Study into harmonisation of Australian and New Zealand competition and consumer protection regimes

Telecom New Zealand Submission to the Productivity Commission

November 2004

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1 Introduction

1.1 Telecom Corporation of New Zealand Limited (**Telecom New Zealand**) is pleased to make a further submission to the Productivity Commission's study into harmonisation of Australian and New Zealand competition and consumer protection regimes. The purpose of this submission is two-fold:

1.1.1 to respond to the findings and recommendations contained in the Productivity Commission's Draft Research Report.

1.1.2 to supplement Telecom New Zealand's initial submission by supporting our initial views on harmonisation with robust economic principles and analysis.

1.2 Telecom New Zealand welcomes the adoption by the Productivity Commission of the policy test for assessing any harmonisation proposal advocated by Telecom New Zealand in its earlier submission, pursuant to the terms of reference for the research study. Specifically, as acknowledged by the Commission in its Draft Research Report, the terms of reference dictate the following policy test for the assessment of policy options for harmonisation:

> Examine each option to identify whether the expected benefits (including any public benefit) will outweigh the costs (including any public cost) for Australia and for New Zealand. (Overview, p.XIX; Chapter 3, p.24)

1.3 As emphasised by the Productivity Commission, satisfaction of this policy test by a policy option requires that it is expected to deliver net benefits in each of Australia and New Zealand:

> That is, the Commission in considering options to foster and enhance a trans-Tasman business environment is to assess whether each country would receive a net benefit from each option, after taking account of all public benefits and costs. (Chapter 3, p.24)

1.4 In this submission, Telecom New Zealand surveys the economic theory underlying regulatory harmonisation and applies this theory in an assessment of the economic benefits and costs associated with the options for harmonisation of the Australian and New Zealand general competition and consumer protection regimes. Telecom New Zealand recognises that the Productivity Commission is required by its terms of reference to have regard to all public benefits and costs, not simply economic benefits and costs. However, in view of the economic policy objectives of at least the general competition regimes of Australia and New Zealand, an examination of economic benefits and costs facilitates an assessment of policy options for harmonisation against the prescribed policy test.

1.5 This submission is structured as follows:

1.5.1 Section 2 contains an executive summary of the submission.

1.5.2 Section 3 defines regulatory harmonisation, and outlines the potential economic benefits and costs associated with harmonisation drawing on the economic and legal literature.

1.5.3 Section 4 sets out a number of key principles to be applied in assessing whether regulatory harmonisation is likely to yield net benefits. It forms a framework for consideration of harmonisation in practice.

1.5.4 Section 5 applies the principles to the issue of harmonisation of competition and consumer protection laws between Australia and New Zealand.

1.5.5 Section 6 addresses the findings and recommendations contained in the Productivity Commission's Draft Research Report.

1.5.6 Section 7 sets out Telecom New Zealand's proposals for harmonisation of specific aspects of Australia and New Zealand's competition laws, including an assessment of these proposals for harmonisation against the policy test prescribed by the terms of reference.

2 Executive Summary

Response to the Productivity Commission's Draft Research Report

2.1 Telecom New Zealand broadly agrees with the Commission's key findings in the Draft Research Report, that radical reform is not warranted and that modest changes are the best way forward having regard to the costs and benefits of harmonisation.

2.2 Telecom New Zealand welcomes the adoption by the Productivity Commission of the policy test for assessing any harmonisation proposal advocated by Telecom New Zealand in its earlier submission, pursuant to the terms of reference for the research study.[1] Specifically, as acknowledged by the Commission in its Draft Research Report, the terms of reference dictate the following policy test for the assessment of policy options for harmonisation:

> Examine each option to identify whether the expected benefits (including any public benefit) will outweigh the costs (including any public cost) for Australia and for New Zealand.[2]

2.3 As emphasised by the Productivity Commission, satisfaction of this policy test by a policy option requires that it is expected to deliver net benefits in each of Australia and New Zealand:

> That is, the Commission in considering options to foster and enhance a trans-Tasman business environment is to assess whether each country would receive a net benefit from each option, after taking account of all public benefits and costs.[3]

2.4 As concluded by the Commission and further supported by the application of economic theory on regulatory harmonisation in the assessment of Australia and New Zealand harmonisation against this policy test in this submission, the differences between the Australian and New Zealand general competition and consumer protection regimes are small in substance and do not generally hinder business operating in the Australasian market. Further, the costs of effecting and maintaining full or partial integration are significant, meaning that change is only warranted where the benefits can be demonstrated to be large and are supported by strong evidence. However, there are some specific cases where the benefits of harmonisation are likely to outweigh the costs, enhancing social welfare in both countries.

Telecom New Zealand's proposals for harmonisation

2.5 Telecom New Zealand asks that the Productivity Commission re-examine the costs and benefits of harmonisation for Australia and for New Zealand in the following

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[1] Productivity Commission (2004) Australia New Zealand Competition and Consumer Protection Regimes, *Draft Research Paper*, Canberra, p.XIX & p.24

[2] Productivity Commission (2004) p.24

[3] Productivity Commission (2004) p.24

specific cases, in which Telecom New Zealand submits that the policy test for harmonisation prescribed by the terms of reference is satisfied:

2.5.1 Harmonisation whereby both countries adopt a formal and informal mechanism for merger clearance is likely to produce net benefits for both countries. Under a harmonised, dual clearance regime, business will have the certainty and transparency associated with immunity under a formal clearance method, and will also have the option of being able to utilise an informal process, especially when seeking to obtain a preliminary view of potential competition concerns in each jurisdiction. The Productivity Commission acknowledged that the lack of harmony in merger clearances has the potential to increase compliance and administration costs for selected trans-Tasman transactions in its Draft Research Report. Telecom New Zealand submits that it is also likely to impede trans-Tasman transactions. The uncertainty around the height of possible impediments to a merger or acquisition associated with the absence of an informal clearance process in New Zealand is likely to deter efficient mergers that have not been opposed by the competition regulator, so resulting in potential efficiency losses for both Australia and New Zealand.

2.5.2 The differing law on merger undertakings in Australia and New Zealand may potentially hinder efficient cross-country mergers, imposing external costs on the Australian economy, as well as costs on New Zealand. In New Zealand, the New Zealand Commerce Commission (**NZCC**) may only accept a divestiture undertaking in relation to clearance or authorisation of a merger or acquisition. By contrast, in Australia, the Australian Competition and Consumer Commission (**ACCC**) has a broad discretion with respect to the form and type of undertakings it can accept in a merger matter, including other types of structural undertakings, quasi-structural undertakings such as those for third party access to essential facilities and behavioural undertakings such as those with respect to price, output, quality and / or service guarantees or obligations. While Telecom New Zealand acknowledges that behavioural undertakings impose greater regulatory costs than structural undertakings and potential dynamic efficiency losses associated with the imposition of rigid constraints on competitive behaviour, such undertakings may be desirable in a particular case, where they address anti-competitive detriments and deliver net public benefits having regard to those additional regulatory and efficiency costs. The absence of a power in the NZCC to accept anything other than divestiture undertakings may act to hinder potentially efficient trans-Tasman mergers and acquisitions, to the detriment of both jurisdictions.

2.5.3 The adoption of a uniform policy statement for the competition provisions in the New Zealand *Commerce Act 1986* (**Commerce Act**) and Part IV of the Australian *Trade Practices Act 1974 (Cth)* (**Trade Practices Act**) would provide a clear signal to business and consumers about the aims and objectives of competition policy in the region, despite the continued existence of two separate regimes. It would also facilitate convergence in the interpretation and resultant operation of the two regimes, due to the role of objects provisions in statutory interpretation, and provide a safeguard to ensure that these provisions do not become a mechanism for the

achievement of social outcomes unrelated to the promotion of competition and economic efficiency.

2.6 In addition, Telecom New Zealand submits that the introduction of a joint regulatory body may be an effective vehicle in dealing with trans-Tasman issues as an alternative to more costly forms of harmonisation. However, this arrangement may involve high implementation costs which potentially outweigh the benefits at this stage.

2.7 We acknowledge that this option requires more detailed and comprehensive consideration in terms of the specific issues associated with implementation and the likely costs involved. In the short term, we agree with the Productivity Commission's conclusion in its Draft Research Report that other, less costly, measures should be pursued, including further alignment of the regulatory procedures and processes governing trans-Tasman transactions in order to reduce compliance costs for business.

Regulatory Harmonisation - Economic Theory

2.8 Telecom New Zealand surveyed the economic theory underlying regulatory harmonisation, with a view to applying this theory in an assessment of options for harmonisation of the Australian and New Zealand general competition and consumer protection regimes, including in its response to the Productivity Commission's Draft Research Paper and in assessing its proposals for harmonisation of specific aspects of the Australian and New Zealand competition regimes.

2.9 In brief, a review of the economic literature discloses that regulatory harmonisation encompasses a broad range of arrangements through which the laws of two or more countries or jurisdictions work together in some way rather than independently. In its most limited form it may involve some coordination and cooperation between regulators (e.g. information sharing), or, in the extreme case, the adoption of common laws and regulatory institutions. Other intermediate forms include, mutual recognition where compliance with laws in one jurisdiction is deemed to be compliance in another jurisdiction, or the adoption of common minimum standards upon which independent laws are based.

2.10 While regulatory harmonisation might appear prima facie to be a desirable policy objective, the economic literature does not support a general presumption in favour of harmonisation. That is, harmonisation in itself is not likely to lead to net economic benefits.

2.11 There are significant economic costs and benefits associated with regulatory harmonisation. The relative magnitude of these costs and benefits varies in each case depending on a range of factors including:

2.11.1 the laws that are the subject of harmonisation;

2.11.2 the form or degree of harmonisation pursued; and

2.11.3 the current economic, legal, political and institutional differences between the countries concerned.

2.12 While regulatory harmonisation may have significant benefits, in some instances it may impose large costs. Harmonisation should only be pursued where the benefits outweigh the costs.

2.13 The economic literature identifies potential economic benefits associated with regulatory harmonisation such as the following:

2.13.1 a reduction in transaction / compliance costs for market participants operating across multiple jurisdictions, which may encourage participation in foreign markets (that are subject to harmonisation), either through increased trade in goods or services, or by direct investment, promoting competition and enhancing economic welfare;

2.13.2 elimination of inter-jurisdiction externalities; and

2.13.3 economies of scale in regulation.

2.14 The literature also identifies potential economic costs of harmonisation such as the following:

2.14.1 the adoption of harmonised, but inefficient laws where the optimal form of regulation is closely linked an economy's unique economic, legal, political and institutional structure;

2.14.2 a loss of regulatory competition and the benefits of cross-learning between independent regimes;

2.14.3 real resource costs of effecting and maintaining harmonised law and policy;

2.14.4 transition costs for market participants; and

2.14.5 loss of domestic policy flexibility and dilution of domestic participation.

