Submission No 22

Australia's trade and investment relations under the Australia-New Zealand Closer Economic Relations Trade Agreement

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THE DEPARTMENT OF COMMUNICATIONS, INFORMATION AND THE ARTS SUBMISSION TO THE JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE ON THE REVIEW OF THE AUSTRALIA-NEW ZEALAND CLOSER ECONOMIC RELATIONS (CER) TRADE AGREEMENT

Introduction

This submission is made at the request of the Joint Standing Committee. We understand that the Committee has a particular interest in exploring further some telecommunications issues in the context of this inquiry. The submission reflects this emphasis but also provides some information on other areas of portfolio interest that may be of assistance to the Committee.

Telecommunications

The Australian Department of Communications, Information Technology and the Arts (DCITA) has a strong working relationship with its New Zealand counterpart. Senior officials from DCITA meet regularly with their counterparts in the New Zealand Ministry of Economic Development (NZMED) to discuss key issues of interest to both countries. In the past year DCITA has hosted two meetings with NZMED officials and high level officials will meet again later this year in Wellington to discuss a wide range of issues relating to telecommunications policy and regulation.

There are extensive commercial telecommunications linkages between Australian and New Zealand companies across the Tasman. TelstraClear, which is a wholly-owned subsidiary of Telstra Corporation of Australia, is the second largest full service provider in New Zealand. TelstraClear has over 300,000 business and residential customers and represents more than 11% of the New Zealand market. Telecom New Zealand is the country's leading fixed-line, mobile, Internet and data communications service provider with a market capitalisation of US$ 4.1 billion.

In Australia AAPT, which is a fully owned by Telecom New Zealand, is Australia's third-largest telecommunications firm, after Telstra and Optus. AAPT offers local, national and international voice calls, as well as mobile, data and Internet services to business, corporate, government and residential customers throughout Australia. Telecom New Zealand also owns a 20% share of Hutchison's 3G mobile business in Australia.

The New Zealand telecommunications market

The provision of telecommunications services in New Zealand was deregulated in 1989. The total telecommunications market in New Zealand was estimated at NZ$ 7.3 billion in 2005. The market is estimated to grow by 5 to 6 % in the next two years. Data, Internet and Value Added Services grew by 8% and the mobile market grew by 13% during 2005. However, the fixed network voice market declined by 3% in 2005. This decline is consistent with global trends for fixed lines.

In 2005 the number of fixed telephone lines in service was 1.86 million and the fixed line teledensity was 47%. There are two major fixed-line public telecommunications operators in New Zealand – Telecom New Zealand and TelstraClear. Telecom New

Zealand maintains a strong hold on the local access market in fixed line voice and broadband (close to 80%). TelstraClear abandoned its ambitions to operate a national telecoms service and will concentrate on expanding its residential assets in Christchurch and Wellington, as well as its corporate and government business.

In 2005 there were 3.53 million mobile subscribers in New Zealand and the mobile penetration rate was 86%. The major mobile operators are Telecom Mobile (owned by Telecom New Zealand) and Vodafone New Zealand. The mobile market is highly concentrated and mobile phone charges are high by international standards. According to the OECD, in terms of mobile calls price, New Zealand ranks 29th out of 30 countries for high volume users and 23rd for low volume users.

For new entrants, a number of significant barriers exist in the mobile market. Entrants are obliged to have demonstrated plans to build a national network that would give them access to regulated national roaming. Consequently, there are high fixed costs to entry into the mobile market. The absence of number portability is another key problem. New Zealand has some of the highest mobile termination rates amongst OECD countries and there is a lack of both wholesale and resale competition in the mobile services market. Australia has extended regulation to mobile termination charges. In New Zealand regulation is being proposed for non-3G networks only.

Fibre optics provides much of New Zealand's telecommunications backbone network as well as offshore links. Telecom NZ and TelstraClear maintain fibre networks in and between all major centres and corporate locations. TelstraClear has local residential and business networks operating in Wellington and Christchurch. TelstraClear also recently announced a NZ$ 20 million fibre backbone network linking Dunedin, Gore, Invercargill, Queenstown and Christchurch.

