Submission No 6

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

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Telstra

21 April 2006

Mr S Dyer
Secretary
Joint Standing Committee on Foreign Affairs, Defence and Trade
Parliament of Australia
Canberra ACT 2600

Dear Mr Dyer

Australia and New Zealand Closer Economic Relations (CER) Trade Agreement

Thank you for the opportunity to provide comments to the Joint Standing Committee on Foreign Affairs, Defence and Trade, as part of its current examination of Australia's trade and investment relations under the Australia and New Zealand Closer Economic Relations (CER) Trade Agreement.

I attach the joint submission of Telstra Corporation Limited and TelstraClear Limited.

We would be glad to appear before the Committee to provide oral evidence, should you require.

With best wishes for the Committee's deliberations.

Yours sincerely

David Thodey

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A Review of the Australia-New Zealand Closer Economic Relations (CER) Trade Agreement

Submission by Telstra Corporation Limited and TelstraClear Limited to the Joint Standing Committee on Foreign Affairs, Defence and Trade

21 April 2006

Executive Summary

Australia and New Zealand have achieved much in the two decades since CER was concluded. But CER has always neglected telecommunications.

Telstra's vision for CER is the achievement of a common trans-Tasman market in telecommunications. There would be significant consumer benefits: Telstra estimates that just the elimination of international roaming charges paid by Australian mobile subscribers travelling in New Zealand, so that we pay standard domestic mobile rates on both sides of the Tasman, would save Australian consumers $31 million per year.[1]

Australia's recent free trade agreements ('FTAs') with the United States and Singapore include chapters devoted to telecommunications, building on the framework set out in the WTO Agreement on Basic Telecommunications. These chapters in the respective FTAs address 'behind-the-border' market access issues typical to telecommunications markets, such as non-discriminatory access to bottleneck services. However, CER does not yet include such detailed treatment, meaning that Australian, United States and Singaporean suppliers have greater reciprocal rights under trade law, than Australian suppliers have in relation to New Zealand.

The excuse provided by the Australian and New Zealand governments for not including telecoms in the CER Business MoU work program – that telecoms regulation has not yet 'bedded in' – is implausible given that the Australian regime has been in place for almost a decade and New Zealand has had its system for so long now (5 years) that it is doing a 'regulatory stocktake'.

If CER had the same commitments as made under the Australia-US FTA, New Zealand consumers would have been enjoying the benefits of number portability in 2004, instead of still waiting for implementation of this critical pro-competitive measure.

While *generic* competition law and regulation has been targeted for co-ordination under CER, little attempt has yet been made by both Governments to co-ordinate *sectoral* competition regulation such as telecommunications. Australia's experience suggests such co-ordination of sectoral regulation is critical. Regulatory harmonisation and the National Competition Policy provided the impetus for the realisation of a single domestic market in Australia. Such domestic initiatives provide an important precedent for the future development of the trans-Tasman economic relationship.

Telstra submits that both economies would stand to benefit from efforts directed towards greater co-ordination of telecommunications regulation. The telecommunications sector is critical to the future prosperity of both economies. There is considerable scope for greater co-ordination. Greater co-ordination would be relatively easy to achieve

Coordination does not mean colonisation. Telstra's advocacy of a common market should not be interpreted as suggesting that Australian telecommunications regulation be slavishly replicated in New Zealand (or vice versa). Instead, both countries should learn from each other's experiences and move as rapidly as possible towards a harmonised regulatory framework.

Telstra's view is that the specific institutional arrangements for regulating a common market in telecommunications services should be left for debate within a harmonisation work program. The need for retention of national control over cultural, social and welfare (universal service) aspects of telecommunications needs to be addressed in the institutional arrangements. But sensitivity towards legitimate national sovereignty and cultural concerns need not stymie the creation of a common market

[1] Calculation of annual savings that would accrue to mobile subscribers of all Australian GSM mobile networks, based on estimate of total roaming minutes in New Zealand multiplied by the difference between the applicable average per minute retail international roaming rate and the average per minute retail domestic rate. This assumes that in a common market, retail domestic mobile rates would be equivalent across Australia and New Zealand. Telstra does not have access to sufficient data from the New Zealand market to similarly calculate the estimated benefit to New Zealand consumers.

and the economic benefits that would flow from it. What is important is that a distinct work program for sectoral competition regulation, specifically telecommunications, should be added to CER and that achieving a single economic market should be articulated as the goal of the work program.

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1. Introduction

Telstra is a true trans-Tasman company

Telstra is well placed to provide comment to the Joint Standing Committee on Foreign Affairs, Defence and Trade on the current relevance of the Australia-New Zealand Closer Economic Relations ('CER') Trade Agreement for businesses and consumers on both sides of the Tasman.

In **Australia** Telstra is the leading telecommunications and information services provider, with one of the best-known brands in the country. We offer a full range of services and compete in all telecommunications markets throughout Australia, providing over 10 million fixed lines and over 8.5 million mobile services. Telstra assumes the Committee is familiar with our operations in Australia; more information is available at www.telstra.com.

In **New Zealand** TelstraClear is the second largest full service carrier behind the incumbent, Telecom Corporation of New Zealand Limited. TelstraClear Limited is a wholly-owned subsidiary of Telstra Corporation Limited of Australia, and was created by the merger of TelstraSaturn Limited (a Telstra subsidiary) with CLEAR Communications Limited in December 2001.

TelstraClear provides a full suite of fixed line telephony, pay television, Internet, data and mobile telephony services in the business, government, wholesale and residential sectors. This includes a triple-play offer of voice, internet and cable TV services for residential customers in Wellington, Christchurch and Kapiti using our own network.

TelstraClear continues to invest in new telecommunications infrastructure in New Zealand, most recently announcing a NZ$20 million fibre backbone network linking Dunedin, Gore, Invercargill, Queenstown and Christchurch. This extends TelstraClear's national fibre network, the most advanced Internet Protocol ('IP') network in New Zealand, to our lower South Island customers. More information is available at www.telstraclear.co.nz.