Application to Australian and New Zealand competition and consumer protection regimes

2.15 Telecom New Zealand applies the economic theory, summarised above, in an assessment of the economic benefits and costs associated with the full or partial integration options for harmonisation of the Australian and New Zealand general competition and consumer protection regimes defined in the Productivity Commission's Draft Research Paper. Telecom New Zealand recognises that the Productivity Commission is required by its terms of reference to have regard to all public benefits and costs, not simply economic benefits and costs. However, in view of the economic policy objectives of at least the general competition regimes of Australia and New Zealand, an examination of economic benefits and costs facilitates an assessment of policy options for harmonisation against the prescribed policy test.

2.16 On the basis of this assessment, Telecom New Zealand submits that the economic benefits attached to the full or partial integration options for harmonisation of general competition and consumer protection laws in the case of New Zealand and Australia identified in the Productivity Commission's Draft Research Paper are likely to be small in practice given that:

2.16.1 existing differences between competition and consumer protection laws are small in substance;

2.16.2 small differences in competition and consumer protection laws are unlikely to be a key determinant of foreign market participation, whether in terms of investment or trade;

2.16.3 in relation to competition law, harmonisation will necessarily be restricted to a limited number of elements due to its qualitative nature and multiple complex dimensions with the result that it will not be possible to completely remove the compliance and transactions costs of operating under two separate regimes (in the absence of joint institutions); and

2.16.4 there is no evidence that differences in competition laws have reduced cross-country investment, or that small divergences in consumer protection laws have hindered trade.

2.17 In respect of the likely economic costs of full or partial integration, Telecom New Zealand submits that:

2.17.1 at least some differences in the application of competition law continues to be justified on the basis of key economic differences between New Zealand and Australia, with the result that full or partial integration would likely involve sub-optimal laws, particularly given the differences in industry concentration and scale in Australia and New Zealand; and

2.17.2 the real resource costs of effecting and maintaining harmonisation are not trivial, and are likely to outweigh the economic benefits in most cases.

2.18 As a result, Telecom New Zealand submits that full or partial integration of Australian and New Zealand competition law regimes is likely to impose net costs on both countries and a reduction in social welfare.

Application to industry-specific regulation

2.19 Although outside the scope of the terms of reference for the Productivity Commission's study, Telecom New Zealand is concerned about the potential for the Government to adopt a harmonisation agenda that extends beyond the limits of the Productivity Commission's study to the harmonisation of industry-specific economic regulation in the absence of any additional detailed consultation process. Accordingly, Telecom New Zealand is of the view that it is beneficial to demonstrate that the harmonisation of industry-specific regulation would be inappropriate, based on an application of the economic literature canvassed above, in the current forum.

2.20 While the nature of market failure and the economic justification for economic regulation might be common between regulated industries in different countries, this commonality provides no justification for harmonisation of industry-specific regulation. The degree of market failure and the distribution and size of the resulting deadweight loss, and so the appropriate regulatory response, depend on the specific demand and supply conditions prevailing in the market.

2.21 There is considerable economic diversity in relation to telecommunications markets across countries as reflected in factors such as the pace of technological change, the emergence of new markets, and the nature of existing regulatory arrangements. Policy independence and responsiveness is required to produce outcomes that minimise the risk of regulatory failure.

3 The Costs and Benefits of Regulatory Harmonisation

What do we mean by regulatory harmonisation?

3.1 Leebron (1996) defines harmonisation as '…making regulatory requirements or government policies of different jurisdictions identical, or at least similar'[4]. Similarly, Lloyd (1997) describes it as 'convergence of requirements or policies'.[5] In practice, regulatory harmonisation encompasses a broad range of arrangements through which the laws of two or more countries or jurisdictions work together in some way, rather than independently. Regulatory harmonisation can be viewed on a spectrum (Quigley (2003)).[6] Table 1 outlines the major forms of harmonisation ranging from the most limited form of 'cooperation' to market integration.

Table 1: Forms of regulatory harmonisation

Form of harmonisation	Description	Degree
Cooperation	Some form of cooperation between policy makers but without any convergence in law making, for example, information sharing	Most limited form of harmonisation, no changes required to substantive laws
Reciprocity (or mutual recognition)	Where compliance with laws in one jurisdiction is deemed to be compliance with different laws in another jurisdiction.	Limited form of harmonisation, usually only adopted where the laws subject to mutual recognition are similar or comply to a minimum standard. No changes required to substantive laws.
Minimum standards	Formulation of laws based on some common minimum standards or regulatory principles.	Involves changes to substantive laws but allows for differences between countries.
Commonality	The adoption of identical laws between jurisdictions	Same substantive and procedural laws and policies but maintaining different institutions.

[4] Leebron, D.W. (1996) "Lying Down with Procustes: An Analysis of Harmonisation Claims" in J.N. Bhagwati and R.E. Hudev (eds.) *Fair Trade and Harmonisation: Prerequisites for Free Trade?*, MIT Press, Cambridge, Mass.

[5] Lloyd, P.J. (1997) "Competition Policy in APEC: Principles of Harmonisation", Department of Economics Research Paper No. 558, The University of Melbourne, March.

[6] Quigley, Neil (2003) "The Economics of Harmonisation: Implications for Reform of Commercial Law and Regulation in New Zealand" *New Zealand Institute for the Study of Competition and Regulation,* page 3.

Integrated markets	Integration of two economies so that they function as a single economic entity	Most extreme form of harmonisation - involves the integration of institutions (e.g. regulatory bodies) as well as adoption of same laws.

The degree of harmonisation pursued must be clearly defined.

No presumption in favour of harmonisation

3.2 While regulatory harmonisation might appear prima facie to be a desirable policy objective for both Australia and New Zealand, the economic literature does not support a presumption in favour of harmonisation.

3.3 Regulatory harmonisation may have many benefits, for example, in terms of reducing the compliance costs of businesses operating across multiple jurisdictions, but it may also impose significant economic costs on an economy, particularly where the optimal form of regulation is dependent upon the particular economic and institutional structure of the economy. Further, the costs and benefits are unlikely to be symmetrical across jurisdictions. In other words, there are significant risks in pursuing regulatory harmonisation that must be carefully weighed against the potential benefits.

3.4 In this section, we survey the economic literature on regulatory harmonisation to provide an economic framework for identifying the likely benefits and costs of harmonising competition and consumer protection laws between Australia and New Zealand and assessing harmonisation against the policy test advocated in our earlier submission and adopted by the Productivity Commission in its Draft Research Report.

There is no general presumption that regulatory harmonisation will lead to net economic benefits.

Potential benefits of regulatory harmonisation

3.5 The economic literature identifies the following potential benefits of regulatory harmonisation:

3.5.1 reductions in transaction / compliance costs;

3.5.2 the elimination of negative externalities on other jurisdictions; and

3.5.3 the achievement of economies of scale in regulation.

3.6 Regulatory harmonisation reduces compliance and transaction costs for firms (and other market participants) operating across multiple jurisdictions. Post-harmonisation,

these firms no longer have to invest resources and incur transactions costs in understanding and complying with different sets of regulatory regimes.

3.7 While the reduction in compliance and transaction costs may be significant for the firms concerned, this is considered to be an intermediate benefit. The reduction of these costs potentially have flow-on effects in terms of trade, investment and the cost of capital that are of greater significance than the initial reduction in compliance and transaction costs associated with harmonisation.

3.8 A reduction in compliance and transaction costs may encourage firms to participate in foreign markets (that are the subject of harmonisation), either through increased trade in goods and services, or by direct investment, promoting competition and enhancing economic welfare in both countries. In relation to firm financing, investors may be more willing to invest in markets with familiar regulatory regimes as a result of reduced compliance and transaction costs, with the result that harmonisation of commercial regulation may reduce the cost of capital (Quigley (2003)).

3.9 Therefore, harmonisation, through a reduction in compliance and transaction costs, has the potential to open and integrate economies, enhancing trade and investment and economic welfare.

3.10 Regulatory harmonisation across multiple jurisdictions may also potentially eliminate negative externalities associated with an individual jurisdiction's regulation on another jurisdiction or jurisdictions.

3.11 An externality occurs where an activity conducted by one person imposes external costs (or benefits) on another party that are not internalized or taken into account by the person causing the external effect. In the case of a negative externality, there will be over-production relative to the social optimal. Where regulation is determined independently across countries, there is the potential for laws to impose negative (or positive) external effects on other countries. Intellectual property laws are a classic example. The protection of intellectual property rights in a foreign jurisdiction has positive external impacts in other jurisdictions through encouraging research and development and investment in innovation. Conversely, jurisdictions with weak intellectual property protection impose negative external effects on other jurisdictions.

3.12 Assuming that there are economies of scale and/or scope in the production of regulation - that is, it is more efficient for a single or coordinated regulator to produce regulatory policy across multiple jurisdictions - harmonisation may result in economies of scale in regulation. Viewing regulatory policy as a product or unit of output, it may be more efficient for one regulatory body to produce the entire output over the relevant range of demand than two separate regulators (Quigley (2003)). Even in the absence of economies of scale, reduction in regulatory duplication is likely to result in a reduction in the real resource costs of policy making.

Potential costs of regulatory harmonisation

3.13 By contrast, the following potential costs of regulatory harmonisation are identified by the economic literature:

3.13.1 inefficiencies associated with harmonised laws that are inappropriate for the unique conditions of a particular jurisdiction's economy;

3.13.2 the loss of regulatory competition;

3.13.3 the incurring of transition costs by market participants;

3.13.4 loss of domestic policy flexibility; and

3.13.5 dilution of domestic policy participation.

3.14 Potentially the most significant cost of regulatory harmonisation results from the adoption of laws that are inappropriate for the unique conditions in the economy. Each economy does differ in terms of its initial endowments, trade, and preferences as reflected in its unique mix of economic, political, legal and institutional structures (see Goddard (1999), Guillen (1999), Quigley (2003)).[7] Under these circumstances, harmonisation may lead to harmonised, but inefficient laws. Put another way, there may be good reasons why the substantive laws and / or their application differs between countries, even where those countries appear to have many economic, legal and institutional characteristics in common, as is the case between Australia and New Zealand.

3.15 The production of commercial law can be viewed as taking place in a competitive market, where countries compete against each other in developing the most efficient laws. Regulatory competition is argued to produce static and dynamic efficiency benefits in the same way as competition in conventional product markets. Esty and Geradin (2000) describe regulatory competition as follows:[8]

> Competitive pressures…force governments to produce their regulatory products at competitive 'prices' (so that the benefits of government intervention exceed the costs) on pain of losing their customers, in this case citizens or businesses. The normative strength of the theory lies in the hope that competition will stimulate experimentation, innovation, and product differentiation in regulation, as in markets for products. The process of refining the product (regulatory requirements and approaches) to meet consumer (societal) desires thus leads to the adoption of more efficient laws and enhances social welfare…
>
> …For regulatory competition theorists, centralized systems of standard setting [harmonisation] should be seen as regulatory cartels which, like any form of collusion between competitors, inhibit the operation of the market, raise prices, and reduce economic efficiency.