The *Telecommunications Act 2001* regulates the supply of telecommunications services in New Zealand. It requires the regulator (the Commerce Commission) to make determinations in respect of designated access and specified services and to undertake costing and monitoring of activities relating to the Telecommunications Service Obligation (TSO), which was previously referred to as 'Kiwi Share'. The services designated[1] were as follows: interconnection with Telecom NZ's fixed telephone network; number portability; wholesaling of Telecom NZ's fixed network services, including residential lines; and fixed to mobile carrier pre-selection from Telecom NZ's fixed network. The services specified[2] immediately were: mobile roaming; mobile cell site co-location; and co-location on Broadcast Communication Ltd's (BCL) sites. Central to this legislation is the establishment of the office of the Telecommunications Commissioner, who would work within the Commerce Commission and be responsible for resolving industry disputes in regulated areas.

[1] Designation is an obligation to provide the services, including pricing principles.
[2] Specification is an obligation to provide the service, not including pricing principles.

'Kiwi Share'[3] was established when Telecom New Zealand was privatised in 1990 and is essentially a contractual arrangement between the New Zealand Government and Telecom New Zealand that enables the Government to meet certain social objectives in telecommunications. It was renegotiated in 2001 to reflect changes in the telecommunications environment and to ensure that all New Zealanders are able to access basic telephony and internet services. In 2001 the New Zealand Government updated Kiwi Share to:

- Clarify that free local calls included standard calls to the Internet and fax calls;
- Require upgrading of NZ Telecom's network to improve Internet access speed;
- Require NZ Telecom's network coverage to be maintained at no less than existing levels (so that it cannot increase profits by abandoning its loss-making rural customers); and
- Require NZ Telecom to meet detailed service quality measures and report to the New Zealand Government and the Telecommunications Commissioner.

Telecommunications trade under CER

The exclusion of telecommunications from the CER was removed in September 1995 through an exchange of letters between Trade Ministers. After that date there were no market access restrictions on Australian and New Zealand telecommunications providers operating in each others market, except for the general foreign investment restrictions applying to investment in Australian and New Zealand. In 1999, Telecom NZ bought a 78% share of AAPT and in December 2000 purchased AAPT outright. AAPT was established in 1991 and was awarded a carrier licence in 1997. In the New Zealand market, TelstraClear was created following the merger of Telstra Saturn Ltd (a Telstra subsidiary) with CLEAR Communications Ltd in December 2001.

Both Australia and New Zealand have signed up to the full text of the WTO "Telecommunications Reference Paper" which includes a set of pro-competition obligations to facilitate market opening and competition with incumbents. Key areas include non-discriminatory interconnection; access to bottleneck services; transparent application of universal service obligations; and the operation of an independent regulator.

While telecommunications is no longer excluded from the scope of the CER, the Agreement contains no specific commitments on telecommunications, nor any harmonisation provisions other than the basic Most Favoured Nation and National Treatment provisions in the general text of the 1988 Services protocol. This is compared with the extensive commitments on telecommunications that Australia has made through its accession to the WTO Reference Paper or in its Free Trade Agreements with Singapore and the United States of America. The CER has no specific chapter devoted to telecommunications to address domestic regulatory issues affecting trade in telecommunications services. In that sense, as Telstra notes in its submission, Australian telecommunications carriers with a commercial presence in

[3] The Kiwi Share, held on the behalf of the New Zealand public by the Minister for Finance, is a single-rights-convertible preference share. The consent of the holder of the Kiwi share is required for the amendment, removal or alteration of the effect of certain provisions of Telecom NZ's constitution. The holder of the Kiwi share is not entitled to vote at any meetings of the company's shareholders nor participate in the capital or profits of the company, except for the repayment of the NZ$ 1 capital upon winding up.

the US and Singapore have "greater reciprocal rights" under the relevant free trade agreements than Australian carriers have in New Zealand (or New Zealand carriers in Australia).