For our **trans-Tasman** telecommunications services, Telstra and TelstraClear work together to supply customers who operate in both countries, predominantly major corporates with businesses on both sides of the Tasman. Our customers include Qantas, NAB/BNZ, IAG, HP, Fairfax, Amcor, Promina, Tower, and numerous other major corporates.

Our vision: a common market for telecommunications services on both sides of the Tasman

In the past Telstra encountered significant behind-the-border obstacles to market access in the New Zealand telecommunications market. But major regulatory developments are taking place in New Zealand at present that have the potential to improve market access.[2] The Australian and New Zealand regulatory regimes for telecommunications are (slowly) converging. Yet the Australian and New Zealand governments have rebuffed calls for harmonisation of telecommunications regulation under the CER.

[2] In addition to the announcement of a "regulatory stocktake', the New Zealand government announced its intention to introduce a Bill into parliament that would amend the *Telecommunications Act* 2001, and address several of the issues identified in Appendix A to this submission, for example providing the New Zealand Commerce Commission with the ability to take enforcement actions. See Media Statement issued by David Cunliffe, Minister of Communications, "End users benefit from Telecoms Act review", 9 August 2005. Available at: http://www.med.govt.nz/templates/Page____1972.aspx .

Telstra has also encountered significant impediments to the supply of seamless trans-Tasman services. Some of these impediments are not specific to the telecommunications industry: for example, difficulties in rendering a single bill to customers for services supplied on both sides of the Tasman due to separate non-harmonised GST imputation credit systems. On these issues we join with other companies operating on both sides of the Tasman to press for continued harmonisation work. But many of the practical issues Telstra faces in providing seamless services across the Tasman are caused by the continued maintenance of two separate sectoral competition regimes for telecommunications.

On 22 February 2006 the Australian Treasurer and the New Zealand Minister for Commerce signed a revised Memorandum of Understanding under the CER which states,

> "Both governments have committed to the objective of a single economic market."[3]

Telstra is a true trans-Tasman company. We have a vision of a single economic market for telecommunications services on both sides of the Tasman.

A common market obviously makes commercial sense for Telstra, but it would also bring benefits to other telecommunications companies, to our business customers, to consumers, and to regulators and other agencies charged with regulating the industry. The CER's current coverage of telecommunications is severely lacking. This submission identifies the work that needs to be done to realise the enormous benefits that a common market would bring.

Key points:

- **Telstra is a true trans-Tasman company, operating the #1 telecoms supplier in Australia and the #2 fixed-line supplier in New Zealand.**
- **Telecoms regulation is a form of sectoral competition regulation, which to date has differed greatly between Australia and New Zealand.**
- **A stocktake of New Zealand's telecoms regulatory system is underway, which could continue the process whereby our two systems are (slowly) converging.**
- **It is time to begin work towards a common market for telecoms services**.

2. How telecommunications got left behind by CER

CER is terrific … except on telecoms

Australia and New Zealand have one of the most open economic and trading relationships of any two countries in the world. The World Trade Organisation ('WTO') has described CER as the "world's most comprehensive, effective and multilaterally compatible free trade agreement."[4]

But telecommunications has always been left behind by CER:

- services (including telecommunications) were not part of the original CER trade agreement which came into force in 1983;

[3] Clause 3, The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, 22 February 2006.

[4] Cited by DFAT in "Australian Department of Foreign Affairs and Trade Submission to the Productivity Commission Study into the Trans-Tasman Mutual Recognition Agreement", Submission to the Productivity Commission, Canberra, 11 April 2003, p1. Available at: http://www.pc.gov.au/study/mra/subs/sub078.pdf

- when services were included within CER by the 1988 Services Protocol, telecommunications services remained largely excluded by a special inscription to the Protocol;[5]

- only in the mid-1990s were the inscriptions restricting supply of telecommunications services removed from CER;[6] but

- in February 2006 the governments of New Zealand and Australia excluded telecommunications from the revised work program for business law under CER, citing the implausible excuse that telecommunications regulation in both countries "is still bedding in" – despite the framework of current Australian telecommunications regulation having been in place since 1997 and the New Zealand framework having been in place since 2001, so long that even the New Zealand government is currently carrying out a 'regulatory stocktake'.[7]

The problem for telecoms services is not only cross-border access, but also behind-the-border regulation

So, finally, the general provisions of the CER were applied to trade in telecommunications services between Australia and New Zealand in the mid-1990s. But by then more far-reaching commitments on telecommunications market access had already been given by both Australia and New Zealand in the WTO General Agreement on Trade in Services ('GATS'), as part of the WTO agreements entered into at the conclusion of the Uruguay Round of multilateral trade negotiations in 1994. The GATS extended international trade obligations to international trade in services, including an Annex addressing telecommunications services.[8]

A group of around 70 WTO members, including Australia and New Zealand, considered this Annex insufficient to addresses their concerns regarding telecommunications market access. These nations negotiated further GATS commitments relating to basic telecommunications within the context of the WTO Agreement on Basic Telecommunications, which came into effect from February 1998. Under the Agreement on Basic Telecommunications each of the subscribing WTO members – including Australia and New Zealand – is bound by its own individual schedule which describes the manner and extent to which that nation will ensure national treatment and market access with respect to specific modes of supply for particular basic telecommunications services.

Most of the signatories to the WTO Agreement on Basic Telecommunications, including Australia and New Zealand, included in their individual schedules a commitment to some or all features of a negotiated regulatory "Reference Paper" which set out principles for the establishment and maintenance of competitive markets.[9] Those countries that signed up to the full text of the Reference Paper (including Australia and New Zealand) undertook a fixed set of specific obligations such as:

- ensuring an environment of fair competition for new entrants competing with the incumbent;

- non-discriminatory interconnection including access to unbundled elements;

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5 See the Annex to the Protocol on Trade in Services (as of 1988), available at: http://www.dfat.gov.au/geo/new_zealand/anz_cer/227.pdf .