3.16 According to this regulatory competition hypothesis, efforts to harmonise commercial laws are likely to lead to inefficient outcomes, as is the case with other types of unregulated monopoly.

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[7] Goddard, David (1999) "Making Business Law: The CER Dimension", *Discussion Paper submitted to Ministry of Economic Development (New Zealand)*. Guillen, M. (1999) "Corporate Governance and Globalization: Arguments and Evidence Against Convergence", *Working Paper 99-11*, The Wharton School, University of Pennsylvania.

[8] Esty, Daniel C. and Damien Geradin (2000) "Regulatory Co-opetition", *Journal of International Economic Law*, 235-255, at 239.

3.17 There are however, a number of important qualifications to this theory. First, the most efficient laws may be heavily dependent upon a countries unique economic, legal and institutional characteristics, meaning that the market for regulatory competition does not extend across national borders (or in some cases, state borders). Secondly, there may be obstacles to the perfect mobility of capital and labour between countries, reducing competitive discipline (Esty and Geradin (2000)). Finally, some countries may possess market power based on other factors, such as size, which reduces regulatory competition. For example, Australia has larger and more liquid securities markets compared to New Zealand (Quigley (2003)).

3.18 Transition costs are another potential cost of harmonisation. Where harmonisation leads to a change in the substance or application of laws market participants incur real resource costs in changing internal processes and documentation to comply with new law.

3.19 Regulatory harmonisation is not a one-shot game. Where laws are harmonised, there is a need to maintain harmonisation, particularly where harmonisation takes the form of the adoption of identical laws or standards. Where changes to domestic laws are considered warranted, coordination and agreement with the other jurisdiction would be required to ensure ongoing harmonisation following the amendment. This necessarily implies a loss of domestic policy flexibility associated with unilateral policy making and a loss of ability to respond quickly to changing market circumstances. This cost is likely to be more significant in cases where the law that is the subject of harmonisation is one that is more specific or prescriptive or needs to be responsive to changes in market conditions.

3.20 In addition to the potential loss of policy flexibility associated with unilateral policy making, harmonisation necessarily dilutes domestic policy participation. The degree of cost involved will depend on the subject of the laws in question.

3.21 In summary, there are significant economic costs and benefits associated with regulatory harmonisation that must be taken into account. The relative magnitude of these costs and benefits will vary in each case depending on a range of factors, including:

3.21.1 the laws that are the subject of harmonisation;

3.21.2 the form or degree of harmonisation pursued; and

3.21.3 the current economic, legal, political and institutional differences between the economies concerned.

3.22 While regulatory harmonisation may have significant benefits in some instances, it may also impose large costs. Thus, harmonisation should not be pursued as an end in itself.

4 Key Principles in Assessing Regulatory Harmonisation

Introduction

4.1 In this section, we outline a number of key principles that should guide any assessment of the relative merits of regulatory harmonisation. We use the framework set out below as a basis for our qualitative assessment of harmonisation in later sections.

4.2 Many of the key principles set out below will be familiar to the Productivity Commission, having been adopted in its Draft Research Paper in its assessment of the options for greater harmonisation between Australian and New Zealand general competition and consumer protection laws. However, not all these principles have been comprehensively adopted by the Commission and, accordingly, it is worth revisiting all relevant key principles here.

Key principles

4.3 Telecom New Zealand submits that the key principles for assessing the merits of regulatory harmonisation are as follows:

4.3.1 *A cost-benefit test should be adopted as the policy test for assessing harmonisation* - A comprehensive cost-benefit analysis should be used in assessing whether regulatory harmonisation is justified. Harmonisation should only be pursued where the net benefits are shown to be positive, taking into account all costs associated with harmonisation. As previously stated, Telecom New Zealand supports the Productivity Commission's adoption of a policy test requiring a net benefit from harmonisation for each of Australia and New Zealand in its Draft Research Paper.

4.3.2 *No general presumption in favour of regulatory harmonisation* - As previously outlined, there is no general presumption in the economics or legal literature that regulatory harmonisation is likely to result in net benefits. Regulatory harmonisation is not in itself welfare-enhancing and is not costless. As such, any analysis should start with the presumption that there are good reasons for differences in the laws between countries.

4.3.3 *Different forms of regulatory harmonisation should be subjected to the economic test* - As evident from the Productivity Commission's conclusions in its Draft Research Paper, while one form of harmonisation might be found to impose net costs, other forms may result in net benefits. The full spectrum of options ranging from reciprocity to commonality should be considered.

4.3.4 *Which harmonised standard?* - It should not be assumed that the optimal laws for harmonisation are necessarily those that currently exist in either of the countries under consideration.

4.3.5 *To what extent is harmonisation practically achievable?* Lloyd (1997) distinguishes between quantitative and qualitative harmonisation in relation to the subject matter of harmonisation.[9] Quantitative harmonisation refers to laws which are expressed or measured in a quantitative sense, for example, a level of excise or tariff. In such instances, harmonisation simply involves agreement on a common absolute level that is unambiguous and certain. In contrast, qualitative harmonisation refers to laws whose substance cannot be readily expressed in numerical terms and may involve a number of different qualitative dimensions in terms of underlying policy, scope, standard, and method of analysis. For example, merger prohibitions involve a qualitative standard in terms of a 'substantial lessening of competition' test, and involve both quantitative and qualitative methods of analysis (e.g., market concentration thresholds, 'ssnip' test etc.). Harmonisation of all dimensions may not be practically achievable or desirable.

4.3.6 *Unique legal, economic and institutional features of each jurisdiction should be considered* - In examining the potential costs and benefits of regulatory harmonisation, the unique legal, economic and institutional features of each economy should be taken into account. The overarching consideration is whether the law or policy is appropriate given these conditions. It is important to consider the actual underlying objective of the law or policy in question, for example, in the case of competition laws, do the laws act to promote the competitive process and enhance economic efficiency? Harmonisation should not be pursued at the expense of adopting laws which actually damage the competitive process or undermine economic efficiency.

4.3.7 *Costs and benefits that are not easily quantifiable should not be disregarded* - It may be difficult to quantify many of the costs and benefits associated with regulatory harmonisation. For example, the reduction in transactions/compliance costs from harmonisation, or dilution of policy participation. As a result, practical examples and case studies detailing the experiences of market participants should be drawn upon where possible.

4.3.8 *The distribution of the costs and benefits across different groups in society and between jurisdictions should be considered in assessing harmonisation* - The distribution of the relative costs and benefits from harmonisation should be taken into account. Harmonisation may reduce the costs for businesses operating across multiple jurisdictions, but may at the same time impose costs on businesses that operate only in a single jurisdiction. Further, the costs and benefits may not be symmetrical between countries.

4.3.9 *Both short and long run costs and benefits should be considered in assessing harmonisation* - The magnitude of the costs and benefits of regulatory harmonisation may vary between the short and long run

[9] Lloyd (1997), pages 9 - 12.

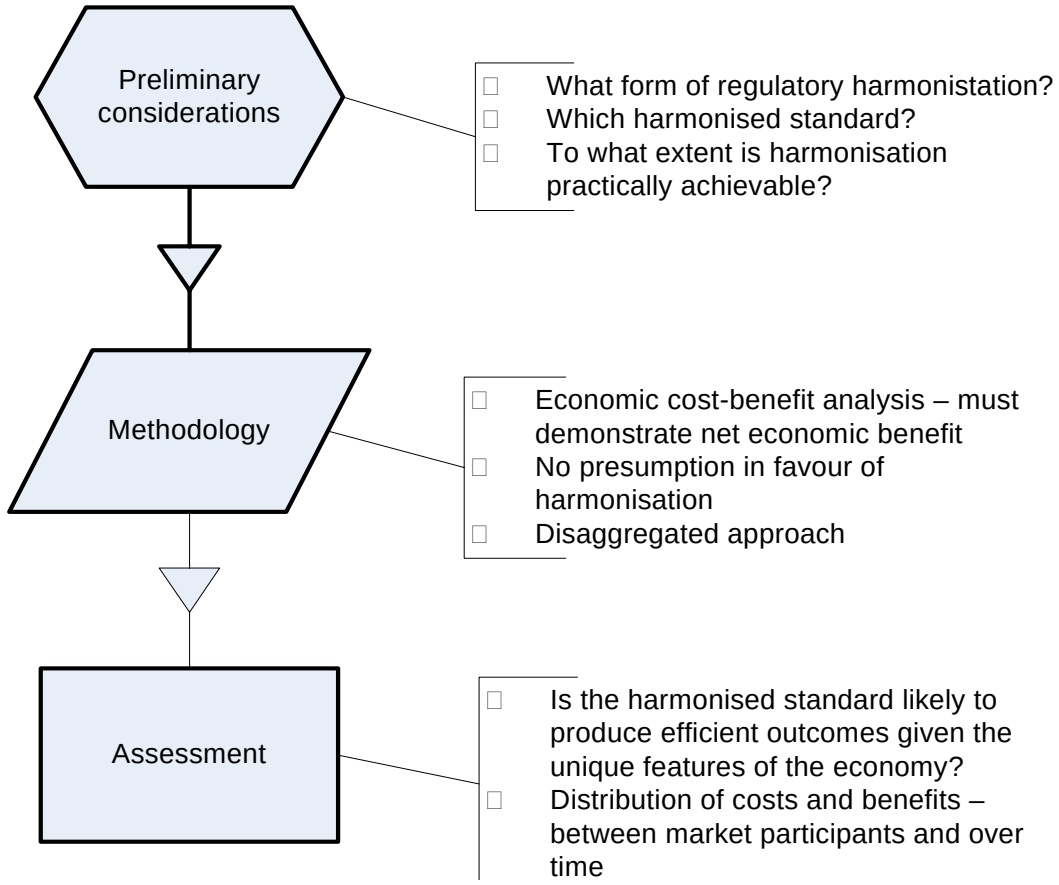
(Niemeyer (2001)).[10] For example, while harmonisation may reduce compliance costs for businesses operating in multiple jurisdictions in the short-run, potential losses associated with the adoption of inefficient laws may reduce commercial activity over the long term, resulting in a net reduction in economic welfare.

4.3.10 *A disaggregated approach to laws should be adopted in assessing harmonisation* - Harmonisation should be assessed at a disaggregated level; rather than asking whether it is desirable to harmonise competition laws on a collective basis, each specific area of competition laws should be independently assessed.