It is important to note that in Australia and New Zealand, liberalisation has been driven by national interest and economic benefits to the wider economy. DCITA's contacts with counterparts in New Zealand therefore focus not only on areas of difference, but also on common challenges arising from changing technologies, new business models, policy and regulatory improvements, and innovations emerging in the market place. In a number of areas, we can usefully learn from each other's experience.

Telecommunications access arrangements

The ability to access the networks and services of competing carriers and carriage service providers, particularly to originate and terminate traffic, is generally regarded as essential to the development of competition in telecommunications. The ability of vertically and horizontally integrated incumbents to use their entrenched market power to impede competition by denying competitors access to facilities or resources is therefore a key issue. Access obligations, more importantly, also provide regulatory certainty (and accompanying investment certainty). Anticipatory access undertakings are particularly important tools for providing investment certaintly in advance of investment in new infrastructure.

Australia and New Zealand have taken a different approach to developing access arrangements in telecommunications. Australia established a general regime in part IIIA of the *Trade Practices Act 1974* (TPA) to provide access to essential facilities. This regime was supplemented by a telecommunications specific access regime in Part XIC of the TPA. New Zealand initially relied solely on the general 'misuse of market power' provisions in Section 36 of its *Commerce Act 1986*. This approach led to problems, particularly in providing timely access to telecommunications services. New Zealand subsequently established a telecommunications-specific access regime in the *Telecommunications Act 2001*. New Zealand does not have an essential facilities regime.

While both telecommunications access regimes are similar in their high-level objectives, aiming to promote the long term 'interests' of end users (Australia) or the long term 'benefit' of end users (New Zealand), there remain some important differences between the two regimes. In practice, the Australian approach has resulted in more telecommunications services being made subject to the access regime, providing a greater level of access to the incumbent's services. Once a service is made subject to the Australian regime the incumbent is required to comply with standard access obligations. This places automatic obligations on the incumbent and results in more timely and equivalent access to services.

The Australian and New Zealand access regimes also have different procedural approaches to the 'declaration' (Aus) or 'designation' (NZ) of regulated telecommunications services. These are the services that must be supplied to access seekers on demand under the access regimes. In Australia this process is undertaken independently of Government by the Australian Competition and Consumer

Commission (ACCC). The ACCC has the discretion to commence a declaration inquiry of its own motion and if it considers it to be in the long term interest of end users, it has authority to declare services, and consequently make them subject to the telecommunications access regime. The New Zealand Commerce Commission (NZCC) on the other hand can only make a recommendation to the Government to designate a service, with the Government making the final decision. The Government's discretion to consider the NZCC's recommendation is limited to accepting, or rejecting the NZCC's recommendation, or asking the NZCC to reconsider the decision.

Overall, Australia's regime gives a greater role to independent regulators (the ACCC and the Australian Communications and Media Authority), where the New Zealand regime involves more direct government involvement in decisions.

A particular focus of concern for Australia has been the absence in New Zealand of a designated unbundled local loop service (ULLS). ULLS is a declared service in Australia. This gave rise to a situation where an Australian competitor in the New Zealand market cannot compete as effectively as a New Zealand competitor can compete in the Australian market. The decision announced by the New Zealand Minister for Communications on 3 May 2006, *inter alia*, to require the unbundling of the local loop (ULL) and the sub-loop copper-wire lines between telephone exchanges and homes and businesses means that companies such as TelstraClear and Ihug will be able to offer broadband and other communication services throughout New Zealand by installing their own equipment in the exchanges. It will also allow other Internet Services Providers (ISPs) to compete with New Zealand Telecom to provide faster and cheaper broadband services.

Implementation of ULL will take time. Between the recent policy announcement and the first line being unbundled in New Zealand could take at least two years, given the process of passing necessary amendments to the *Telecommunications Act 2001*, industry and community consultations and the roll-out of equipment and DSLAMs in exchanges.