6 See the 1992 and 1995 Exchanges of Letters, available at: http://www.dfat.gov.au/geo/new_zealand/anz_cer/anz_cer.html .

7 Review of the Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, February 2006, page 9.

8 Annex on Telecommunications, available at: http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm .

9 Negotiating Group on Basic Telecommunications, available at: http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm .

- making available the standard terms and conditions on which the incumbent provides access to bottleneck services;

- maintaining a transparent and fair way to fund universal service that is not unnecessarily burdensome for new entrants; and

- independent regulation.

These are all typical 'behind-the-border' trade issues: both Australia and New Zealand undertook in the GATS that their domestic telecommunications regulation would meet these minimum standards. And although somewhat vague and open to interpretation, the Reference Paper is not a toothless document: the United States successfully prosecuted a WTO dispute against Mexico when it failed to regulate its incumbent telecommunications carrier TelMex in accordance with these principles.[10]

CER is supposed to be WTO-'plus', but WTO rules give Australian telecoms suppliers a better deal in the US, Singapore … even Mexico!

No attempt was made to incorporate the Reference Paper obligations within CER after 1998. This has the bizarre consequence that Australian telecommunications suppliers have greater guarantees to a fair regulatory deal in Mexico (and in the other 60+ signatories to the Reference Paper) under WTO rules than we do in New Zealand under CER!

In the more recent free trade agreements ('FTAs') recently concluded by Australia with the United States and Singapore, the WTO Basic Telecoms Agreement and regulatory Reference Paper were used as a starting point for the negotiation of fairly sophisticated obligations relating to telecommunications. Each of the Australia-US and Singapore-Australia FTAs contains an entire chapter devoted to trade in telecommunications services.[11]

Indeed, the incorporation of a chapter on telecommunications has become an important feature of many modern bilateral free trade agreements, building upon the work undertaken by the WTO.

In contrast, CER has no specific coverage of telecommunications regulation or its harmonisation other than the basic non-discrimination obligations in the general text of the 1988 Services Protocol. The CER agreement contains no specific chapter devoted to behind-the-border issues affecting trade in telecommunications services. As a consequence, an Australian supplier's ability to rely on trade obligations to obtain access to the New Zealand telecommunications services market is now materially lesser than the guarantees given by trade law in relation to the Singapore and United States markets. CER has therefore fallen some way behind Australia's other trade relationships on this issue.

For example, the telecommunications chapter in the Australia-US FTA includes an obligation in Article 12.4 on both countries to ensure that their regulation enables fixed-line number portability between telecommunications carriers, as well as mobile number portability if technically feasible (which is the case). Number portability is a key facilitator of fair competition in telecommunications markets. Australians have enjoyed the benefits of both fixed and mobile number portability for over six years. New Zealand has yet to implement either (although their implementation is promised within the coming year).

Telstra submits that immediate steps should be taken to incorporate more detailed treatment of telecommunications into CER, at least consistent with the WTO Reference Paper, but preferably

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[10] World Trade Organisation (2004), *Mexico – Measures Affecting Telecommunications Services: Report Of The Panel*, 2 April 2004 (WT/DS204/R).

[11] Australia – U.S. Free Trade Agreement Chapter 12 (http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_12.html); and Singapore-Australia Free Trade Agreement Chapter 10 (http://www.dfat.gov.au/trade/negotiations/safta/chapter_10.pdf).

duplicating the more detailed approach of the existing telecommunications chapters in the FTAs that Australia has concluded with the US and Singapore.

Including a telecommunications chapter in CER does not add to existing regulation. It only describes what is already in place or in plan. A CER telecommunications chapter would need to be adapted to the specific regulatory circumstances that pertain on both sides of the Tasman, as was the case when drafting the telecommunications chapters in Australia's other FTAs. The major benefit of putting such a chapter in place is that it would provide the institutional and regulatory framework for trans-Tasman harmonisation of telecommunications regulation going forward.

Key points:

- **CER now lags behind the WTO GATS and Australia's bilateral FTAs on telecoms.**
- **the excuse provided by the Australian and New Zealand governments for not including telecoms in CER Business MoU work program – that telecoms regulation has not yet 'bedded in' – is implausible given that the Australian regime has been in place for almost a decade and New Zealand has had its system for so long now (5 years) that it is doing a 'regulatory stocktake'.**
- **if CER had the same commitments as made under the Australia-US FTA, New Zealand consumers would have been enjoying the benefits of number portability in 2004, instead of still waiting for implementation of this critical pro-competitive measure.**

3. What we should be aiming for: the benefits of a common market for telecoms

Intuitively, the greatest economic benefits from further co-ordination of business and sectoral regulation under CER are likely to arise in those areas where only little or moderate progress has been made. The key target area for the future development of CER should be those areas of regulation that are significant to trans-Tasman economic integration but in which little or no attempt at greater regulatory co-ordination has yet been made. Telecommunications regulation is clearly one such area.

If Australia and New Zealand started working towards a single economic market for telecommunications today, these are just some examples of the benefits that would likely be achieved by 2010:

Mobile roaming:

- there would be one trans-Tasman mobile market with operators offering subscribers seamless service on both sides of the Tasman
- Australian mobile subscribers would no longer pay international roaming charges for making and receiving mobile calls when travelling to New Zealand; instead they would be charged at domestic rates
- travelling to New Zealand with your mobile would be no different to interstate travel within Australia
- Telstra estimates that just the elimination of international roaming charges paid by Australian mobile subscribers travelling in New Zealand, so that we pay standard domestic mobile rates on both sides of the Tasman, would save Australian consumers $31 million per year.[12]

[12] Calculation of annual savings that would accrue to mobile subscribers of all Australian GSM mobile networks, based on estimate of total roaming minutes in New Zealand multiplied by the difference between the applicable average per minute retail international roaming rate and the average per minute retail domestic rate. This assumes that in a common market, retail domestic mobile rates would be equivalent across Australia and New Zealand. Telstra does not have access to sufficient data from the New Zealand market to similarly calculate the estimated benefit to New Zealand consumers.

