generally to be read as including references to a person not being a corporation, if the activity undertaken is in the course of foreign or interstate trade or commerce; or in the course of trade or commerce within a Territory, between a State and a Territory or between two Territories; or in relation to the supply of goods or services to the Commonwealth or an authority or instrumentality of the Commonwealth. The State equivalents to Part V Division 1 have substituted "person" for "corporation".

92 It is important to note that changes to State legislation, in response to changes to Federal legislation, occur at different times. Consequently, although State legislation broadly mirrors Part V of the TPA, and the FTA, the various pieces of State legislation are not necessarily identical.

93 Before greater harmonisation between New Zealand and Australia is sought, Telecom New Zealand's view is that harmonisation within Australia should be achieved. Otherwise the benefits sought at Federal level will not necessarily be achieved intra-State.

Harmonisation is not appropriate or desirable in the consumer area

Key points
• Consumer protection legislation needs to be responsive • Consumers need to be able to effectively participate • The costs of harmonisation cannot be justified in the consumer protection area

94 Harmonisation is not appropriate in the context of consumer protection in New Zealand and Australia because:

94.1 consumer protection legislation needs to be responsive;

94.2 consumers need to be able to effectively participate in determining regulation;

94.3 the costs of harmonisation cannot be justified.

Consumer protection legislation needs to be responsive

95 Telecom New Zealand submits that harmonisation is not appropriate in the context of consumer protection because legislation needs to be responsive to differences in the social, economic, and regulatory environments.

96 Although New Zealand and Australia have a wealth of shared history and tradition, there are significant differences – especially political differences - which need to be, when appropriate, recognised and able to be dealt with. An example of this in the consumer context is the Working Party commissioned by the Ministerial Council of Consumer Affairs in recognition of the issues facing Indigenous Australians.

97 Harmonisation increases the difficulty and cost of being responsive and making amendments.

Consumers need to be able to effectively participate

98 Harmonisation reduces the ability of splintered interest groups to participate in decision making. Consumers are not a homogenous or well

organised interest group. This reduces their ability to participate at a national level.

99 In Telecom New Zealand's submission, this issue will only be aggravated if consumer protection measures are harmonised because policy and decision making will be even further removed from the community.

100 This will in turn reduce the effectiveness and accountability of any institution charged with protecting consumers.

The costs of harmonisation cannot be justified

101 Telecom New Zealand believes that current consumer protection measures work well in both New Zealand and Australia.

102 It will be a costly exercise, in terms of both time and other resources, to harmonise the two systems when many of the benefits of harmonisation (such as sharing academic and judicial reflections) have already been achieved through informal measures while maintaining a desirable degree of flexibility and cost effectiveness. Telecom New Zealand therefore believes that the significant costs will outweigh minimal benefits that may be achieved by harmonisation.

CONCLUSION

103 In summary, Telecom New Zealand believes that harmonisation of competition and consumer protection rules should proceed to the extent that efficiencies will be enhanced, and any tensions likely to result from such harmonisation can be reconciled in a way that mutually benefits both countries.

104 There are no obvious efficiency gains for consumers in harmonising consumer protection laws, and promoting the interest of consumers is the primary purpose of such legislation. It would be easy to upset the balance in either jurisdiction; the review process will become highly political. While a few large businesses would have a reduced compliance burden, many more smaller businesses and all consumers in at least one country would face the burden of change. And, going forward, consumers in both countries would lose the ability of their consumer protection legislation to be as responsive to changing market conditions.

105 With competition legislation, however, the balance is different. There are some obvious efficiency gains for all firms on both sides of the Tasman through closer assignment of the rules and processes to which they are subject. Harmonisation along the lines suggested in this submission would reduce compliance costs, and "level the playing field", for firms that operate

in both jurisdictions. Such efficiency gains would be to the long term benefit of all consumers. But, care needs to be taken to ensure that changing a particular provision will not exacerbate tensions between competing interests to the extent that respect generally for competition law is thereby diminished.

106 There are two areas of special danger in this regard – and both are superficially attractive. The first is enforcement processes, sanctions and remedies. Harmonisation must not mean a simple ratcheting-up to adopt the high-water mark from each jurisdiction. There is no surer way to engender disrespect for a law than to distort the local tariff for its breach.

