

**National Interest Analysis [2014] ATNIA 13**

**with attachment on consultation**

**Amendment to the Annex to the Protocol on Trade in Services to the *Australia  
New Zealand Closer Economic Relations Trade Agreement***

(Canberra, date TBA)

[2014] ATNIF 6

## NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

### SUMMARY PAGE

#### **Amendment to the Annex to the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement [2014] ATNIF 6**

##### **Nature and timing of proposed treaty action**

1. The proposed treaty action is to remove the inscription “*Broadcasting and Television: Limits on foreign ownership as set out in the Broadcasting Services Act 1992*” from the Annex to the *Protocol on Trade in Services* (the Protocol)<sup>1</sup> to the *Australia New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA)<sup>2</sup>.

2. Article 10(2) of the Protocol provides that “a Member State may, at any time, either upon request of the other Member State or unilaterally, remove in whole or in part services inscribed by it from the Annex by notifying the other Member State in writing of its intention to do so.” Subject to the recommendation of the Joint Standing Committee on Treaties and approval of the Executive Council, it is proposed Australia would notify New Zealand of its decision to remove the broadcasting inscription by the end of 2014. The amendment would enter into force on the date of Australia’s notification.

##### **Overview and national interest summary**

3. The Protocol provides for liberalised trans-Tasman trade in services, with exclusions in specific areas recorded as “inscriptions” in the Annex to the Protocol. Australia currently has six exclusions under the Protocol: air services, coastal shipping, broadcasting (foreign ownership), broadcasting and television (short-wave and satellite broadcasting), third party insurance and postal services. New Zealand has two exclusions, for coastal shipping and air services. Article 10 of the Protocol provides for the Protocol to be reviewed from time to time to ensure the scope for liberalising trade by removing remaining inscriptions is regularly tested. The Protocol was previously reviewed in 1991, 1992, 1995, 1997 and 1999.

4. The *Broadcasting and Television: Limits on foreign ownership as set out in the Broadcasting Services Act 1992* (BSA) inscription is out of date. New Zealand investors have been able to invest in Australian commercial television broadcasters, subscription television broadcasters and newspapers without restriction since Australia repealed limits on foreign ownership of these media services in 2007.

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<sup>1</sup> Protocol done at Canberra on 18 August 1988: [1989] ATS 2

<sup>2</sup> ANZCERTA done at Canberra on 28 March 1983: [1983] ATS 2

Removing this inscription from the Annex would align Australia's commitments under the Protocol with existing legislation.

5. All foreign persons remain subject to the requirements of Australia's Foreign Investment Policy (FIP) and the *Foreign Acquisitions and Takeovers Act 1975* (FATA). Under the FIP all investments of 5 per cent or more in the 'media sector' as defined in the FIP require prior notification and approval regardless of the value of the investment. Where the Treasurer considers a proposal would be contrary to the national interest, the Treasurer can prohibit the proposal or approve it subject to conditions.

### **Reasons for Australia to take the proposed treaty action**

6. The purpose of the amendment is to align Australia's commitments under the Protocol with existing legislation.

7. The action is the outcome of an agreement by Australia and New Zealand to review the Protocol to ensure the scope for liberalising trade by removing inscriptions is tested regularly. Removing the inscription brings Australia's trade commitments to New Zealand into line with liberalisation previously undertaken domestically by the Australian government. It also gives certainty to current or future New Zealand investors in the media sector that media-specific foreign ownership limits will not be reintroduced.

### **Obligations**

8. The Protocol requires Australia and New Zealand (the Member States) to allow "persons" (individuals and corporations) of the other Member State access rights in their respective markets no less favourable than allowed to their own persons and services ("market access", Article 4). Each Member State is required to afford persons of the other Member State treatment no less favourable than that accorded in like circumstances to their own services providers ("national treatment", Article 5). Persons of one Member State may establish their preferred form of commercial presence (for example, an office or agency) in the territory of the other Member State, subject to the laws and regulations of that Member State (Article 7). Member States are forbidden to introduce measures (laws, regulations or other conditions for the provision of a service) that unjustifiably discriminate against persons of the other Member State or act as a disguised restriction on trade (Article 8), and must ensure that any applicable licensing or certification requirements do not impair or restrict market access (Article 9). The Protocol also sets out rules governing export subsidies (Article 11), monopolies (Article 12) and transparency (Article 13), and specifies circumstances under which one Member State may deny the benefits of the Protocol to a person of the other Member State (Article 14). The provisions of the Protocol apply subject to the foreign investment policies of the Member States (Article 2).