It remains to be seen whether TelstraClear will vigorously take up the opportunity to unbundle Telecom New Zealand's local loop, particularly after a recent agreement with Telecom New Zealand on access to voice and internet. In January 2006, Telecom New Zealand and TelstraClear signed an agreement on a number of long standing issues including interconnection, wholesaling and Unbundled Bitstream Service (UBS). This included Telecom New Zealand providing a wholesale discount of 5% for its Homeline service (previously 2%) and 18% for other wholesale services (previously 16 %).

There are other areas where Australia's access regime provides some advantages to a new entrant that are lacking in New Zealand.

Australian legislation provides explicitly for an access seeker to be given access to telecommunications transmission towers, the sites (includes buildings and structures) of telecommunications transmission towers and underground facilities that are designed to hold lines, where it is in the long term interest of end-users. It does not appear that the New Zealand access regime provides for facilities access rights of this nature.

In addition, the New Zealand regime does not currently make provision for access undertakings. Access undertakings, in Australian legislation, provide a halfway point between pure commercial regulation and one-on-one dispute resolution as they allow an access provider unilaterally to set terms and conditions of access, subject to the regulator's approval. The effect of this mechanism is to grant access providers a right to supply access on the terms and conditions set out in the undertaking. This mechanism has the advantage of allowing for industry-wide resolution of disputes on relevant terms and conditions. This is another area where closer alignment of the two regimes may benefit competitors in the New Zealand market.

Other aspects of telecommunications competition policy

Regulation of anti-competitive conduct is another important issue for telecommunications, particularly as it applies to dominant carriers.

In Australia the incumbent's market power and ability to engage in anti-competitive conduct led the Government to establish a telecommunications specific anti-competitive conduct regime in Part XIB of the TPA. These provisions supplement the ACCC's general anti-competitive conduct powers in Part IV of the TPA. Under Part XIB the ACCC can issue competition notices to carriers and carriage service providers with substantial market power engaging in conduct with the purpose *or effect* of substantially lessening competition. Issuing a competition notice is designed to stop the conduct promptly and opens the way for the ACCC or third parties to seek substantial penalties and damages in the Federal Court.

New Zealand on the other hand relies on section 36 of the *Commerce Act 1986*, which is a general restrictive trade practices provision. Section 36 does not adopt an *effects* test, nor does it provide the regulator with a regulatory tool such as a competition notice.

The ACCC and NZCC are both called upon to make regulatory decisions in relation to telecommunications issues. These decisions often involve complex technical and legal issues that can have a significant impact on industry development and consumer benefits. Many of these issues would be considered contemporaneously in both countries, and while the market conditions will vary between New Zealand and Australia, there is likely to be overlap in many of the policy and technical matters that must be taken into account.

These factors suggest that greater institutional coordination between the NZCC and ACCC is likely to realise benefits to both organisations. The ACCC and NZCC signed a bilateral cooperation and coordination agreement in 1994. Under this agreement the regulators can exchange information about a number of matters. It has been suggested that this exchange of information could extend further, including increased staff transfer and increased exchange of information. In October 2003, the ACCC entered into a cooperation arrangement with the NZCC. The arrangement establishes a framework for notification, co-ordination and co-operation on competition and consumer protection enforcement activities, exchange of information and treatment of confidential information. In the future there may also be scope for further joint consideration of common issues.

Operational separation

Operational separation is another area where Australia is implementing regulatory controls that are absent in New Zealand. Operational separation involves a clear internal separation between a 'retail business' supplying services to end users, and a 'network business' supplying wholesale services to both the incumbent's retail business and its competitors. Operational separation puts up "Chinese walls" between the retail and wholesale divisions of the incumbent without actually breaking up the company into two separate entities. The intention of operational separation is not to stymie the commercial operation of the incumbent but to bring it onto a level playing field with its retail competitors. Australia is implementing operational separation in anticipation of the full sale of Telstra.