Summary

4.4 Figure 1 provides a summary of the key issues to consider when assessing a case for regulatory harmonisation.

Figure 1: Key issues in assessing regulatory harmonisation



[10] Niemeyer, J. (2001) "An Economic Analysis of Securities Market Regulation and Supervision: Where to Go after the Lamfalussy Report", *SSE/EFI Working Paper Series in Economics and Finance*, No.482, December 14.

5 Cost-Benefit Analysis

Introduction

5.1 In this section we apply the economic theory and principles to the issue of harmonisation of general competition and consumer protection laws between Australia and New Zealand. Specifically, we identify the potential economic costs and benefits of full or partial integration, as defined by the Productivity Commission in its Draft Research Report, with a view to evaluating the expected net benefit or cost. While the nature of the analysis is purely qualitative, it is still instructive in terms of the likely net costs or benefits in each case.

5.2 Telecom New Zealand also recognises that the Productivity Commission is required by its terms of reference to have regard to all public benefits and costs, not simply economic benefits and costs. However, in view of the economic policy objectives of at least the general competition regimes of Australia and New Zealand, an examination of economic benefits and costs facilitates an assessment of policy options for harmonisation against the prescribed policy test.

5.3 We also examine the case of full or partial integration of industry-specific economic regulation. Although outside the scope of the terms of reference for the Productivity Commission's study, Telecom New Zealand is concerned about the potential for the Government to adopt a harmonisation agenda that extends beyond the limits of the Productivity Commission's study to harmonisation of industry-specific economic regulation, without undertaking any additional detailed consultation process. Accordingly, Telecom New Zealand is of the view that it is beneficial to demonstrate that the harmonisation of industry-specific regulation would be inappropriate, based on an application of the economic literature canvassed above, in the current forum.

Competition laws

5.4 Full or partial integration of the competition laws of Australia and New Zealand would be likely to provide some private benefit to businesses operating in both Australia and New Zealand or contemplating business activity in both economies. The costs of complying with two different sets of competition laws would be removed, with market participants needing only to understand and comply with a single common regime.

5.5 In addition to private compliance cost reduction, further benefits may flow in terms of overall commercial activity in the region. Where the costs of doing business are reduced, the overall level of commercial activity is likely to increase.

5.6 While these arguments are persuasive in theory, the key question is the magnitude of these benefits likely in the case of New Zealand and Australia. It is possible that these flow-on benefits will be small in practice given that:

5.6.1 existing differences in competition laws, both in terms of policy objectives and substance, are small, given the degree of convergence that has already taken place between the two regimes;

5.6.2 harmonisation will necessarily be restricted, due to the qualitative nature of competition laws and its multiple complex dimensions (Lloyd (1997)), such

that it is not possible to completely remove the compliance and transactions costs of operating under two separate regimes; and

5.6.3 small differences in competition laws are unlikely to be determinative in terms of a firm's decision to invest, trade or otherwise participate in another jurisdiction. Factors such as relative returns and market efficiency are more likely to be key determinants of foreign participation (Quigley (2003)).[11]

5.7 These points are now addressed in more detail.

5.8 First, small differences in competition laws imply that the potential compliance cost savings for business are likely to be small in practice, and that the associated flow-on effects to trade and investment are also likely to be small. The benefits of harmonisation would be expected to be more significant where existing competition regimes remain quite divergent. For example, where one country has an inefficient competition regime that, for example, is designed to protect local firms from international competition and leads to barriers to entry into the economy. In such a case, some form of harmonisation with a more efficient regime would produce benefits for both countries. This is clearly not the case as between Australia or New Zealand, where both have mature competition regimes designed to generate efficient economic outcomes for internal commerce, trade and investment.

5.9 Second, it may not be possible to harmonise all aspects of competition laws such that the compliance and transactions costs of complying under two separate regimes are eliminated. Lloyd (1997) argues that, at best, some form of weak harmonisation, restricted to a limited number of harmonised elements, can be achieved.[12] For example, both Australia and New Zealand now have the same substantive mergers test, following New Zealand's change from a 'dominance' to a 'substantial lessening of competition' test in 2001. However, the substantive test is only one dimension of the merger provisions, with other key dimensions including in particular:

5.9.1 the underlying policy objective of the Act, used by courts and tribunals as the basis for interpreting the provisions of the Act articulating the substantive test; and

5.9.2 critically, in the case of competition laws, the multi-dimensional approach to analysing competition (e.g., market definition, market concentration thresholds, the height of barriers to entry, import competition, countervailing power, the ability of the merged entity to impose a small but significant and sustainable increase in prices or profit margins, the availability of substitutes, the dynamic characteristics of the market, the removal of a vigorous and effective competitor, the nature and extent of vertical integration etc.).

5.10 While it is relatively simple to harmonise the substantive law in terms of a 'dominance' or 'substantial lessening of competition' test, it is practically very difficult to harmonise

[11] Quigley (2003), page 15.

[12] Lloyd (1997), page 11.

the approach to assessing competition effects as it contains many complex elements. Without harmonisation of each of these elements, market participants still need to incur the costs associated with compliance under two separate regimes (except where the policy option for integration involves a single set of institutions for the two countries, see option 1a for full integration and 2a for partial integration in the Productivity Commission's Draft Research Paper[13]).

5.11 Thirdly, a firm's decision to participate in a foreign jurisdiction is more likely to be determined by factors such as relative returns and market efficiency, rather than small differences in competition laws (Quigley (2003)).[14] For example, a firm considering whether to operate across the Tasman will be more concerned with market size, potential returns, and factors such as the level of business taxation.

5.12 Finally, there is no evidence that the integration of the Australian and New Zealand economies has been hindered or lessened by the existence of two separate competition regimes. In fact, recent statistics indicate that the two economies have become increasingly more integrated in terms of investment and merger/acquisition activity.[15]

5.13 Given that the differences between the competition regimes are small, and that both focus on the promotion of competition in the interests of economic efficiency, there are no significant areas of negative external effect that could potentially be eliminated by harmonisation.

5.14 There may be some resource cost savings in terms of joint policy making should harmonisation be pursued, for example, with fixed policy making costs being spread over a combined population so achieving economies of scale. However, this factor is unlikely to be determinative.

5.15 Competition laws regulate the structure and configuration of business arrangements, and therefore play a major role in determining the structure, conduct and performance of markets, directly influencing the level of long run economic growth. Given this, if the harmonisation of competition laws was to result in harmonised, but inefficient laws, the costs would be expected to be significant.

5.16 There are many economic, political and institutional similarities between the Australia and New Zealand economies. These similarities and historical ties account for the significant unilateral convergence that has already occurred in relation to competition policy.

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[13] Productivity Commission (2004), Table 1, p.XX.

[14] Quigley (2003), page 15.

[15] For example, a recent article reported that "total direct investment from Australia to New Zealand was $NZ29.5 billion at March 31 2004, an increase of more than $8.6 billion or 40% over the same time the previous year." In relation to trans-Tasman merger activity, "Of the 13 applications seeking clearance under the merger provisions of the Commerce Act filed this year, five were from Australian-owned companies." See Thomson, M. and Williamson, M (2004) "The Lucky Country Spends Up Large in New Zealand" *The National Business Review*, 17 September 2004, 27-02.

5.17 However, there continue to be areas where the substance and / or the application of competition laws should remain independent given the economic differences that persist between the two economies. A recent study by Arnold, Boles de Boer and Evans (2003) shows that there are important economic distinctions between Australia and New Zealand, with New Zealand having relatively higher industry concentration and higher average costs, due to its relatively low output scale.[16] That these economic differences between Australia and New Zealand justify differing competition laws or their application as between jurisdictions can best be illustrated by reference to the differing standards used in each jurisdiction for assessing a merger against the common merger test.

5.18 Although both countries have adopted a common 'substantial lessening of competition' merger test, the application of the test differs in relation to the market concentration thresholds (or 'safe harbours') used. New Zealand has adopted a higher threshold than Australia in relation to coordinated conduct in recognition of its smaller market size and more concentrated markets.[17] Theoretically, if New Zealand were to adopt the Australian thresholds, fewer mergers would proceed leading to potential losses in efficiency in the long-run.

5.19 Another example of differences between Australian and New Zealand competition laws justifiable by reference to economic differences between those jurisdictions and the maximisation of efficiency is provided by the recent proposed amendments to the Trade Practices Act in Australia to allow 'small' businesses to obtain approval for collective bargaining with a 'large' business through a notification process, as an alternative to the currently available authorisation process. The availability of the notification process would be limited to transactions up to a value of A$3 million over a 12 month period. The proposal is intended to avoid the time and expense of

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[16] Arnold, T. Boles de Boer, D. and Evans L. (2003) "The Structure of New Zealand Industry: Its Implications for Competition Law" in Berry M, Evans L, (eds.), Competition Law at the Turn of the Century, Wellington, Victoria University Press, 2003, 24. See also Evans, Lew and Patrick Hughes (2003) "Competition Policy in Small Distant Open Economies: Some Lessons from the Economic Literature" *New Zealand Treasury Working Paper 03/31*, December 2003.

[17] New Zealand uses a 3-firm concentration ratio, with safe harbours (which indicate mergers and acquisitions which are unlikely to be of concern to the Commission) applying where:

- the 3 largest firms have a combined market share of less than 70%; *or*
- the merged entity will have a market share of less than 20%.

In Australia, a 4-firm concentration ratio is used, with safe harbours applying where:

- the four largest firms have a combined market share of less than 75%; or
- the merged entity will have a market share of less than 15%.

If the merger is not within the safe harbour established by the concentration thresholds in the relevant jurisdiction, the Commission in that jurisdiction will consider further qualitative assessment to be necessary.

authorisation, where the applicant must establish to the satisfaction of the ACCC that there is a net public benefit associated with the proposed collective bargaining arrangement, in circumstances where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit, i.e. 'small' business collectively negotiating with 'large' business. [18] Under the new notification process, the onus will be on the ACCC to establish that there is no public benefit within a relatively short period of time. We would expect that the rationale for these proposed amendments may not be made out in the context of New Zealand's smaller economy, which is dominated by small enterprises. That is, the experience in the New Zealand economy of collective bargaining by 'small' businesses may not be one of collective bargaining doing little or no harm to the competitive process, with the potential for public benefit in some instances.

5.20 An important issue to consider is whether there is actually the scope for regulatory competition between Australia and New Zealand, such that harmonisation might result in inefficiencies from the loss of competitive tension in the development of competition policy. Quigley (2003) suggests that the scope for regulatory competition between Australia and New Zealand in the area of securities laws is potentially strong, given the high degree of capital and labour mobility and the competition between the two countries for foreign investment.[19] By contrast, in practice, Australian and New Zealand companies are not likely to be induced to relocate their head offices in response to changes in competition regulation.[20]

5.21 Although competitive tension in the development of competition policy may not induce market participants to move between jurisdictions, there might be significant learning benefits from the maintenance of distinct competition regimes leading to convergence towards efficient laws in both jurisdictions. For example, the unilateral adoption by New Zealand of a 'substantial lessening of competition test' for the anti-competitive assessment of mergers may point to some degree of regulatory competition between Australia and New Zealand, with convergence arising from competition rather than harmonisation. A policy of harmonisation would eliminate this type of cross-learning between the two regimes.

