Telstra

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Attention: Joanne Towner
Secretary
Standing Committee on Legal and Constitutional Affairs
By email: Joanne.Towner.reps@aph.gov.au

Dear Ms Towner

Inquiry into the harmonisation of legal systems both within Australia and between Australia and New Zealand

I refer to your letter dated 8 December 2005 in which you invited Telstra Corporation Limited to make a supplementary submission to update the Legal and Constitutional Affairs Committee on any developments or changes that might have taken place since Telstra's original April 2005 submission to the above Inquiry.

Relevantly, Telstra made a submission to the New Zealand and Australian Governments in August 2005 on the need for trans-Tasman harmonisation of telecommunications sectoral regulation. Telstra's August 2005 submission is of direct relevance to this Inquiry and expands and updates upon the issues that Telstra raised in its earlier April 2005 submission. Telstra has **attached** a copy of its August 2005 submission for the consideration of the Committee as part of this Inquiry and requests that this submission (with this covering letter), be treated as Telstra's supplementary submission. To summarise:

- Telstra is supportive of harmonisation efforts. Telstra believes the Committee should give specific attention to the need for greater trans-Tasman harmonisation of sectoral competition regulation and greater inter-State harmonisation of Australian consumer protection legislation.

- While there is already a high degree of harmonisation of the general competition laws of Australia and New Zealand, little attempt has yet been made by both Governments to co-ordinate sectoral competition regulation. Such co-ordination is fundamental to the realisation of a single economic market and a precondition for greater economic integration.

- Both economies would clearly stand to benefit from efforts directed towards greater co-ordination of telecommunications sectoral competition regulation. The telecommunications sector is critical to the future prosperity of both economies. There are currently significant adverse divergences in regulatory approach. There is considerable scope for greater co-ordination

- Greater harmonisation of Federal, State and Territory consumer protection laws in Australia is similarly important. Telstra has identified specific issues requiring harmonisation in relation to the various State laws dealing with telemarketing, door to door sales, unfair terms in consumers contracts, third party trading stamps and trade promotions.

Thank you for the opportunity to make a supplementary submission. Please let us know if the Committee requires further information on any issues identified by Telstra in both submissions.

Yours sincerely

Tony Warren
General Manager Regulatory Affairs
Telstra Corporation Limited

Telstra Corporation Limited
TelstraClear Limited

Review of the Memorandum of Understanding between the Government of New Zealand and the Government of Australia on Coordination of Business Law (MOU)

Submission by Telstra Corporation Limited and TelstraClear Limited to The Treasury and the Ministry of Economic Development

5 September 2005

A. Executive Summary

This submission sets out a proposal to expressly contemplate, within the MOU, efforts directed towards the greater co-ordination of telecommunications regulation.

1. Importance of regulatory co-ordination

> "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."[1]

This quote from the Australian Department of Foreign Affairs and Trade highlights that regulatory harmonisation and co-ordination is fundamental to the realisation of a single economic market. The MOU similarly emphasises, as a key principle, the importance of accelerating, deepening and widening the trans-Tasman relationship by further coordination of significant areas of law and regulation.

As recognised in the MOU, a high degree of trans-Tasman business law co-ordination has now been achieved in such areas as competition law, consumer protection law, taxation law, company law, and securities law. Such co-ordination has realised significant economic benefits to enterprises engaged in trans-Tasman business operations. In this first review of the MOU, it is important that momentum is not lost and that pro-active steps are taken towards achieving greater economic integration.

While *generic* competition law and regulation has been targeted for co-ordination, little attempt has yet been made by both Governments to co-ordinate *sectoral* competition regulation. 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.

2. Co-ordination of telecommunications regulation

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 are currently significant adverse divergences in regulatory approach. There is considerable scope for greater co-ordination.

The Annex to the MOU already contemplates work programmes relating to competition law, legislation affecting electronic transactions, and consumer protection in electronic commerce. The incorporation of a work programme relating to telecommunications regulation would be entirely consistent with, and could build upon, these existing work programmes.

Telstra urges the Australian and New Zealand governments to expressly contemplate, within the MOU, efforts directed towards the greater co-ordination of telecommunications regulation. Telstra has identified a number of matters in this submission that it believes could inform a work programme directed specifically at telecommunications regulation.

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1 Department of Foreign Affairs and Trade, *New Zealand Country Brief*, September 2004

B. 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 Domestic Product. Given these statistics, the combined 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.

Several other issues suggest that the telecommunications sector should be a key area of focus in the current review of the MOU:

- **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 in Australia. A range of telecommunications providers, including 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. As well as providing substantial benefits, telecommunications services may involve significant household and business expenditure. Any unnecessary regulatory costs incurred by telecommunications operators may be passed to consumers in the form of higher telecommunications charges, impacting adversely on consumers in both nations.

- **Social impact:** The efficient provision of telecommunications services is vital not only to each nation's future economic prosperity, but also to the collective well-being of its citizens. Telecommunications services are now central to the ability of citizens to participate fully in society and the global community.

Largely in recognition of these issues, the MOU already includes work programmes relating to electronic transactions, and consumer protection in electronic commerce. The MOU also relevantly contemplates a work programme in relation to the application and enforcement of competition law. In this manner, three of the eight work programmes in the Annex to the MOU are already directly relevant to telecommunications regulation.

The incorporation of a work programme relating to telecommunications regulation into the MOU would be entirely consistent with, and could build upon, these existing work programmes.

Importantly, Telstra also highlights the outcome of the first session of the Australia-New Zealand Leadership Forum held in Wellington on 14 and 15 May 2004. The 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.

The Forum determined as its main objective, moving from "CER" to the establishment of a single market (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.

