

Telecommunications

- 3.1 The telecommunications sector is one of the most vibrant and growing areas of business in the world today. The relationship between countries as close as Australia and New Zealand necessarily involves close cooperation in this area. The Committee took much evidence as to the 'state of play' between the two countries in the area of telecommunications.
- 3.2 Senior officials from the Australian Department of Communications, Information Technology and the Arts (DCITA) meet regularly with their counterparts in the New Zealand Ministry of Economic Development (NZMED) to discuss key issues of interest to both countries. ¹
- 3.3 In the past year there have been two meetings between DCITA and NZMED officials. Officials will meet again later this year in Wellington to discuss a wide range of issues relating to telecommunications policy and regulation. ²

1 DCITA, *Submission 22, Vol 2*, p. 16.

2 DCITA, *Submission 22, Vol 2*, p. 16.

The New Zealand telecommunications market

- 3.4 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. It is estimated that the market will 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 has been declining at levels consistent with global trends for fixed lines.³
- 3.5 There are two major fixed-line public telecommunications operators in New Zealand – Telecom New Zealand and TelstraClear. Telecom New Zealand has close to 80% of the local access market in fixed line voice and broadband.⁴
- 3.6 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.⁵

Telecommunications access arrangements

- 3.7 In developing access to telecommunications regimes Australia has relied on the telecommunications specific access regime in Part XIC of the *Trade Practices Act 1974* (TPA) whilst New Zealand, after previous provisions in their *Commerce Act 1986* proved unworkable, enacted the *Telecommunications Act 2001*.⁶
- 3.8 Services that must be supplied to access seekers on demand under the access regimes are known as 'regulated telecommunications services'. Once a service is designated (NZ) or declared (Aus), each country has a different procedural regime to deal with access issues. In Australia the Australian Competition and Consumer Commission

3 DCITA, *Submission 22, Vol 2*, p. 16

4 DCITA, *Submission 22, Vol 2*, p. 16

5 DCITA, *Submission 22, Vol 2*, p. 17

6 DCITA, *Submission 22, Vol 2*, p. 19

(ACCC), independent of the Australian Government, has the power to declare services. In NZ the New Zealand Commerce Commission (NZCC) can only recommend to Government that a service be designated with the final decision being left to the Government.⁷

- 3.9 Anti-competitive conduct is policed in Australia by the ACCC under Part XIB of the TPA. Under this legislation the ACC are able to issue 'competition notices' which are designed to stop anti-competitive conduct and allow the ACC and other parties to seek penalties and damages in the Federal Court.⁸ TPA parts XIB and XIC are the responsibility of the Minister for Communications.⁹
- 3.10 New Zealand relies on section 36 of the *Commerce Act 1986* which is a general restrictive trade provision. There is no provision in the legislation for a regulatory tool such as a competition notice.¹⁰
- 3.11 Two other issues where Australia is ahead of New Zealand on regulatory control and increased competition are:
- Number portability (see explanatory box below); and,
 - Operational separation (see explanatory box below).

7 DCITA, *Submission 22, Vol 2*, p. 19-20.

8 DCITA, *Submission 22, Vol 2*, p. 21.

9 Mr J Murphy, Executive Director, Markets Group, Department of the Treasury, *Evidence*, 12/05/06, p. 12.

10 DCITA, *Submission 22, Vol 2*, p. 21.

NUMBER PORTABILITY¹¹

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.

OPERATIONAL SEPARATION¹²

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.

11 DCITA, *Submission 22*, Vol 2, p. 22.

12 DCITA, *Submission 22*, Vol 2, p. 22.

Telstra Corporation/TelstraClear's position

- 3.12 Telstra Corporation and their New Zealand subsidiary TelstraClear (hereafter Telstra) made a detailed and comprehensive submission to the Committee. The main issues they address are:
- A common market for telecommunications services on both sides of the Tasman;
 - How telecommunications got left behind by CER;
 - Benefits of a common market for telecoms;
 - CER needs to keep evolving;
 - Importance of the telecommunications sector
 - Historical barriers to a trans – Tasman telecoms market;
 - Need for greater harmonisation of sectoral regulation; and
 - Greater coordination of telecoms regulation in the interim.

A common market for telecommunications on both sides of the Tasman

- 3.13 Telstra have difficulties encountered in the supply of seamless services between Australia and New Zealand and point to the lack of regulatory harmonisation, which they argue has been hampered by the Australian and New Zealand Governments.¹³ Specifically Telstra states that telecoms regulation “is a form of sectoral competition regulation, which to date has differed greatly between Australia and New Zealand.”¹⁴
- 3.14 Telstra's submission refers to the proposed Single Economic Market (SEM) and states that “it is time to work towards a common market for telecoms services.”¹⁵

How telecommunications got left behind by CER

- 3.15 Telstra contends that agreements such as WTO Basic Telecoms Agreement and regulatory Reference Paper as well as Australia's

13 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 65.