5.22 Other potential costs associated with harmonisation of Australian and New Zealand competition laws include:

5.22.1 transition costs in moving to a harmonised regime of the following types:

(a) costs associated with deciding which harmonised standards to adopt, whether it be the current law applying in Australia, New Zealand, a combination of both, or some other OECD norm;

[18] Trade Practices Legislation Amendment Bill 2004, Explanatory Memorandum, pp.46-50.

[19] Quigley (2003), page 15.

[20] Quigley (2003), page 17.

(b) the short run costs imposed on all market participants associated with learning, understanding and complying with a new harmonised regime; and

(c) the costs of passing the new laws through Parliament;

5.22.2 the dilution of domestic policy participation. The response to the recent Dawson Committee of Inquiry in Australia illustrated the very wide range of stakeholders interested in participating in competition policy formulation; and

5.22.3 loss of unilateral policy flexibility.

5.23 There are three main conclusions in relation to the net economic effect of the full or partial integration of competition laws in Australia and New Zealand. These are as follows:

5.23.1 while there may be some economic benefits in terms of a reduction in transaction and compliance costs for firms operating or investing in both jurisdictions, these benefits are likely to be small in practice;

5.23.2 on the cost side, at least some differences in the application of competition laws continue to be justified on the basis of key economic differences between New Zealand and Australia. This is particularly so in relation to differences in industry concentration and scale, which have direct links to the optimal design of competition regulation. Further, while there is no direct evidence of effective regulatory competition operating between Australia and New Zealand, cross-learning between the two regimes has generated benefits for both countries as evidenced by the degree of unilateral convergence over time. The loss of this competitive tension and resultant cross-learning would be an additional cost of harmonisation;

5.23.3 the small quantum of expected economic benefits of harmonisation and the potentially significant expected economic costs, suggests that it is unlikely the relevant policy test for harmonisation would be satisfied in respect of full or partial integration.

Consumer protection laws

5.24 Consumer protection laws are a regulatory response to market failure associated with the existence of asymmetric information and unequal bargaining power in product markets. The traditional view was that this type of law making was best done at the domestic level, rather than being subject to cross-country harmonisation. However, in recent years, consumer protection has increasingly become the focus of harmonisation, with the most prominent example being the European Union.

5.25 From a theoretical perspective, the full or partial integration of consumer protection laws is expected to provide increased confidence and certainty to both consumers and businesses in conducting cross-border trade.

5.26 In relation to consumers, harmonisation (assuming commonality of laws) removes the need to incur transaction costs associated with being subject to different consumer

regimes where they purchase goods from across the Tasman. Consumers would only need to understand their rights and obligations under a single regime where purchasing products in Australia or New Zealand.

5.27 From a business perspective, domestic and trans-Tasman trade would be subject to a single regime, meaning that businesses' obligations and responsibilities are the same regardless of the location of the customer.

5.28 Harmonisation therefore provides increased certainty and lower transactions costs for consumers and producers, potentially leading to an increased volume of cross-country trade.

5.29 Whilst the theoretical arguments in relation to harmonisation are persuasive, the magnitude of these benefits will depend upon the current laws and trading conditions between the countries concerned. In some instances, the benefits of harmonisation are likely to be significant, while in other scenarios, the benefits may be quite small. Examining the case of Australia and New Zealand, it may be that the trade benefits are likely to be small in practice, given that:

5.29.1 although there are small differences in substance and style between the consumer protection regimes in Australia and New Zealand, both jurisdictions have mature, comprehensive consumer protection regimes by OECD standards that protect consumers regardless of their place of domicile; and

5.29.2 small differences in consumer protection regimes are unlikely to affect a consumer's decision to trade or a business decision to supply, especially where the overall level of protection is of a similar level to that which exists domestically.

5.30 Harmonisation is likely to lead to greater benefits where the level of protection afforded under the two regimes subject to harmonisation is divergent, such that one country's regime offers far superior protection to consumers. For example, consider the case of two countries looking to harmonise their consumer protection regimes. Assume Country A has a very poor system of consumer protection and Country B has a very good system. Under these conditions and other things being equal, consumers from Country B will be reluctant to purchase goods from Country A given the low level of consumer protection, while consumers from A will be happy to purchase from Country B where the level of protection is better. Harmonisation of consumer protection standards to the higher standard in Country B would benefit both countries as consumers in B benefit from increased competition in supply from producers in Country A, and consumers in A benefit from increased protection domestically, leading to an overall increase in social welfare.

5.31 The situation in Australia and New Zealand is different. Here we start from the position where both jurisdictions have comprehensive consumer protection regimes that provide confidence and certainty to consumers and business. The gains from harmonisation are therefore more limited.

5.32 There is no evidence that small differences in consumer protection regimes affect a consumer's decision to purchase goods abroad, especially where the overall level of

protection is similar to that which exists domestically, as is the case with Australia and New Zealand. Other factors such as differences in the prices and quality of goods and transport costs are more likely to be determinative of a consumer's decision than small differences in consumer protection laws.

5.33 Similarly in the case of business, small differences in consumer regimes are unlikely to be a determining factor in whether to supply goods into an overseas market. The business will be more concerned with the level of demand, potential returns and other types of business regulation such as tariffs and taxes.

5.34 While harmonisation may lead to lower compliance and transaction costs for consumers and business in theory, in practice this is not expected to have significant flow-on effects in terms of trade and overall commercial activity.

5.35 Further, negative external effects in relation to consumer protection laws are negligible given that differences in the consumer regimes are small, and that both jurisdictions have mature, comprehensive consumer protection regimes by OECD standards that protect consumers regardless of their place of domicile. As a result, any potential benefits from the harmonisation of Australian and New Zealand consumer protection laws associated with the elimination of negative inter-jurisdictional external effects would likely be negligible.

5.36 With respect to the potential costs of harmonising consumer protection laws, there is the potential for efficiency losses associated with divergent laws that have developed in response to the particular economic, political and institutional circumstances of each jurisdiction. The development of the substance and style of consumer protection laws in both New Zealand and Australia has been closely linked to each country's particular economic, political and institutional circumstances. There are several examples where consumer protection laws have diverged, for example, in relation to bait selling and pyramid schemes, based on each countries unique experience in the area.

5.37 Further, there may be costs associated with the loss of competitive tension between Australia and New Zealand in the development of consumer protection laws. As in the case of competition laws, while it is not likely that New Zealand and Australia actively compete for business based on differences in consumer protection laws, there may be cross-learning benefits from the maintenance of separate consumer protection regimes in the absence of harmonisation.

5.38 In terms of transition costs, Australia's consumer protection laws are contained in both Federal and state legislation laws, so any attempts at harmonisation would first require harmonisation of laws across several Australian jurisdictions. Assuming that harmonisation within Australia can be achieved in a cost effective way, Australia and New Zealand would need to agree on the substance of the harmonised standards, whether they be those in currently existing in Australia, New Zealand, a combination of both, or some other OECD norm. Accordingly, although one-off, the transition costs associated with harmonisation of Australian and New Zealand consumer protection laws are likely to be substantial.

5.39 The costs of dilution of participation are potentially more significant in the case of consumer protection laws than competition laws, given their localised, consumer-

focus. Similarly, policy flexibility is important in relation to consumer protection laws, as they need to be responsive to changing business practices which may affect consumer welfare.

5.40 Overall, we submit that the full or partial integration of consumer protection laws is not likely to be welfare enhancing for New Zealand or Australia.

5.41 The economic benefits of harmonisation of consumer protection laws are likely to be small in practice given that both jurisdictions have mature, comprehensive consumer protection regimes by OECD standards. It is unlikely that trade or commerce between New Zealand and Australia is currently impeded by the existence of separate consumer protection regimes.

5.42 Further, the real resource costs of effecting and maintaining policy coordination are likely to be significant, particularly given that Australian consumer protection laws are currently divergent between state and territory jurisdictions. The degree of policy responsiveness may also compromised under a harmonised regime.

Industry-specific economic regulation

5.43 Industry-specific economic regulation has the same objectives as general competition laws. Both target market failure and focus on the promotion of competition as a means to achieving economically efficient outcomes. Industry-specific regulation is an additional layer of regulation used to target specific industries where general competition laws do not provide an effective constraint on market power. The specific (rather than economy-wide) nature of industry regulation facilitates a more targeted approach to market failure with the regulatory response determined in each instance on the degree of market failure and the associated deadweight loss.

5.44 The market failure test is frequently applied to justify industry specific regulation. The three elements of the market failure test are:

5.44.1 A determination of the magnitude of the inefficiencies resulting from the market failure;

5.44.2 A determination of the feasibility of industry-specific regulation successfully correcting the identified inefficiencies; and

5.44.3 An assessment that the benefits of industry-specific regulation justifies the costs.

5.45 While the nature of market failure and the economic justification for economic regulation might be common between regulated industries in different countries (for example, natural monopoly network infrastructure), this commonality provides no justification for harmonisation of the regulation that governs it as the magnitude and nature of the resultant inefficiencies will not potentially be anywhere near the same. Industry-specific regulation is not an appropriate area for regulatory harmonisation as the degree of market failure, the distribution and size of the resulting deadweight loss, and so the appropriate policy response, depend on the specific demand and supply conditions prevailing in the market.

5.46 In its 2001 Inquiry into Telecommunications Competition Regulation, the Productivity Commission highlighted the diversity of economic conditions in telecommunications markets:

> Telecommunications services are constantly changing and heterogeneous. There are many different delivery platforms and markets (such as mobile, internet, messaging and the plain old telephone system). Change is buoyed by rapid technological innovation and expanding uses of telecommunications and other infrastructure... This may undermine or accentuate the need for regulation, depending on whether they reinforce incumbency advantages or lead to new sources of workable competition…[21]

5.47 The need for telecommunications regulation to be responsive over time has also been highlighted by the Commission:

> It is often argued that telecommunications incumbents have market power because of natural monopoly. However, natural monopoly can hold in some market segments and not others. It may not hold over time…[22]
>
> …The fast pace of change requires that the need for and type of regulation should be periodically re-assessed, with the possibility that at some time telecommunications-specific regulation may no longer be required. Policy makers must determine the right scope of intervention (which markets, firms and periods?).[23]

5.48 The economic diversity of telecommunications markets means that there is no one-size-fits-all policy solution for competition regulation. Further, the economic conditions are subject to rapid change over time due to changing technologies and the creation of new markets, meaning that policy responsiveness is critical to minimise regulatory failure. As such, industry specific regulation is an unsuitable target for harmonisation.