New network and technology roll-out investment decisions made on a trans-Tasman basis:

- The access regime for telecommunications (for Australia this is currently set out in Part XIC of the *Trade Practices Act*) would be harmonised so that a common regime applies on both sides of the Tasman
- new investment decisions would be subject to the same rules, enabling decisions on roll out of new technologies and networks to encompass both countries
- roll-out of one network across both countries would bring scale benefits – New Zealand consumers would enjoy services that might not otherwise have been supplied to them due to the small size of the New Zealand market; while Australian consumers would enjoy lower cost service options

One contract and one bill for business customers:

- providers would be able to easily generate a single contract and a single bill for business customers obtaining services on both sides of the Tasman
- telecommunications legislation requiring publication by carriers of their standard service terms would incorporate products sold on both sides of the Tasman
- technical standards, data retention and interception obligations would be subject to harmonised rules and self-regulatory codes

Elimination of duplicate work by regulators and self-regulatory agencies:

- the Australian Competition and Consumer Commission and the New Zealand Commerce Commission would no longer duplicate each other's work on common issues such as mobile termination rates; instead one inquiry could be held for both countries, and the substantial cost of input into these inquiries would be reduced
- self-regulatory technical codes such as those developed by the Australian Communications Industry Forum could be developed inclusive of the New Zealand industry. This would not be a one-way street: given New Zealand industry's level of technical sophistication in newly emergent technology areas such as wireless broadband, Australia stands to gain from the input of New Zealand industry.

There are differences that are worth retaining

However far the common market program may develop, each country would be free to retain key differences in their regulatory approaches, for example:

- each country's approach to universal service could continue to differ if this was deemed necessary. The New Zealand government could continue to retain the Kiwi Share and telecommunication service obligations, and the Australian government could continue to determine universal service obligations and the appointment of the Universal Service Provider through Australian legislation;

- each country could continue to determine its own scheme for regulating content, both for content rating and for supporting the production of local content;

- distinct identifiers such as the top-level domains ".nz" and ".au" would remain undisturbed;

- services would continue to be billed in each country's own currency.

Neither country holds a monopoly on regulatory wisdom, and neither should be constrained from experimenting with new ideas, for example new approaches to allocation of spectrum or targeted competitive universal service funding, provided there is no material detriment to the other country's suppliers.

The need for retention of national control over cultural, social and welfare (universal service) aspects of telecommunications would be addressed in institutional arrangements that are to be developed. But sensitivity towards legitimate national sovereignty and cultural concerns need not stymie the creation of a common market and the economic benefits that would flow from it.

How will the institutional/structural arrangements work?

There are a variety of possible institutional arrangements for a common market, e.g. one shared regulatory agency versus separate regulators administering distinct but harmonised legislation. The institutional arrangements ultimately chosen are less important than the factual existence of a common market. Telstra observes that there are many examples of institutional pathways to choose from:

- existing trans-Tasman precedents such as the regulation of therapeutic goods;
- domestic Australian precedents such as the National Competition Policy framework;
- the European Union approach of adopting generic competition law applicable in all the national jurisdictions, and then relying on national regulatory agencies to implement that competition law in specific national markets – while retaining the ability to introduce measures applicable to the entire common market, such as the European Commission's recent announcement that it will introduce EU-wide regulation of international mobile roaming charges;[13] or
- adopting learnings from a single economic market for telecoms services in a diverse federal state, e.g. Canada has a single federal telecommunications regulatory agency notwithstanding that there are two regionally-based incumbents, TELUS in the west and Bell Canada in the east – from which valuable lessons may be drawn as to how to regulate a common market in which both Telstra and Telecom are competing.

Telstra's view is that the institutional arrangements for regulating a common market should be left for debate within a harmonisation work program, as all of the above approaches have the potential to achieve the same practical outcome. What is important is that a distinct work program for sectoral competition regulation, specifically telecommunications, should be added to CER and that achieving a single economic market should be articulated as the goal of the work program.

[13] See: http://europa.eu.int/information_society/activities/roaming/index_en.htm .

Key points:

- **there would be significant benefits for consumers if a common market was achieved: Telstra estimates that just the elimination of international roaming charges paid by Australian mobile subscribers travelling in New Zealand would save Australian consumers $31 million per year.***
- **New Zealand and Australia would be able to safeguard key differences in their approach to telecommunications regulation, particularly in areas where differing social and cultural policies may exist, for example universal service and content regulation.**
- **there are many possible paths to achieving a trans-Tasman single economic market for telecommunications – debate over institutional/structural issues such as whether to harmonise laws or amalgamate regulators, should be left aside for now. What is necessary now is to identify a common market as the goal and begin working towards that goal.**

* Calculation of annual savings that would accrue to mobile subscribers of all Australian GSM mobile networks, based on estimate of total roaming minutes in New Zealand multiplied by the difference between the applicable average per minute retail international roaming rate and the average per minute retail domestic rate. This assumes that in a common market, retail domestic mobile rates would be equivalent across Australia and New Zealand. Telstra does not have access to sufficient data from the New Zealand market to similarly calculate the estimated benefit to New Zealand consumers.

4. CER needs to keep evolving

CER needs to lead, not be held hostage to claims that domestic regulation is still 'bedding in'

CER should be perceived as a dynamic arrangement, evolving to suit the needs of both nations. As a former Prime Minister of New Zealand said almost two decades ago:

> "The establishment of a single trans-Tasman market is an exciting and noteworthy achievement. If we can take the process further, so much the better. There is no reason why, in this part of the world, we should fall short of the vision the Europeans have set themselves. We will have at the end of it not a single Australasia, or the ANZAC peoples living separate existences side by side, but a vibrant, challenging and outward community of two nations."[14]

It is now over two decades since CER first entered into force. Telstra submits that a clear vision is needed for the evolution of CER over the next two decades: a vision for CER to 2010 and beyond.