9. Article 2(4) states that subject to certain limited exceptions, the obligations of the Protocol do not apply to services inscribed in the Annex, within the territory of the Member State responsible for the inscription. In other words, Australia and New Zealand may continue to maintain restrictions on the services they have respectively inscribed in the Annex (although Australia cannot discriminate between New Zealand

persons and persons of third countries in the inscribed sectors, and vice versa – “most favoured nation treatment”, Article 6).

10. Removing an inscription from the Annex makes the relevant services subject to the general obligations outlined in paragraph 8 above. By removing the inscription *Broadcasting and Television: Limits on foreign ownership as set out in the Broadcasting Services Act 1992*, Australia would no longer have the right to limit participation by New Zealand persons in the Australian broadcasting industry, subject to its foreign investment policy. Removal of this inscription reflects the current state of Australian broadcasting legislation. Foreign investment in the Australian media remains subject to Australia’s FIP and the FATA (as outlined in paragraph 5).

### **Implementation**

11. Foreign ownership limits in Australia’s *Broadcasting Services Act 1992* were repealed in 2007 by the *Broadcasting Services Amendment (Media Ownership) Act 2006*. Amending the Annex would simply bring Australia’s commitments under the Protocol into line with existing Australian legislation. No further change to Australian legislation would be required to give effect to the amendment.

### **Costs**

12. There are no foreseeable financial costs to Australia of compliance with the treaty action.

### **Regulation Impact Statement**

13. The Office of Best Practice Regulation, Department of Prime Minister and Cabinet, has been consulted and confirms that a Regulation Impact Statement is not required.

### **Future treaty action**

14. Article 10(1) of the Protocol provides that the Member States will regularly review the status of services inscribed in the Annex to determine whether, and how, such inscriptions may be removed. Australia and New Zealand will continue to review remaining inscriptions on a regular basis in accordance with this provision to ensure the scope for liberalising trade by removing inscriptions is tested.

### **Withdrawal or denunciation**

15. There is no express withdrawal or denunciation provision related to the proposed treaty action.

### **Contact details**

New Zealand Section  
Pacific Division  
Department of Foreign Affairs and Trade

## ATTACHMENT ON CONSULTATION

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#### **CONSULTATION**

16. In October 2013 the Minister for Trade and Investment wrote to the Treasurer, the Minister for Communications, the Minister for Industry and the Minister for Infrastructure and Regional Development to seek their views on whether there was scope to remove from the Protocol inscriptions which come within their portfolio responsibility.

17. In response, the Minister for Communications, the Hon Malcolm Turnbull MP, proposed that the inscription *Broadcasting and Television: Limits on foreign ownership as set out in the Broadcasting Services Act 1992 (BSA)* be removed from the Annex to the Protocol as the foreign control limits in the Act had already been repealed in 2007. He further advised that the inscriptions for short wave and satellite broadcasting and postal services should be retained unchanged.

18. In February 2014 the Minister for Infrastructure, the Hon Warren Truss MP, and the Treasurer, the Hon Joe Hockey MP, advised the Minister for Trade and Investment that the remaining Protocol inscriptions for air services, coastal shipping and third party insurance should be retained unchanged.

19. The 2007 repeal of the foreign control limits in the BSA has already given legislative effect to the proposed treaty action. Led by the then Department of Communications, Information Technology and the Arts, a regulation impact statement was prepared and included in the explanatory memorandum to the *Broadcasting Services Amendment (Media Ownership) Bill 2006* (the Bill) analysing the impact of foreign ownership changes at that time.

20. Prior to implementing these reforms in March 2006, the then Minister for Communications, Information Technology and the Arts released a discussion paper to consult publicly on possible reforms to the control and ownership rules, including the proposal to remove foreign ownership rules from the BSA. The regulation impact statement accompanying the Bill noted that submissions received from industry were supportive of the proposal to repeal the foreign ownership restrictions, citing the benefits this would bring to the Australian media through increased access to foreign capital and an increased pool of potential owners. Given the extensive public consultation already undertaken in relation to the BSA reforms, no additional public consultation was undertaken regarding the amendment to the Protocol.

21. States and Territories were informed of the amendment to the Protocol through its inclusion in the biannual schedule of treaties under consideration, negotiation and review by the Australian Government. No concerns were raised.