14 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 66.

15 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 66.

bilateral Free Trade Agreements (FTAs) deal more comprehensively with telecoms. Their submissions states:

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 duplicating the more detailed approach of the existing telecommunications chapters in the FTAs that Australia has concluded with the US and Singapore.¹⁶

- 3.16 Telstra informed the Committee that, in their view, 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 is doing a ‘regulatory stocktake’.¹⁷

- 3.17 Mr Danny Kotlowitz, a solicitor for Telstra’s Regulatory Legal Group, gives the example of number portability as one area in which CER has not kept pace with a current FTA:

In the free trade agreement with Singapore, there is a list of behind-the border, domestic regulatory obligations. For example, there is an obligation to provide number portability. That means that when you go to a competing provider for your mobile, you get to take your number with you. In New Zealand, that is currently not available; it is not mandated.¹⁸

- 3.18 In Telstra’s opinion:

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.¹⁹

- 3.19 The submission by Australia’s Department of Communications, Information, Technology and the Arts echo these comments when it states in relation to new entrants to the New Zealand market that;

... a number of significant barriers exist in the mobile market. Entrants are obliged to have demonstrated plans to

16 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, pp. 68 - 69.

17 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 69.

18 Mr D Kotlowski, Solicitor, Regulatory Legal Group, Telstra, *Evidence*, 12/05/06, p. 11.

19 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 69.

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.²⁰

Benefits of a common market for telecoms

3.20 Telstra lists benefits of a common market for telecoms such as:

- Reduced charges by the elimination of international roaming charges;²¹
- The continuing ability to safeguard key differences in each countries' approach to telecommunications regulation in such areas as universal services and content regulation.²²

3.21 At this point Telstra see the mechanics of a single economic market for telecommunications as something that can be discussed in due course. What is important now is to identify a telecommunications SEM as a goal that can be achieved and worked towards:

...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.²³

20 DCITA, *Submission 22, Vol 2*, p. 17.

21 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 72. Telstra estimate the savings to Australian consumers to be \$31 million per year.

22 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 72.

23 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 72.

CER needs to keep evolving

3.22 It is Telstra's belief that that:

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 CER²⁴

Importance of the telecommunications sector

3.23 Telstra believes that telecoms are in danger of being put in the CER's 'too-hard basket'²⁵ and, given the importance of telecommunications to all aspect of business, suggests this would have a negative impact on the economic development of both countries.

Historical barriers to a trans – Tasman telecoms market

3.24 Until recently New Zealand had 'light touch' regulation of telecoms and Australia's regulatory regime was more mainstream in international terms.

3.25 It is Telstra's view that Australia is now tending towards over-regulation in international terms whilst New Zealand, with the introduction of the *Telecommunications Act* (2001), has abandoned the 'light touch' regulatory approach. As a result regulatory approaches in the two countries are now converging.²⁶

3.26 With New Zealand currently undergoing a 'regulatory stocktake' in relation to telecommunications in which many issues of divergence between Australia and New Zealand, such as unbundling of the local loop, will be addressed it is Telstra's view that CER "drive greater convergence, by setting a goal of achieving a common market in telecoms services to the benefit of both economies."²⁷

24 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 73.

25 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 74.

26 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 75.

27 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 75.

Need for greater harmonisation of sectoral regulation

- 3.27 Telstra believes that “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.”²⁸

Greater coordination of telecoms regulation in the interim

- 3.28 Telstra envisages interim steps that can be taken along the way to realisation of a common market such as:
- greater institutional co-ordination;
 - greater pooling of expertise; and
 - formal consultative obligations.²⁹
- 3.29 Telstra is critical of the fact that, although the revised CER Business Law MoU adopts the above measures they are not being applied to telecoms because telecoms are not on the formal work program. This is despite the fact that a great deal of the time of the ACCC and the NZCC is devoted to telecoms Telstra believes that regulators are being asked to consult with each other but what they may discuss is being limited.³⁰

AAPT's position

- 3.30 AAP Telecommunications (AAPT) grew out of Australian Associated Press (AAP) in 1991 after the Australian telecommunications market commenced de-regulation. After various owners AAPT was fully acquired by Telecom New Zealand in 2000.
- 3.31 AAPT's submission is concerned expressly with “why the proposals in the Telstra submission are not in Australia's interest.”³¹ Specifically AAPT disagrees with following points made by Telstra:
- Non inclusion of telecommunications in CER
 - End user benefits of regulatory harmonisation
 - ⇒ International mobile roaming savings

28 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 76.