In this regard, greater economic integration through regulatory harmonisation is an important next step in the evolution of the trans-Tasman economic relationship. The Australian Department of Foreign Affairs and Trade has itself commented:

> "With most of the trade goals of CER met, the way ahead will be to foster closer economic integration through regulatory harmonisation, and the creation of a more favourable climate for trans-Tasman business collaboration. ... At the 3 March 2004 meeting between Prime Ministers Howard and Clark, ... [they] re-iterated their strong commitment to work towards the development of a single economic market."[15]

[14] Rt Hon Professor Sir Geoffrey Palmer (as Prime Minister of New Zealand) "International Trade Blocs - New Zealand and Australia: Beyond CER" (1990) 1 *Public Law Review* 223, 228.

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

As the Committee will be well aware, both nations stand to gain much from greater economic integration:

- from a New Zealand perspective, as the smaller of the two economies, the benefits to New Zealand are likely to be considerable;

- from an Australian perspective, a common market with New Zealand acts as the equivalent of the addition of another Queensland.

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

The Australia-New Zealand Leadership Forum[16] says we should deal with telecoms in CER

In its first session in Wellington on 14 and 15 May 2004, the Australia-New Zealand Leadership Forum determined as its main objective, moving from CER to the establishment of a single market (dubbed the 'Tasman Economic Area') embracing both countries. It was acknowledged that there would be significant difficulties and obstacles with some elements of this, but that the objective was important and well worth pursuing.

Among the seven key elements of a single market identified by the Forum was,

> "harmonising and/or integrating business regulation with particular reference to taxation, banking, ***telecommunications*** and intellectual property." *(emphasis added)*

Telecommunications was included by the Forum in the communiqué it sent to the Prime Ministers of Australia and New Zealand, because the Forum recognised its key role as an enabling service for trans-Tasman social, economic and cultural activity. The Forum did not feel constrained to exclude telecommunications regulation from its goals because it was allegedly "still bedding in" – instead the Forum sought to set a goal for CER, to harmonise and/or integrate telecommunications regulation *because* of the sector's critical importance.

Key points:

- **CER's general development, and the achievement of a common economic market across all industry sectors, will be held back for so long as telecoms regulatory harmonisation is ignored by CER.**
- **Government has done itself little credit by ignoring the recommendation of the Australia-New Zealand Leadership Forum in regard to telecoms.**

5. The critical importance of the telecommunications sector

The telecommunications sector is critical to the future prosperity of the Australian and New Zealand economies. In Australia, the telecommunications sector contributes approximately 3% of Gross Domestic Product. In New Zealand, the telecommunications sector contributes approximately 4% of Gross

[16] The Australia-New Zealand Leadership Forum included participants from both sides of the Tasman representing a wide range of interests including Government, business, policy-makers, regulatory authorities, culture, sport, academia and the media. The purpose of the Forum was to examine the current state of the trans-Tasman relationship and discuss options for its future direction. For more background see http://www.mfat.govt.nz/foreign/regions/australia/leadershipforum/leadershipforum.html .

Domestic Product. Given these statistics, the combined trans-Tasman telecommunications market has an estimated annual value of around AU$28 billion.

Access to a world class telecommunications system is all the more important to Australia and New Zealand given that both economies are located at a considerable distance from their trading partners and from each other. Telecommunications provides an important means to overcome geographic distance and facilitate access to global markets. Both nations depend heavily on the quality, efficiency and innovativeness of their respective telecommunications systems. Current technological trends, and the evolution of the modern digital economy, suggest that this dependence on telecommunications will continue to increase:

- **Substantial trans-Tasman investment:** Very substantial investment has occurred by telecommunications providers from each nation in the other nation's telecommunications sector. Most notably, this has included Telstra's current 100% investment in TelstraClear in New Zealand, and Telecom New Zealand's current 100% investment in AAPT and 20% ownership of Hutchison's 3G mobile business in Australia. Many other telecommunications providers, for example Vodafone, have operations in both Australia and New Zealand. Firms with trans-Tasman operations currently comprise around 80% of the combined trans-Tasman telecommunications market.

- **Ubiquitous nature:** Almost every household and business in Australia and New Zealand purchases some form of service from a telecommunications operator. Unnecessary duplication of regulatory costs incurred by telecommunications operators are invariably passed to consumers in the form of higher telecommunications charges, impacting adversely on consumers in both nations.

Key point:

- **Telecoms is too important to the economic development of both countries to be put in the CER's 'too-hard basket'.**

6. Historical barriers to the realisation of a trans-Tasman telecoms market

Historically, Australia and New Zealand adopted widely divergent approaches to regulating the telecommunications sector:

- **New Zealand regulatory approach:** Until recently New Zealand adopted very light-touch regulation of its telecommunications markets relative to international best practice. New Zealand liberalised its telecommunications sector at a much earlier stage than Australia, in the late 1980s. New Zealand was one of the first jurisdictions in the world to do so. In the absence of international precedent, New Zealand adopted a laissez-faire regulatory model which is now regarded as one of the most extreme examples of that approach in the world.[17] New Zealand relied almost purely on the existence of generic competition law to regulate the telecommunications sector, and decided against the enactment of significant *ex ante* sectoral regulation.

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

New Zealand's historical "light handed" approach was widely criticised and is now generally regarded as having failed to deliver the desired market outcomes.[18] New Zealand eventually abandoned that approach in December 2001 with the enactment of the *Telecommunications Act 2001 (NZ)*. Since then, a number of critical New Zealand regulatory decisions have been at odds with similar decisions made in Australia, including New Zealand's decision not to unbundle the local loop.

- **Australian regulatory approach:** In contrast, Australia did not emulate New Zealand's "light handed" approach when liberalising its telecommunications regime in 1991 and 1997. Rather, Australia's regulatory approach has been more mainstream in international terms. However, Australia is now tending towards significant over-regulation by international standards as Australia has not reduced its level of regulation in line with the development of competition. The Productivity Commission, for example, has recommended that telecommunications competition regulation in Australia should be rolled back in those markets where competition has developed.[19]

Today telecommunications legislation in New Zealand and Australia has numerous common features, albeit with different interpretations by the ACCC and the NZCC in terms of implementation. But, there is now a clear convergence of regulatory approach between the two countries. The 'Regulatory Stocktake' being undertaken at present by the New Zealand is understood to be focusing particularly on key issues affecting broadband take-up such as unbundling of the local loop and its impact on network investment decisions. These issues happen to be amongst the most important remaining points of divergence between Australian and New Zealand telecommunications regulation. CER should get ahead of this trend and drive greater convergence, by setting a goal of achieving a common market in telecoms services to the benefit of both economies.