5.49 The recent decision in New Zealand not to unbundle the local loop network, as had previously occurred in Australia, is an instance where different economic conditions in the Australian and New Zealand telecommunications industries led to different, but efficient, regulatory outcomes in each jurisdiction. Although the unconditioned local loop had been earlier declared in Australia, different economic conditions in New Zealand meant that the NZCC could not identify any significant benefits from unbundling. While international experience with unbundling was considered by the NZCC as an input into its analysis, the NZCC recognised that the costs and benefits of unbundling needed to be assessed in terms of New Zealand telecommunications markets. The differing level of pre-existing telecommunications regulation and the differing degree of technological advancement in Australia and New Zealand mean that the assessment of competition in relevant markets and the costs and benefits of

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[21] Productivity Commission (2001) "Telecommunications Competition Regulation", Report No.16, AusInfo, Canberra, p.20.

[22] Productivity Commission (2001), page 17.

[23] Productivity Commission (2001), page 20.

regulation will differ markedly between jurisdictions, predicating different, and often unique regulatory solutions.

5.50 Overall, it is specific local demand and supply conditions that determine the optimal form and degree of industry-specific economic regulation. Any attempts at harmonisation, in the absence of identical economic conditions, will lead to regulatory failure. The consequences of regulatory failure include the hindering of efficient investment, prices and innovation, the encouragement of anti-competitive conduct, poor quality services, and excessive compliance burdens, damaging overall industry growth.[24]

[24] Productivity Commission (2001), page 19.

6 Response to the Productivity Commission's Draft Research Report

Introduction

6.1 Telecom New Zealand broadly agrees with the Productivity Commission's key findings in the Draft Research Report, that radical reform is not warranted and that modest changes are the best way forward having regard to the costs and benefits of harmonisation. As outlined earlier in this submission, the differences between the regimes are small in substance and do not generally hinder business operating in the Australasian market. Further, the costs of effecting and maintaining harmonisation are significant, meaning that change is only warranted where the benefits can be demonstrated to be large and are supported by strong evidence.

6.2 The purpose of this section is to respond specifically to the Productivity Commission's Draft Research Report. First, we make some comments on the Commission's analytical approach to the assessment of harmonisation in the Draft Research Report. We then review and respond to each of the Commission's Draft Findings and Recommendations. Finally, we outline some specific areas where Telecom New Zealand submits that harmonisation may yield net benefits for both jurisdictions.

Productivity Commission's assessment methodology

6.3 The Productivity Commission's assessment methodology is articulated in Chapter 3 of the Draft Research Paper. In particular its methodology for assessing identified policy options is set out in section 3.4.

6.4 Telecom New Zealand broadly endorses the Productivity Commission's assessment methodology. As already discussed, Telecom New Zealand welcomes the adoption of the policy test employed by the Productivity Commission, in accordance with the terms of reference. Further, Telecom New Zealand is satisfied that the Productivity Commission's assessment methodology is broadly consistent with the majority of the key principles for assessing regulatory harmonisation outlined in section 4 of this submission. For example, a cost-benefit test is adopted as the appropriate policy test, there is no general presumption in favour of harmonisation, different forms of regulatory harmonisation are subjected to the policy test and the Productivity Commission adopts a qualitative, rather than quantitative, approach to its assessment with the result that costs and benefits that are not easily quantifiable are not disregarded.

6.5 However, Telecom New Zealand questions whether the Productivity Commission's methodology is consistent with the principle for assessing harmonisation advocated by Telecom New Zealand requiring a disaggregated approach to assessing harmonisation. Rather than asking whether it is desirable to harmonise competition laws on a collective basis, we submit that each specific area of competition law be independently assessed. This approach allows for the harmonisation of specific areas of law yielding net benefits even where the aggregate benefits of full integration and/or partial harmonisation are outweighed by the costs.

6.6 In Chapter 5 of its Draft Research Report, the Productivity Commission takes a very aggregated approach to the question of harmonisation, presenting three main policy options, full integration, partial integration or two regimes with enhanced cooperation.

In relation to both full and partial integration, the Commission finds that the costs are likely to outweigh the benefits. This is consistent with Telecom New Zealand's submissions as outlined in Section 5 of this submission. However, the Commission does not consider either regime on a disaggregated basis, for example, by asking whether harmonisation of merger clearance procedures is likely to yield net benefits. In taking an aggregated approach, Telecom New Zealand submits that the Productivity Commission is overlooking specific areas where there may be net benefits from harmonisation.

6.7 For example, in relation to the differences between merger clearance and notification procedures in Australia and New Zealand, the Productivity Commission concludes that it:

> …is not convinced that the lack of harmony in the use of clearances and notifications alone is sufficient to affect the day-to-day operations of business and, therefore, impede the trans-Tasman business environment generally. However, for selected trans-Tasman transactions concerning a trans-Tasman market, different approval mechanisms have the potential to increase compliance and administration costs.[25]

6.8 While the Productivity Commission concedes that different approval mechanisms have the potential to increase compliance and administration costs for selected trans-Tasman transactions, it does not undertake an assessment of the relative costs and benefits of potentially harmonising the merger clearance (or other approval) procedures.

6.9 Overall, Telecom New Zealand considers that the Productivity Commission should analyse harmonisation on a case-by-case basis, separately examining the harmonisation of each specific area of competition and consumer protection laws to determine whether the benefits of harmonisation are likely to outweigh the costs for that specific area of law.

Telecom New Zealand's response to the Productivity Commission's Draft Findings and Recommendations

6.10 A summary of Telecom New Zealand's responses are contained in Tables 6.1 and 6.2 respectively.

Table 6.1 Productivity Commission's Draft Findings

No.	Draft Finding	Telecom New Zealand's view	Comments
Context of this study			
2.1	*The Australian and New Zealand competition and consumer protection regimes have undergone considerable harmonisation. The laws are very similar and there is considerable cooperation and coordination between the*	Agree	Both harmonisation and unilateral convergence over time have contributed to the development of effective and mature competition and consumer

[25] Productivity Commission (2004), p. 44.

	relevant authorities of the two countries.		regimes in New Zealand and Australia.
Assessment of current regimes			
4.1	*For the Australian and New Zealand competition and consumer protection regimes:* *- the substantive laws,* *- the application of the laws,* *- the approval processes for acquisitions and restrictive trade practices,* *- the sanctions and remedies, and* *- the review and appeals processes,* *are sufficiently similar that they generally are not an impediment to an integrated trans-Tasman business environment.*	Broadly agree	However, harmonisation in some specific cases may be welfare-enhancing, with the benefits outweighing the costs.
4.2	*There are aspects of the Australian and New Zealand competition and consumer protection regimes that do not provide a framework for considering competition and consumer protection policy in terms of a single economic market. The particular aspects relate to:* *- the objectives of each country's regime are confined to the welfare of only those in the respective country* *- the inability to consider the impact of restrictive trade practices conduct on markets beyond each country* *- differences in public benefit tests* *- differences in guidelines, processes and decision making.*	Agree, but these aspects should only be harmonised where the benefits outweigh the costs.	Some welfare-enhancing transactions may be rejected on the basis of competitive detriment in one economy that is outweighed by benefits in the other jurisdiction. However, the costs of full or partial integration required to remedy this concern are likely to outweigh the benefits. The benefits from harmonisation of guidelines are limited given that some differences in the application of competition and consumer protection laws will always persist, given the qualitative nature of these laws. In relation to procedural matters, harmonisation is typically less costly to implement, with obvious benefits to firms in terms of reduced transactions and regulatory compliance costs.
4.3	*There are several factors which can impede the abilities of regulators in Australia and New Zealand to enforce effectively competition and consumer protection regimes in relation to cases with trans-Tasman dimensions:* *- statutory restrictions prevent the ACCC and NZCC exercising their information requisitioning powers in each other's jurisdiction. They also face limits on the use of their investigative powers in providing assistance to each other.* *- statutory restrictions limit the extent to which the ACCC and NZCC can exchange information that was obtained through their information gathering powers.* *- Information exchange between the ACCC and NZCC is impeded by the inability to protect safely confidential information against unauthorised disclosure*	Telecom agrees that reform is needed in relation to information sharing.	However, the confidentiality of commercial information should not be compromised by reform in this area. Further, the purposes for which commercial information is used by regulatory bodies should be limited and transparent.

Policy options			
5.1	*Implementing and maintaining a single competition and consumer protection regime for Australia and New Zealand is unlikely to generate benefits that outweigh the associated costs. The resulting benefits would be small, given that the two countries' competition and consumer protection regimes are already very similar, there is extensive cooperation and coordination between Australian and New Zealand regulators, and only a small proportion of cases handled by those regulators involve trans-Tasman transactions. The costs of implementation and maintenance would be substantial, it would require agreement on many complex issues, including how each country's sovereignty would be changed.*	Agree	Draft Finding 5.1 is consistent with Telecom New Zealand's findings in Section 5 of this submission. The benefits of full or partial integration are likely to be small given that the differences between the regimes are small in substance and unlikely to be a key determinant of foreign participation, whether in terms of investment or trade. The real resource costs of effecting and maintaining harmonisation of this type are not trivial, and are likely to outweigh the benefits in most cases.
5.2	*Implementing and maintaining a joint competition and consumer protection regime (operating side-by-side with two separate national regimes) that would apply to selected trans-Tasman transactions is unlikely to generate net benefits at this stage. Benefits are likely to be small and the costs large. In particular, it would require agreement on many of the complex issues that arise in implementing a single regime for all transactions in the two countries.*	Broadly agree	An ad hoc joint regulatory body may be an effective vehicle in dealing with trans-Tasman issues as an alternative to more costly forms of harmonisation. However, Telecom agrees that this arrangement presents complex implementation issues that are likely to outweigh the benefits at this stage. Regulatory procedures and processes governing trans-Tasman transactions should be aligned as far as possible with the objective of reducing compliance costs for business.

6.11 In relation to Draft Finding 4.1, Telecom New Zealand has indicated its broad agreement that the regimes are sufficiently similar so as not to act as an impediment to the operation of the trans-Tasman market. This finding is generally consistent with the conclusions reached in Section 5 of this submission. Telecom New Zealand agrees that the differences in regimes are small and that these differences are unlikely to be determinative in terms of the level of investment and trade, and overall commercial activity in the region.

6.12 However, we find that harmonisation in some specific cases may be welfare-enhancing, with the benefits outweighing the costs. These cases are discussed below in relation to Draft Finding 5.1.

6.13 In respect of Draft Finding 4.2, Telecom New Zealand acknowledges that under two separate domestically-based regimes, it is feasible that some trans-Tasman transactions (for example, mergers or alliances) may be rejected on the basis of their adverse impact on competition in a single jurisdiction despite the fact that they are welfare-enhancing overall. From an economic perspective, such transactions should be allowed to proceed on the basis that they benefit social welfare.