The introduction of operational separation in New Zealand for Telecom New Zealand is still some way off. In terms of priorities, the rapid implementation of unbundling the local loop (ULL) is a more urgent concern than operational separation. Australia and the UK have adopted different models for operational separation. New Zealand also will need to develop responses to this and other issues based on its own economic and social priorities, and the relevant business, legal and institutional structures that exist.

Number portability

New Zealand is one of the few countries in the OECD that does not have fully extended number portability. Number portability allows a customer to retain a phone number when changing operators, services or geographical locations. The concept is important for promoting competition and ensuring the availability of choice in a market. This issue has been on the agenda in New Zealand since 1992.

Number portability reduces the cost of customers changing suppliers and moving locations. For businesses and personal users, the cost and inconvenience of changing numbers is a major deterrent to changing carriers and service providers who are competing in the market place. Presently number portability is not mandated and limited to a small number of locations for fixed line. There is no number portability for mobile telephony and in some respects this is preventing the entry of a third mobile provider into the market. We understand that number portability will be available in New Zealand by 2007.

Other telecommunications issues

The preceding discussion of the regulation of telecommunications, with an emphasis on competition between carriers, represents only part of the picture as far as users and consumers of telecommunications are concerned. A number of other trans-Tasman telecommunications issues affect business and consumer costs. For example, businesses could benefit from a single trans-Tasman mobile market which offers subscribers domestic mobile rates, including cheaper mobile roaming rates, and single billing for business customers on both sides of the Tasman would reduce the cost of doing business. Fortunately, there are vigorous telecommunications user organisations in both countries. Some of these issues are amenable to business solutions. It would

also be useful to continue to explore areas where duplication of work done by regulators and self-regulatory agencies on both sides of the Tasman could be reduced.

Postal cooperation with New Zealand

Australia and New Zealand hold similar positions on the importance of improving the efficiency of global mail arrangements. The two countries work closely in the Universal Postal Union (UPU) to represent the views of high quality, low cost postal administrations and to promote efforts which aim to reform the UPU and the arrangements governing international mail flows.

DCITA and the New Zealand Ministry of Economic Development (MED) and NZ Post exchange views on a regular basis, in particular in the lead up to UPU and Asian Pacific Postal Union (APPU) Congresses. Although not all such meetings are formalised the consultative arrangements have been effective to date.

Digital content

The New Zealand Government has developed a Digital Strategy, which incorporates a plan to make to make New Zealand content more accessible. Components of this plan include: developing a National Content Strategy; developing an on-line Cultural Portal; implementing the National Digital Heritage Archive and progressing *Te Ara*, the Encyclopaedia of New Zealand. Australia has a similar Digital Content Strategy supported by the Australian Government-initiated Digital Content Industry Action Agenda.

Considerable scope exists for further exchanges on digital content and related issues between Australia and New Zealand, particularly through existing mechanisms such as the Cultural Ministers Council on which New Zealand is represented.

Film production

Under the established CER protocols for the movement of professionals between the two countries, Australia and New Zealand have a healthy exchange of cinema and film professionals moving back and forth. Major films shot in New Zealand (e.g., *Lord of the Rings, King Kong etc*) have had significant Australian participation.

Film co-production Memorandum of Understanding with New Zealand

Australia and New Zealand entered a film co-production Memorandum of Understanding (MOU) in 1994. The effect of this arrangement is that a film or television program approved as an official co-production is regarded as a national production of each of the co-producing countries and is therefore eligible to apply for any benefits or assistance available. Film co-production agreements can help Australian producers and producers from other countries work creatively together and share the costs and risks of film production. An agreement can also assist to increase the output of high quality productions.

Australia currently has eight film co-production agreements in place, six are treaties and two are MOU (having less than treaty status). As of March 2006, 84

co-productions with a total budget of approximately $808 million have gone into production.

Since the inception of the MOU with New Zealand, eight productions (four feature films and four mini-series) have been undertaken, representing a total budget of $38.46 million.