(**Attachment A** to this submission identifies a number of key current differences between Australian and New Zealand telecommunications regulation that are impacting directly on Telstra. This list is intended to be indicative and is by no means exhaustive.)

Key points:

- **Until recently New Zealand and Australia adopted very different approaches to telecoms regulation.**
- **Regulatory approaches in the two countries are now (slowly) converging.**
- **CER should get ahead of this trend and drive greater convergence, by setting a goal of achieving a common market in telecoms services to the benefit of both economies.**

7. Need for greater harmonisation of sectoral regulation

The extent of harmonisation between the competition laws of Australia and New Zealand now ranks among the greatest of any two nations in the world outside the supra-national competition law adopted by the European Community. The early harmonisation initiatives are summarised in **Attachment B** to this submission, for the period from 1984 to 1996.

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

[19] Productivity Commission, Telecommunications Competition Regulation, Report No. 16, December 2001.

General competition law was subsequently included on the CER harmonisation agenda in 1998 in the context of the Memorandum of Understanding on Coordination of Business Law. As a result, significant progress was made in further harmonising the general competition laws of both nations.

Yet while *generic* law and regulation has been targeted for harmonisation, little attempt has yet been made by both Governments to harmonise *sectoral* regulation. Telstra submits this is an important oversight.

Australia's own experience suggests such harmonisation of sectoral regulation is critical to the realisation of a single market. Regulatory harmonisation under the National Competition Policy provided the basis for the realisation of a single domestic market in Australia. Such initiatives greatly improved Australian economic integration while reducing inter-State transaction costs and compliance costs on a sector-by-sector basis. They provide an important precedent for the evolution of the trans-Tasman relationship.

The benefits of regulatory harmonisation were also expressly recognised when both nations entered into the Memorandum of Understanding on Coordination of Business Law in 1988, as updated in 2000 and 2006.

The benefits of regulatory harmonisation were further recognised in June 1992, when Australia and New Zealand entered into negotiations to extend Australian domestic mutual recognition arrangements to New Zealand.[20] The mutual recognition model in Australia was itself based on the mutual recognition arrangements adopted by the European Union that facilitated the creation of a single European market.[21] Relevantly, the Trans-Tasman Mutual Recognition Agreement enables New Zealand to fully participate in the deliberations and decisions of the Council of Australian Governments on matters affecting the operation of the agreement.

The experience with the adoption of Trans Tasman Mutual Recognition, and New Zealand's participation within the mutual recognition and COAG framework, clearly demonstrate that the Australian domestic experience can be readily transferred to the Australian-New Zealand intergovernmental relationship. Trans Tasman Mutual Recognition was viewed as a natural extension of CER and a catalyst towards greater harmonisation of standards and regulations between Australian and New Zealand.[22]

Regulatory harmonisation should be the first step in the evolution of CER's treatment of the telecommunications sector.

Key points:

- **Claims that competition law has been harmonised under CER ring hollow for so long as that harmonisation has only occurred at the level of generic competition law.**
- **Harmonisation of sectoral competition law under CER should begin with telecommunications.**

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

21 Op.cit.

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

8. Steps along the way to a common market: greater co-ordination of telecoms regulation in the interim

The dramatic benefits of a common market identified in section 3 above will not be achieved in the short term. But there are interim steps than can be taken along the way. Primarily, these interim measures would be stepping stones to realisation of the goal of a common market for telecoms services. But they have their own appreciable benefits.

Telstra has identified below a number of key benefits that it believes could result from an interim program of greater co-ordination of telecommunications regulation under CER. As indicated in the list below, the work programme could consider options for greater co-ordination of telecommunications regulation at the industry, regulator and government levels:

- **Greater institutional co-ordination:** Greater co-ordination between the Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC) would be likely to lead to material efficiency gains by realising trans-Tasman regulatory synergies, particularly economies of scope and scale. Greater co-ordination will reduce wasteful duplication of effort. The 2006 revision of the Memorandum of Understanding on Co-ordination of Business Law, added the following new statements:

  > "The administration of coordinated regimes is an important feature of the trans-Tasman market. Both Governments will seek to encourage cooperation between the relevant regulators and will seek to ensure that any opportunities for cooperation are maximised."[23]

  And,

  > "Both countries also place great value on cooperation between regulators, and between regulators and policy officers. The work program has been varied to reflect this and it is hoped that Australian and New Zealand officers and regulators in each sphere will meet together annually to discuss issues of mutual interest."[24]

  Given the extent of staff resource and time that both the ACCC and NZCC devote to telecommunications competition regulation, it is particularly incongruous that, having made these statements on the need for cooperation between the regulators, the two governments have dropped telecommunications off the Business MoU work program!

- **Greater pooling of expertise:** Greater trans-Tasman pooling of regulatory resources would enable the ACCC and NZCC to have access to a broader range of expertise. Such expertise is particularly important in complex and highly technical industries such as telecommunications. Such pooling of expertise and resources would reduce the corresponding risk of regulatory error and increase the speed, quality and consistency of regulatory decisions. The welfare costs of regulatory error, in particular, can be substantial.

- **Formal institutional arrangements:** Co-operation and co-ordination between the ACCC and NZCC could potentially extend to interim formal institutional arrangement. Professor Allan Fels (the previous chairman of the ACCC) has suggested for example, that:[25]

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[23] Clause 11, The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, 22 February 2006.

[24] Ibid, Clause 18,

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

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

As Professor Fels expressly recognises in this comment, access regimes and access pricing is an area that would most benefit from this approach. Such regimes are primarily directed at telecommunications regulation in both nations.