6.14 However, as expressed in our initial submission, Telecom New Zealand's view is that if harmonisation cannot be effected in a manner that mutually benefits both parties then it should be avoided.

6.15 In relation to Draft Finding 4.3, Telecom agrees in principle that reform is needed in relation to information sharing between regulatory bodies, both on a domestic and international basis. Key issues of concern to Telecom New Zealand relate to the confidentiality of commercial information and the purpose(s) for which commercial information is used by regulatory bodies.[26]

6.16 The Commission noted in its key points that 'safeguards should be included to ensure that confidential information can remain protected from disclosure.'

6.17 However, Telecom New Zealand considers that the existing 'safeguards' in New Zealand must be significantly improved before the Commission can begin to assess the benefits of harmonisation.

6.18 Telecom New Zealand agrees with Draft Finding 5.1, that, in the case of Australia and New Zealand, the benefits of a single common general competition and consumer law regime are likely to be outweighed by the costs. Telecom New Zealand submits that the economic benefits of harmonisation in the case of Australia and New Zealand are likely to be small given that:

6.18.1 the differences between competition and consumer laws in Australia and New Zealand are small in substance. Both jurisdictions have mature competition regimes directed at promoting competition and economic efficiency, and both have comprehensive consumer protection regimes by OECD standards;

6.18.2 small differences in competition and consumer protection laws between countries are unlikely to be a key determinant of foreign participation, whether in terms of investment or trade; and

6.18.3 there is no evidence that differences in competition laws have reduced cross-country investment, or that small divergences in consumer protection have hindered trade.

6.19 While in terms of the costs of harmonisation:

[26] For further information on information sharing see Telecom New Zealand's Submission to the Ministry of Economic Development on Information Sharing by the Commerce Commission dated 16 November 2004.

6.19.1 the existence of separate regimes allows for regulatory competition and 'unilateral convergence' based on economic efficiency, allowing each country to adopt the most efficient laws given its unique legal, economic, and political circumstances;

6.19.2 the real resource costs of effecting and maintaining harmonisation are likely to be substantial, outweighing the economic benefits in most cases;

6.19.3 the costs of diluted domestic participation are difficult to quantify but are likely to be substantial in relation to these areas of law.

6.20 However, Telecom New Zealand has identified some specific areas where it considers that the benefits of harmonisation are likely to outweigh the costs. These are discussed in section 7 below.

Table 6.2 Productivity Commission's Draft Recommendations

No.	Draft Recommendation	Telecom New Zealand's view	Comments
5.1	*The Trade Practices Act 1974 (Cth) and the Commerce Act 1986 (NZ) should be amended to enable the ACCC and NZCC to use their information gathering powers for the purposes of acting on a request for investigative assistance from each other.*	Agree in principle	
5.2	*The Trade Practices Act 1974 (Cth) and the Commerce Act 1986 (NZ) should be amended to allow the ACCC and the NZCC to exchange information that has been obtained through their information gathering powers.*	Agree in principle	. Subject to existing "safeguards" in NZ being first strengthened.
5.3	*For draft recommendation 5.1 and 5.2, safeguards should be built into the Trade Practices Act 1974 (Cth) and the Commerce Act 1986 (NZ) to ensure against the unauthorised use and disclosure of confidential or protected information.*	Agree	
5.4	*The Australian and New Zealand authorities should further enhance their cooperation and coordination, including operational, enforcement and research activities.*	Agree	

7 Telecom New Zealand's proposals for harmonisation

7.1 As advocated earlier in this submission, Telecom New Zealand has considered Australian and New Zealand competition laws using a disaggregated approach and identified some specific areas where it considers that the benefits of harmonisation are likely to outweigh the costs for both Australia and New Zealand, i.e. the Productivity Commission's policy test is satisfied. Accordingly, we ask that the

Commission re-examine the desirability of harmonisation in the following cases, balancing the costs and benefits of harmonisation in each individual case.

Harmonisation of merger clearance processes

7.2 Harmonisation is typically easier to effect and less costly to implement in relation to some regulatory processes such as for merger clearance. The economic benefits are also immediately obvious in terms of reduced transactions and regulatory compliance costs for business. Merger processes and procedures are an obvious candidate for harmonisation between Australia and New Zealand given the relatively large number of trans-Tasman business mergers and acquisitions. In fact, five out of the total 13 merger applications received by the NZCC in 2004 have been from Australian-owned companies.[27]

7.3 At present, Australia and New Zealand have different merger clearance processes.[28] Australia currently has an informal clearance process and New Zealand has a formal clearance process. The formal avenue currently available in Australia for addressing competition concerns in relation to a merger is limited to authorisation on public interest grounds. However, as a result of the *Trade Practices Legislation Amendment Bill 2004* implementing the Government's response to the recommendations of the Dawson Review currently before Parliament, Australia will likely soon adopt a formal mechanism for merger clearance that will be an alternative to the informal mechanism currently available to parties to a merger. Under the voluntary formal process, the ACCC would have 40 days to make a decision on a proposed merger and would have to provide reasons for its decision, with the parties to a proposed merger having the opportunity to have the Australian Competition Tribunal review an unfavourable decision.

7.4 Telecom New Zealand submits that harmonisation between Australia and New Zealand of their merger clearance mechanisms by adoption in New Zealand of an informal merger clearance option is likely to produce net benefits for both countries. Under a harmonised, dual clearance regime, business will have the certainty and transparency associated with immunity under a formal clearance method, but will also have the option of being able to utilise an informal process in both countries.

7.5 While the ACCC has stated that it will not provide its finalised view to parties to a merger where the proposed acquisition is confidential, as the ACCC would not then be able to undertake relevant market enquiries, the Australian informal clearance option does provide parties to a confidential merger with an opportunity to obtain an indication as to the ACCC's likely views about the competition effects of the merger. The ACCC has commented on the response that can be expected in relation to an informal assessment of a confidential merger, as follows:

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[27] Thomson, M. and Williamson, M (2004) "The Lucky Country Spends Up Large in New Zealand" *The National Business Review*, 17 September 2004, 27-02.

[28] A merger clearance process is a process for determining whether a merger in fact breaches the relevant legal prohibition against mergers that result in a substantial lessening of competition and 'clearing those' that are not considered to breach. By contrast authorisation is a process for assessing and 'authorising' mergers that may breach the prohibition on public interest grounds.

The range of responses to a confidential proposal that parties can expect from the Commission include the following:

- the Commission considers that the proposed acquisition would substantially lessen competition and requests the parties not to proceed;
- the Commission has some concerns in relation to the proposed acquisition (which will be set out), but does not propose to oppose the acquisition prior to making market inquiries; or
- in the absence of market inquiries the Commission does not propose to express an opinion, but does not intend to oppose the acquisition at that point in time.[29]

7.6 Such an opportunity may be important where a potential acquirer has a commercial imperative to seek a preliminary view of potential competition concerns associated with a proposed transaction before it is in the public domain. Even where the parties to a merger permit the ACCC to undertake market enquiries, the informal merger clearance process is a relatively less public process than the formal clearance process available in New Zealand, with a smaller level of detail around the proposed acquisition and the businesses of parties to the merger having to be disclosed in the public domain.

7.7 In this way, the availability of an informal route in both countries is likely to yield economic benefits in terms of reducing the degree of uncertainty for businesses engaging in trans-Tasman merger and acquisition activity. As discussed above, the Productivity Commission acknowledged in its Draft Research Report that the lack of harmony in merger clearances has the potential to increase compliance and administration costs for selected trans-Tasman transactions. Telecom New Zealand agrees with this conclusion. However, in addition, Telecom New Zealand submits that this lack of harmony is likely to impede trans-Tasman transactions. The uncertainty around the height of possible regulatory impediments to a merger or acquisition associated with the absence of an informal clearance process in New Zealand is likely to deter efficient mergers that may not have been opposed by the competition regulator, so resulting in potential efficiency losses for both Australia and New Zealand.

7.8 In terms of potential costs, there are no likely negative impacts on efficiency, and the transaction costs of effecting and maintaining coordination in this area are small. Further, transition costs would be negligible, as the provision of an informal clearance mechanism in New Zealand would not require legislative amendment. The informal clearance mechanism in Australia is not enshrined in the Trade Practices Act. Rather, an informal clearance mechanism of the type employed in Australia involves the competition regulator considering the competition effects of the proposed merger and, where appropriate, providing a letter of comfort to the effect that it does not consider that the merger would be likely to result in a substantial lessening of

[29] ACCC (1999), p.16

competition and it does not intend to oppose the merger. Transition costs for business would also be negligible.

7.9 Overall, harmonisation will provide increased choice and certainty for business in conducting merger and acquisition activity, while imposing very small costs in the short-run.

Harmonisation of law on merger undertakings

7.10 The law on merger undertakings in New Zealand may potentially hinder efficient cross-country mergers, imposing external costs on the Australian economy as well as costs on New Zealand.

7.11 In New Zealand, in giving a formal clearance or granting an authorisation in respect of a merger or acquisition, the NZCC may accept a written undertaking 'to dispose of assets or shares specified in the undertaking'[30]. The NZCC is prohibited from accepting an undertaking for the purpose of giving clearance or granting authorisation for a merger or acquisition of any other type[31].

7.12 By contrast, in Australia, the competition regulator has far greater flexibility with respect to the form of undertakings it may accept to address any competition concerns in relation to a proposed merger. The ACCC's power to accept an undertaking in a merger matter is sourced in the general power to accept undertakings 'in connection with a matter in relation to which the Commission has a power or function under this Act (other than Part X)', conferred by s87B of the Trade Practices Act.

7.13 There are no express limits on the form of an undertaking that may be accepted by the ACCC pursuant to s87B and, as a result, the ACCC has considerable discretion in this regard. In contrast to the NZCC, in respect of a merger matter, the ACCC may accept:

7.13.1 structural undertakings of a type other than those requiring divestiture of assets or shares, such as undertakings that restructure the proposed merger in such a way as to address competition concerns, e.g. an undertaking may be provided to restructure the proposed acquisition to confine the role of a party in the acquisition where the participation of that party in a consortium making the acquisition raises competition concerns; [32]

7.13.2 'quasi-structural' undertakings, such as undertakings, in relation to a vertical merger involving the integration with a natural monopoly infrastructure

[30] Commerce Act, s69A(1)

[31] Commerce Act, s69A(2)

[32] The ACCC regarded undertakings of this type to be structural undertakings in ACCC (1999a) A guideline on the Australian Competition and Consumer Commission's use of enforceable undertakings, August, p.9.

owner with a party in a competitive dependent market, that provide for ring-fencing or third party access to a facility;[33] and

7.13.3 behavioural undertakings, such as price, output, quality and / or service guarantees or obligations.[34]

7.14 Telecom New Zealand acknowledges that the ACCC has expressed a preference for structural undertakings within its *Merger Guidelines* and its *s87B Guidelines*, as they facilitate the competitive process on an on-going basis and involve minimal regulatory costs, as ongoing monitoring of compliance is not required. As stated by the ACCC in its *Merger Guidelines*:

> Structural solutions provide an ongoing basis for the operation of competitive markets. The regulatory costs are one-off rather than a permanent burden.[35]

7.15 By contrast, behavioural undertakings may result in:

7.15.1 dynamic efficiency losses associated with the imposition of rigid constraints on competitive behaviour;

7.15.2 significant regulatory costs associated with the ongoing monitoring of compliance and enforcement in the case of breach; and

7.15.3 anti-competitive effects and associated efficiency losses where detecting non-compliance is difficult.