29 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 79.

30 Telstra Corporation Limited/TelstraClear Limited, *Submission 6, Vol 1*, p. 79.

31 AAPT, *Submission 28, Vol 2*, p. 61.

⇒ One contract one bill

- 3.32 AAPT's submission also offers ways to include telecommunications in CER on a sustainable basis.

Non inclusion of telecommunications in CER

- 3.33 AAPT argues that, if telecommunications requirements under the WTO are looked at Australia and New Zealand are at "similar stages of WTO compliance."³²

- 3.34 It is AAPT's position that the elements required in a Free Trade Agreement are fully provided for by current Australian and New Zealand Regulatory regimes;

But the extent to which there is perhaps an impediment to the 'one market' is that we have not yet even formally harmonised the trade practices requirements – the actual underpinning competition law. Talking about harmonising the specific regimes prior to that is a bit strange when we have not worked out issues about trans-Tasman enforcement for generic competition law. So it is hard to understand how you could actually build a trans-Tasman harmonisation for the specific before you have done the generic.³³

End user benefits of regulatory harmonisation

- 3.35 AAPT rejects the idea that regulatory harmonisation will provide any benefits to end-users. In relation to mobile roaming charges their view is that:

. . . there is nothing about harmonising the regime that would magically make that inbound roaming more competitive and there is actually nothing that would make it immediately covered by the regulatory regime because you would have to cover domestic mobile roaming, which neither regime has done . . . ³⁴

- 3.36 AAPT expressed bemusement as to Telstra's submission that regulatory harmonisation will promote the ability to have "one

32 AAPT, *Submission 28*, Vol 2, p. 67.

33 Mr D Havyatt, Solicitor, Head of Regulatory Affairs, AAPT Ltd, *Evidence*, 7/08/06, p. 6.

34 Mr D Havyatt, Solicitor, Head of Regulatory Affairs, AAPT Ltd, *Evidence*, 7/08/06, p. 3.

contract and one bill.” In AAPT’s view there “is nothing in the existing regime to stop a person who is a service provider writing one contract and offering one bill.”³⁵

- 3.37 AAPT’s believes that regulatory harmonisation is unnecessary as the end result of current regulatory regimes will be the same:

So we both have the same starting point and the same end point. It is a bit like we are both travelling from Sydney to Brisbane but one of us has chosen to do that journey via the New England Highway and the other has gone via the Pacific Highway. . . The call for harmonisation is bit like making a new road when we are already on pretty well laid out roads.³⁶

Including telecommunications in CER

- 3.38 The Committee was impressed with the effort put in by AAPT, in commissioning their own research into trans-Tasman business, to look at the “inclusion of telecommunications in CER on a sustainable basis.” The Committee notes that AAPT sees closer regulatory ties (but not necessarily harmonisation) as one way forward:

AAPT would further support regular meetings that include both policy departments and regulators to undertake “stocktakes” of the current institutional settings in both markets. However, we would note that these meetings are more likely to be productive if conducted on the “economy to economy” model of APECTEL than the “government to government” model more traditionally associated with international relations.³⁷

The committee’s view

- 3.39 The Committee notes the evidence from DCITA on the close ties between officials in Australia and New Zealand on telecommunications. In addition the Committee notes the lack of formal ministerial contact. Ministerial ties are already provided for in

35 AAPT, *Submission 28*, Vol 2, p. 68.

36 Mr D Havyatt, Solicitor, Head of Regulatory Affairs, AAPT Ltd, *Evidence*, 7/08/06, p. 3.

37 AAPT, *Submission 28*, Vol 2, p.

many other areas by Ministerial Councils and it is the Committee's recommendation that a Telecommunications Ministerial Council is established.

Recommendation 3

The Committee recommends that a Telecommunications Ministerial Council be established.

- 3.40 The Committee notes some quite divergent views on regulatory harmonisation and other issues relating to telecommunications in Australia and New Zealand. It is not the province of this Committee to adjudicate complex regulatory and technical issues. These are things best left to legal and technical experts. The Committee, however, is able to see, from the evidence gathered, that there is much room for more discussion on these issues.
- 3.41 The establishment of a Telecommunications Ministerial Council will be useful to address issues that are raised for time to come in the future. However, the Committee is of the view that telecommunications be placed on the CER Work program at the earliest opportunity to facilitate discussion of the complex technical and regulatory issues mentioned above.

Recommendation 4

The Committee recommends that telecommunication be placed on the CER Work Program at the earliest opportunity.