- **Formal consultative obligations:** The New Zealand and Australian Governments could consider the further development of formal consultation requirements between their respective regulatory agencies. This could involve, for example:

  - requirements for the ACCC and NZCC to consult with each other in relation to regulatory decisions that require a high degree of specialist expertise and knowledge, particularly telecommunications;

  - requirements for each regulator to have regard to the decisions of the other with a view to ensuring greater regulatory co-ordination;

  - requirements to ensure that reviews of competition in telecommunications markets are jointly conducted by the ACCC and NZCC to ensure greater pooling of expertise in relation to the telecommunications sector; and

  - as contemplated by Professor Fels, closer ties between the ACCC telecommunications team and the NZCC telecommunications team so that staff are shared between the regulators, resulting in an immediate pooling of expertise and resources.

- **Co-ordination of telecommunications policy:** Telstra also suggests that regulatory co-ordination could extend beyond the regulators themselves to encompass policy review activities at the departmental level. Telstra notes that the benefits of regulatory co-ordination would be undermined if Australia and New Zealand failed to co-ordinate their respective policy review and development activities. The Memorandum of Understanding on Co-ordination of Business Law, for example, expressly contemplates that,

  > "each Government will keep the other Government informed of proposed reforms in the business law area. Further, each Government will give the other the opportunity to be involved in the others reform process at an early stage."[26]

- **Convergence of substantive law and regulation:** Ideally, differences in regulatory approach should not be maintained unless there are net benefits to either or both countries arising from such differences. An example where continued differences may be appropriate, for example, would be if New Zealand adopted tougher regulation than Australia in certain markets in recognition that competition had not developed in those markets to the same extent as in Australia.

- **Convergence of industry self-regulation:** The New Zealand Telecommunications Carriers' Forum ('TCF') could be readily guided by the industry codes already developed by the Australian Carriers' Industry Forum ('ACIF'). ACIF has been operating for a number of years and generally is

[26] Clause 16, The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, 22 February 2006.

better resourced than the New Zealand TCF. ACIF has produced around 26 industry codes to date. The New Zealand TCF has produced only around four industry codes to date.

These examples are illustrative and would need to be assessed in greater detail in the context of incorporation within the CER framework and work programmes. However, Telstra believes that such measures could provide considerable benefits. Such measures would progress Australia and New Zealand a long way towards realising a single trans-Tasman telecommunications market.

Key points:

- **there are interim steps than can be taken along the way to realisation of a common market that would have their own appreciable benefits, such as greater institutional co-ordination, greater pooling of expertise, and formal consultative obligations.**
- **the revised CER Business Law MoU identifies adopts these measures but – despite the fact that a great deal of the time of the ACCC and the NZCC is devoted to telecoms – none of the new consultative obligations will be applied to telecoms because telecoms is not on the formal work program. Telstra questions the logic of requiring regulators to consult with each other but limiting what they may discuss, particularly when the basis for exclusion of telecoms is implausible.**

Attachment A : Trans-Tasman differences in telecoms regulation

This Attachment identifies a few key differences between Australian and New Zealand telecommunications regulation that are currently impacting on Telstra. The differences relate to the following matters: access regulation; enforcement powers; conduct regulation; and industry self-regulation.

This list is intended to be indicative only and is by no means exhaustive. Note that many of the issues are currently being considered in the context of the 'Regulatory Stocktake' being conducted by the New Zealand government. In addition, the New Zealand government announced its intention to introduce a Bill into parliament that would amend the Telecommunications Act 2001, and address several of the issues identified in Appendix A to this submission, for example providing the New Zealand Commerce Commission with the ability to take enforcement actions.[27]

	Key regulatory differences	Australia	New Zealand
1	**Access regulation:** • Differences in the type of telecoms services and products subject to access regulation to ensure any-to-any connectivity and to promote competition in downstream markets. • Differences in the ability of the regulator in each jurisdiction to ensure reasonable and timely access to non-contestable services and products in the context of access regulation.	• Australia unbundled its local loop in the context of the Part XIC declaration of the "unbundled local loop service" (ULLS) and the "spectrum sharing service" (SSS). Access seekers are utilising these services to engage in facilities-based customer access competition.	• New Zealand has so far decided not to unbundle its local loop so ULLS and SSS services are not provided by Telecom New Zealand. Rather, customer access is only provided in the context of a bandwidth-constrained wholesale "bit stream" data access tail.
		• When arbitrating an access dispute, the ACCC has the power to issue a binding interim determination that can provide access to access seekers on an interim basis while the arbitration continues. Access can therefore be obtained fairly quickly. The ACCC also has powers to give directions in relation to access negotiations.	• The NZCC does not have powers to issue binding interim determinations or give directions in relation to negotiations. The process of obtaining access to regulated services is subject to very considerable delays. During this period, the access seeker cannot purchase the services and is commercially disadvantaged.
		• When arbitrating an access dispute, the ACCC has the power to backdate its final determination to the date on which negotiations first commenced, even if this occurred before the date on which the access dispute was notified.	• When arbitrating an access dispute, the NZCC only has the power to backdate its final determination to the date on which the access dispute was notified. In this manner, the timing of the notification of the dispute is critical.

[27] See Media Statement issued by David Cunliffe, Minister of Communications, "End users benefit from Telecoms Act review", 9 August 2005. Available at: http://www.med.govt.nz/templates/Page____1972.aspx .