7.16 As noted by the ACCC, in its *Merger Guidelines*:

> Such undertakings may well interfere with the ongoing competitive process through their inflexibility and unresponsiveness to market changes. The duration of such undertakings is also highly problematic.
>
> In addition, such undertakings have substantial regulatory difficulties. They are extremely difficult to make certain and workable in detail, particularly in the short time frames in which mergers are considered, they require continuing monitoring, and where breaches are detected they are often dependent on enforcement after the event. There is also likely to be substantial associated costs to the Commission of compliance and enforcement.[36]

7.17 Nonetheless, while the ACCC has a preference for structural remedies, the ACCC has allowed mergers in the past on the basis of quasi-structural or behavioural undertakings. In particular, the ACCC has been prepared to accept behavioural

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[33] The ACCC described undertakings of this type as 'quasi-structural undertakings' in ACCC (1999b) Merger Guidelines, 30 June, p.77.

[34] Examples of behavioural undertakings provided in ACCC (1999a), p.9.

[35] ACCC (1999b), p.75.

[36] ACCC (1999b), p.76.

undertakings that address the balance of public benefits and detriments, specifically anti-competitive detriments, in authorising anti-competitive mergers, where the resultant net public benefit outweighs the regulatory and other costs associated with the behavioural undertaking.[37]

7.18 For example, in *Davids Ltd* (1995) ATPR (Com) 50-185, the ACCC accepted undertakings from David Ltd in relation to a proposed merger in the market for the wholesale supply groceries to independent retailers in New South Wales and Victoria, pursuant to which Davids Ltd undertook to pass on a proportion of the cost savings to its customers and to provide other guarantees, including dispute resolution procedures, to its customers. The ACCC concluded that, while the undertakings were not a substitute for a structurally competitive market, post-merger retail competition and the undertakings were likely to ensure that the merger was in the public interest.

7.19 In respect of quasi-structural undertakings, the ACCC has accepted undertakings regarding non-discriminatory access in considering a number of port privatisations.[38] More recently, the ACCC granted informal clearance to a consortium including Alinta Limited (the primary gas retailer and distributor in Western Australia) for the proposed acquisition of the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) (the sole gas pipeline for the transportation of gas from the Carnarvon Basin to Perth) on the basis of undertakings such as the following:

7.19.1 no person who is a director or secretary or a member of the staff of Alinta Limited (other than Alinta Network Services) will be involved in commercial negotiations between DBNGP Holdings and other shippers relating to gas transportation on the DBNGP;

7.19.2 Alinta is to ring fence its activities in relation to Alinta Network Services so no member of the marketing staff of Alinta has access to ring fenced information;

7.19.3 Alinta Network Services is not to discriminate between shippers in performing its functions as service provider;

7.19.4 the standard shipper contract includes confidentiality and non-discrimination obligations;

7.19.5 shippers are dealt with on a fair and non-discriminatory basis; and

7.19.6 independent audits on compliance with the undertaking are to be completed.[39]

[37] ACCC (1999b), p.77.

[38] ACCC (1999b), p.77.

[39] Alinta/Alcoa/DUET Consortium undertaking of 25 October 2004, available on the ACCC's s87B undertakings public register at www.accc.gov.au.

7.20 The ACCC's preparedness to accept quasi-structural and behavioural undertakings where they address competition concerns, or where the associated higher regulatory and other costs relative to structural undertakings are justified by an outweighing public benefit or efficiency gain suggests that the absence of a broader discretion in respect of undertakings in merger matters under the New Zealand regime may act to hinder potentially efficient trans-Tasman business acquisitions.

7.21 Harmonisation involving the adoption by New Zealand of a broad discretion in the NZCC with respect to the form and type of undertakings accepted in relation to the clearance and authorisation of mergers and acquisition would provide the NZCC with the flexibility necessary to ensure an outcome that maximises efficiency and economic welfare on a case-by-case basis. Where the avenues available to the NZCC included other, potentially less intrusive, means than divestiture for addressing anti-competitive effects and resultant detriments, the NZCC would be able to facilitate mergers that would be efficiency enhancing with some modification to the structure of the proposed acquisition or limits on the behaviour of the merged entity. That is, the NZCC would have a greater range of discretionary tools for pursuing the objective of maximising efficiency and economic welfare. The significance of this for trans-Tasman business is again illustrated by the fact that, as discussed above, five of the thirteen merger applications by the NZCC in 2003 have been from Australian-owned companies.

7.22 In terms of potential costs, there are no likely negative impacts on efficiency provided the NZCC appropriately exercised its greater discretion, and the transaction costs of effecting and maintaining coordination in this area are likely to be small. Accordingly, Telecom New Zealand submits that harmonisation of the law on merger undertakings between Australia and New Zealand, by conferral of a broader discretion on the NZCC with respect to the form and type of merger undertakings, would result in net benefits in both Australia and New Zealand. That is, the policy test for harmonisation is, in our view, satisfied.

Unified competition regime objectives

7.23 In terms of the broad policy objectives of general competition laws in Australia and New Zealand, Telecom New Zealand supports the current policy objective of promoting the competitive process, rather than the protection of individual competitors. The Commerce Act and Part IV of the Trade Practices Act are instruments for the promotion of competition, with the ultimate policy objective being the enhancement of economic efficiency in the interests of economic welfare.

7.24 Telecom New Zealand submits that the adoption of a uniform policy statement for the competition provisions in both Acts is an area where harmonisation would result in net benefits. In terms of benefits, common objective provisions applicable to the competition regimes in each jurisdiction would provide clear policy signals to business and consumers about the economic aims of competition policy in the overall region, despite the continued existence of two separate competition regimes. More significantly, it would facilitate convergence in the interpretation and resultant operation of the two substantively-similar regimes, as a result of the role of objects provisions in statutory interpretation. Adoption of a common economic objective would also provide a safeguard to ensure that competition laws do not, in practice

through their interpretation by courts and tribunals, become a mechanism for the achievement of social outcomes unrelated to the promotion of competition.

7.25 There are no real economic costs in adopting a common objective provision for the competition regimes of both jurisdictions. The overall aims of competition policy are not specific to the unique economic, legal or institutional characteristics of each economy and, arguably, regulatory competition has already led to some policy convergence on the objective of the competition regimes despite the currently differently worded statutory objectives. In terms of real resource costs, harmonisation in this area can be achieved at low cost.

7.26 A consideration of the costs of any legal consequences of a change in the wording of the statutory objective provisions, including identification of any case law dependent on the current objective provision in each jurisdiction and the consequences of amendment for that case law, is essential. However, Telecom New Zealand submits that amendment of the statutory objective provision along the lines proposed would not have adverse consequences for existing precedent and thus would not impose any resultant costs.

7.27 The objects provision in the Trade Practices Act currently provides:

> The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.[40]

7.28 The phrase 'the promotion of competition and fair trading and provision for consumer protection' in s2 is arguably a reference to the distinct parts of the Act, with the phrase 'the promotion of competition' being a reference to Part IV of the Act. Accepting this, the purpose of Part IV and related provisions of the Act is thus to enhance the welfare of all Australians, whether consumers or some other group in society. Accordingly, the adoption of a common objects clause of the type proposed below would not represent a significant departure from the existing object for Part IV set out in s2.

7.29 By contrast, s1A of the Commerce Act provides that the purpose of that Act is:

> …to promote competition in markets for the long-term benefit of consumers within New Zealand.

7.30 The wording of the purpose provision in the Commerce Act suggests that the purpose of promoting competition is to enhance the welfare of New Zealand consumers, rather than the economic welfare of New Zealand. The latter would also include any welfare gains to other groups in society, e.g. producers / shareholders. However, in part due to s3A of the Act which requires the NZCC to consider any efficiencies likely to result from proposed conduct in assessing the likely public benefit associated with that conduct, the NZCC and the Courts have concluded that a total welfare standard, rather than a consumer welfare standard, should be adopted in assessing public

[40] Trade Practices Act, s2

benefit in an authorisation matter[41]. Accordingly, Telecom New Zealand submits that amendment of the purpose provision in the Commerce Act in the manner proposed below would not have adverse consequences for established legal precedent.

7.31 In terms of the form of the common objective, the object or purpose provision should focus on the economic objectives of 'competition', 'economic efficiency' and the overall 'enhancement of welfare'. The Trade Practices Act objective focuses on competition and welfare in relation to its Part IV competition regime: '…enhancing the welfare of Australians through the promotion of competition…'.

7.32 By contrast, the Commerce Act is more specific in terms of the beneficiary of competition: 'promotion of competition in markets for the long-term benefit of consumers within New Zealand'. In order to promote consistency, it would be preferable to remove the reference to 'the long-term benefit of consumers' in the Commerce Act, and replace it with the broader term 'enhancement of welfare of New Zealanders', which incorporates the welfare of all groups in society. Further, the targeting of economic outcomes in terms of consumers may imply a relatively narrow focus on short-term, static efficiency considerations (for example, price competition) at the expense of longer-term dynamic competition aspects which may be more welfare-enhancing, benefiting consumers in the long-run.

Ad hoc joint regulatory body

7.33 As outlined in our initial submission, an ad hoc joint regulatory body may be an effective vehicle in dealing with trans-Tasman issues as an alternative to more costly forms of harmonisation. A key benefit of this approach is that it would allow each country to maintain an independent competition and consumer law regime, while promoting regulatory consistency in significant trans-Tasman transactions. However, Telecom New Zealand agrees with the Productivity Commission's finding that this arrangement may involve high implementation costs which potentially outweigh the benefits at this stage.

7.34 In our view, this option requires more detailed and comprehensive consideration in terms of the specific issues associated with implementation and the likely costs involved. In the short term, other, less costly, measures should be pursued, including further alignment of the regulatory procedures and processes governing trans-Tasman transactions in order to reduce compliance costs for business.

[41] *Fisher & Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731; *New Zealand Co-operative Dairy Co Ltd v Commerce Commission* [1992] 1 NZLR 601; NZCC (1997) *Guidelines to the analysis of public benefits and detriments*, October (soon to be superseded).