Australian and New Zealand incentives to attract film production

The Australian Government's refundable film tax offset (the offset) and New Zealand's Large Budget Screen Production Grant (the LBSPG) are almost identical programs aimed at attracting large-budget film and television productions to each country. Each program refunds 12.5 per cent of the qualifying production expenditure of an eligible production in the relevant country. The offset was introduced in 2001 and the LBSPG in 2003.

To be eligible, each program requires a film to spend a certain amount of qualifying production expenditure in the relevant country. That amount is either:

- at least $15 million and less than $50 million, which must represent at least 70 per cent of the total (worldwide) production expenditure; or
- at least $50 million.

The only substantive difference between the two programs is that the offset benefit is delivered through the tax system and the LBSPG is delivered as a grant. Both countries are very active in promoting their respective advantages as a location for high budget production.

National Archives of Australia

Negotiation of a MOU is currently underway between National Archives of Australia and New Zealand Archives relating to archival recordkeeping following the establishment of a Joint Trans Tasman Therapeutic Products Authority. NZ is well underway with their implementing legislation. The new Authority would be a Commonwealth institution and therefore subject to the *Archives Act 1983*.

National Gallery of Australia

The National Gallery has developed the exhibition *Constable: Impressions of Land, Sea and Sky* in partnership with the Museum of New Zealand, Te Papa Tongarewa (Te Papa). Te Papa are the second venue for the exhibition and will share the international freight costs with the NGA. Depending on the success of this venture for both Australia and New Zealand, the NGA may seek to send other exhibitions to New Zealand. This is the first time that the Australian Government initiative, Art Indemnity Australia, and the New Zealand Government Indemnity Scheme have been used together to underwrite the tour of a single exhibition to both countries.

Sport

<u>Anti-Doping</u>

Australia and New Zealand are both strong and active supporters of international measures aimed at combating doping in sport. Australia and New Zealand hold the two Oceania region seats on the Foundation Board of the World Anti-Doping Agency (WADA); Australia is also the sole Oceania representative on the WADA Executive Committee.

Both countries are also signatories to the UNESCO International Convention Against Doping in Sport (the Convention), which is expected to enter into force shortly. The relevant sports Ministers, Senator the Hon Rod Kemp and the Hon Trevor Mallard, and their respective offices and agencies, have worked together to keep their Oceania counterparts informed of relevant international developments and major outcomes of WADA meetings through regular joint letters. The last joint letter, sent in August 2005, provided advice to relevant Oceania Ministers on the final draft of the Convention and urged countries to consider their position on formal ratification of the treaty.

New Zealand and Australia are also both members of the International Anti-Doping Arrangement (IADA) and the Association of National Anti-Doping Organisations (ANADO). IADA is a government-to-government agreement that reflects the commitment of a number of nations to dealing with the problem of drug use in sports. IADA aims to influence the international sports community to implement more effective anti doping programmes through demonstration of best practice. ANADO is a professional association with the aim of promoting and assisting national anti-doping organisations (NADOs) to achieve their anti-doping aims. ANADO provides a forum to raise, discuss and determine solutions for strategic and technical issues specific to NADOs.

In addition, the Australian Sports Anti-Doping Authority has a bilateral agreement with their New Zealand counterpart, the New Zealand Sports Drug Agency, which provides for reciprocal testing of New Zealand and Australian competitors.

Australian and New Zealand are both involved with the Standing Committee on Recreation and Sport (SCORS) and the Sport and Recreation Ministers' Council (SRMC). SCORS meets twice annually and exchanges views on the nation-wide development and co-ordination of recreation and sport. It provides advice and administrative support to the SRMC.

The SRMC provides a forum for co-operation and co-ordination between the Commonwealth, State and Territory Governments on matters relating to the development of sport and recreation in Australia and, more recently, in New Zealand and Papua New Guinea. The SRMC is comprised of Commonwealth, State and Territory Ministers with responsibility for sport and recreation.