	Key regulatory differences	Australia	New Zealand
2	**Enforcement powers:** • Differences in the availability of enforcement mechanisms and powers necessary for the regulator to ensure effective compliance with regulatory instruments. • Differences in the availability of private rights of enforcement action where a third party suffers damages.	• Regulatory access determinations can be enforced either by the party to the determination or by the ACCC as regulator.	• Regulatory access determinations can only be enforced by the party to the determination, potentially at considerable cost.
		• Statutory non-discrimination standard access obligations are the subject of a sophisticated enforcement regime. The regulator or a private party may take enforcement action. A further obligation not to "hinder access" has a low enforcement threshold.	• The statutory non-discrimination access obligation can only be enforced by a private party, potentially at considerable cost. The NZCC has little ability to ensure regulated services are supplied on a non-discriminatory basis under the access obligations.
3	**Conduct regulation:** • Differences in the ability of parties subject to investigatory action to be subjected to binding undertakings in the context of a negotiated resolution.	• The ACCC has the power to accept court enforceable undertakings that have a clear statutory basis. These undertakings can be used by the ACCC to leverage a binding outcome. Third parties are less exposed to risk.	• The NZCC does not have powers to enforce undertakings, so is hindered in its ability to leverage a binding outcome. Where an outcome is negotiated, third parties may be exposed to greater risk.
4	**Industry self-regulation:** • Differences in each nation's reliance on industry self-regulatory codes. • Differences in the number of industry self-regulatory codes in each jurisdiction.	• Australia actively promotes the development of industry codes. As a result, there are a range of industry codes, technical standards, specifications and guidelines.	• New Zealand has been less active in its promotion of industry codes, although these are likely to be developed. The TCF has produced only around four industry codes to date.

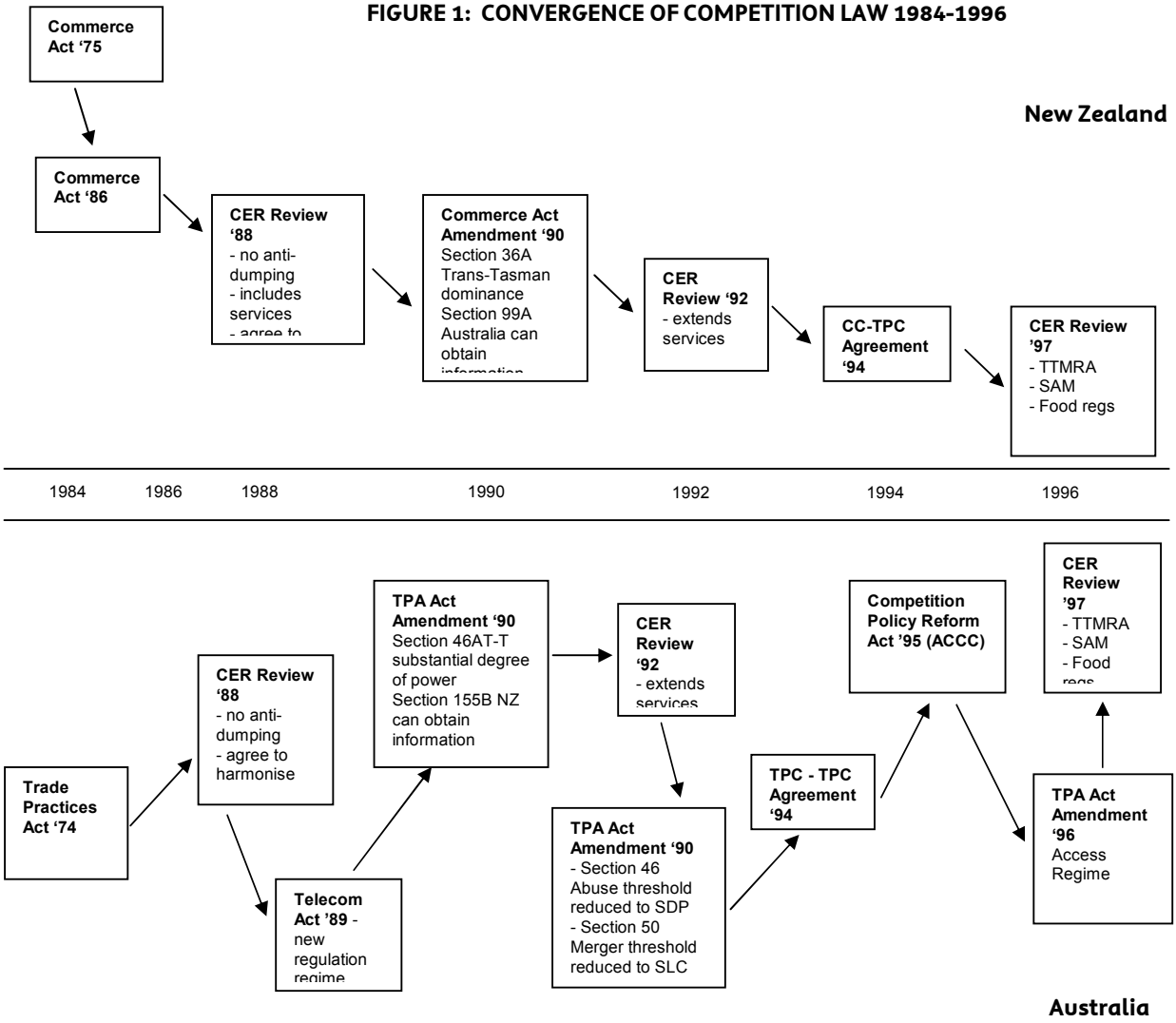
Telstra notes that while some of the differences identified in this table may seem technical or procedural, the ultimate impact of those differences in the context of telecommunications competition regulation is very considerable. As the Productivity Commission indicated its 2001 final report on Australian telecommunications competition regulation: "*Small and subtle differences in process and test thresholds for competition policy can make a large difference… the devil is in the detail.*" [28]

[28] Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, September 2001, p. 21.

Attachment B : Harmonisation of general competition law until 1996

This Attachment illustrates the level of progress that was achieved in relation to the harmonisation of general competition law from 1984 until 1996. General competition law was subsequently included on the CER harmonisation agenda in 1998 in the context of the Memorandum of Understanding on Coordination of Business Law.

FIGURE 1: CONVERGENCE OF COMPETITION LAW 1984-1996



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

(Extracted from: http://www.comcom.govt.nz/publications/GetFile.CFM?Doc_ID=42&Filename=AB101197.pdf)