107 The second is to confuse competition with regulation. The latter should only occur where, and to the extent that, the former fails in a particular market. And the indicia, and causes, of such failure will be market and economy specific.

APPENDIX A: CONSUMER PROTECTION COMPARISONS NEW ZEALAND AND AUSTRALIA

1 To follow are some specific examples of provisions which are enacted in the TPA but have no direct equivalent in the FTA, yet the result remains the same due to the scope of the FTA and the relevant body of case law:

Section 51A TPA

1.1 Section 51A TPA provides that a representation as to future matters shall be deemed misleading unless, at the time of making the representation, the party had reasonable grounds for making it. The onus of proof of reasonable grounds lies on the representor.

1.2 The Western Australian, Queensland, Northern Territory, and New South Wales equivalents to section 51A(2) are worded differently to the TPA, but have the same effect.

1.3 In New Zealand case law has established that if a party makes a statement about his or her future intentions he or she represents the existing fact that such an intention exists ie a statement that appears to be about the future may imply a statement about an existing fact (*CC v Telecom New Zealand Corp Ltd* (1990) 4 TCLR 1). Therefore, the same result will be reached.

Sections 52 and 53(eb) and Division 1AA

1.4 Division 1AA of Part V of the TPA gives specific statutory defences to proceedings taken under section 52 TPA (misleading or deceptive conduct) and section 53(eb) (misleading representations as to country of origin) in respect of country of origin claims. The defences essentially relate to "substantial transformation", which is covered in New Zealand by case law.

Section 53A(ea)

1.5 Section 53A(ea) TPA deals with false representations as to the availability of either facilities for the repair of goods or spare parts for goods. The 1986 explanatory memorandum to the Trade Practices Amendment Bill stated that the section was enacted to provide additional protection for farmers and truck owner-operators, who had complained about the difficulty of obtaining spare parts or repairs for their expensive machinery even though they were promised at the time of purchase that these facilities would be available.

1.6 This is an example of how in New Zealand the same behaviour could be dealt with under a general provision. In New Zealand it would be a breach of section 9 FTA to engage in such conduct if in the circumstances it was "misleading or deceptive" or "likely to mislead or deceive".

Section 53C

1.7 This section provides that when goods or services are advertised and part of the consideration is stated, the full cash price must also be stated. Section 53C TPA seeks to ensure that advertisers tell the "whole story" in relation to time payment advertisements (TPC v Autoways Pty Ltd (1990) 12 ATPR 51,674).

1.8 This is another example of how in New Zealand the same behaviour could be dealt with under a general provision. In New Zealand it would be a breach of section 9 FTA to engage in such conduct if in the circumstances it was "misleading or deceptive" or "likely to mislead or deceive".

Section 63A

1.9 Section 63A TPA prohibits the distribution of unsolicited debit or credit cards. In New Zealand this is provided for in the UGSA.

Sections 64 and 65

1.10 Section 64 TPA prohibits a seller from asserting a right to payment for unsolicited goods or services or for making a directory entry without a reasonable belief in the right to payment.

1.11 Section 65 TPA defines the rights and liabilities of persons in receipt of unsolicited goods.

1.12 In New Zealand this is provided for in the UGSA.

2 Some of the FTA provisions are contained in Australian legislation other than the TPA. For example:

Section 16

2.1 Section 16 FTA deals with forgery of trademarks and false applications for trademarks. In Australia, this is covered by sections 98(a) and 98(b) of the Trade Marks Act 1955 (Aust).

Section 26

2.2 Section 26 FTA deals with the importation of goods bearing false trademarks. In Australia, this is covered by sections 100 – 104 Trade Marks Act 1955 (Aust), the Commerce (Trade Description) Act 1905 (Aust), and the Commerce (Imports) Regulations 1905 (Aust).

3 Matters covered by New Zealand legislation which are not replicated in Australia are quite minor. For example:

3.1 Section 13(b) FTA covers, amongst other things, false representations that items were provided by a "person of a particular trade, qualification, or skill". The related Australian provision does not extend to this type of representation.

3.2 Section 13(d) FTA extends to false representations that goods have been "reconditioned at a particular time". The related Australian provision does not extend to this type of representation.