The seven key elements of a single market identified by the Forum were set out in a resulting communiqué sent to the respective Prime Ministers of Australia and New Zealand as follows:

"• a common border;

- common accounting and financial reporting standards;
- the integration of competition and consumer protection regimes;
- the liberalising of foreign investment regimes;
- the establishment of a trans-Tasman mutual recognition arrangement governing securities offerings and managed investment scheme interests;
- harmonised Australian New Zealand Stock Exchange; and
- harmonising and/or integrating business regulation with particular reference to taxation, banking, ***telecommunications*** and intellectual property." *(emphasis added)*

Telstra notes that harmonisation of telecommunications regulation was expressly recognised on this list, further emphasising that greater co-ordination of telecommunications regulation is fundamental to the future realisation of a single trans-Tasman market.

In the Joint Statement issued following the second annual meeting of the Australia-New Zealand Leadership Forum in Melbourne in April this year, the Forum further recognised the importance of close cooperation between Australian and New Zealand business and Governments on the regional Free Trade Agreement (FTA) agenda. Telstra points out that the FTAs recently concluded by Australia with the United States, Thailand and Singapore all include specific sections covering regulation of telecommunications services. In contrast, the CER has no specific coverage of telecommunications regulation or its harmonisation. The New Zealand – Australia relationship has therefore fallen some way behind Australia's other regional trade relationships in this respect.[2]

C. Barriers to the realisation of a trans-Tasman telecoms market

As already recognised by both Governments, divergences in regulatory approach act as a significant impediment to the realisation of a trans-Tasman market. Differences in regulation may impose material transactions and compliance costs on firms operating in both nations. Over-regulation by one nation or under-regulation by the other may distort efficient trade and investment and lead to real economic and welfare costs.

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[2] Joint Statement for the Australia-New Zealand Leadership Forum by Margaret Jackson and Kerry McDonald, Melbourne, 30 April 2005.

In addition, numerous businesses now operate on a trans-Tasman basis reflecting the realisation of a integrated "trans-Tasman" market in many other economic sectors, such as banking. However, divergent regulation in New Zealand and Australia makes it particularly difficult for telecommunications operators to provide equivalently priced telecommunications products and services with equivalent functionality in a seamless "trans-Tasman" manner to these business customers.

Historical differences in approach between Australia and New Zealand in relation to the telecommunications sector are clear:

- New Zealand liberalised its telecommunications sector at a much earlier stage than Australia, in the late 1980s but relied purely on generic competition law as the principal regulatory instrument. New Zealand's previous "light handed" approach was abandoned with the enactment of the *Telecommunications Act 2001 (NZ)*. New Zealand has now moved closer towards the Australian regulatory model.

- 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 over-regulation by international standards and increasingly so in the light of the recent announcements by the Australian government in the context of the sale of Telstra. Even prior to these announcements, the Productivity Commission, for example, was recommending that telecommunications competition regulation in Australia should be rolled back in those markets where competition has developed.

Notwithstanding greater convergence of approach since 2001, the Australian and New Zealand approaches to telecommunications regulation still exhibit significant differences. Generally, Telstra Corporation Limited is subjected to significantly greater regulation in Australia than Telecom New Zealand Limited is subjected to in New Zealand. A number of critical New Zealand regulatory decisions have been at odds with similar decisions made in Australia, including New Zealand's decision to date not to unbundle the local loop.

The **Attachment** to this submission identifies a number of key 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.

Telstra submits that continuing divergences in regulatory approach between Australia and New Zealand are acting as an impediment to the realisation of a single trans-Tasman telecommunications market.

D. Benefits from greater co-ordination of telecoms regulation

Intuitively, the greatest economic benefits from further co-ordination of business regulation are likely to arise in those areas where only little or moderate progress has been made. In this manner, Telstra believes that key target areas for the MOU 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.

Telstra has identified below a number of key benefits that it believes could result from a work programme in the MOU directed specifically at telecommunications regulation. 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.

- **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 a formal institutional arrangement. Professor Allan Fels (ex-chairman of the ACCC) has suggested for example, that:[3]

  > "...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 in relation to 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.

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

- **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 MOU, 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.*"

- **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 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 better resourced than the New Zealand Telecommunications Carriers' Forum. ACIF has produced around 26 industry codes to date. To date, only two industry codes of that nature exist in New Zealand.

These examples are illustrative and would need to be assessed in greater detail within the context of a work programme under the MOU. 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.

E. Suggested refinements to the MOU

In order to give effect to Telstra's submissions set out above, Telstra suggests several refinements to the MOU, as follows:

- **Telecommunications work programme:** Telstra proposes that the existing eight work programmes in the Annex to the MOU could be extended to include telecommunications regulation. For example, the following work programme could be incorporated into the Annex to the MOU:

  > "To more closely co-ordinate telecommunications regulation between Australia and New Zealand, to avoid further divergences in regulatory approach and to encourage greater institutional, legal, regulatory and self-regulatory convergence, thereby promoting the development of a single trans-Tasman telecommunications market."

  Telstra proposes that this new work programme, for example, could work through the various issues that Telstra has identified in this submission.

- **Consultation obligation:** Telstra notes that Article 10 of the MOU already contains a requirement for the two Governments to consult with a view to resolving differences between their respective business laws or regulatory practices that give rise to an impediment to the development of the trans-Tasman relationship. Telstra proposes that the Governments could also agree that they will consult with each other in relation to issues relating to telecommunications regulation.

- **Law reform:** Telstra notes that Article 11 of the 2002 MOU already contains a requirement for each Government to keep the other Government informed of proposed reforms in the business law area and to give the other the opportunity to be involved in the other Government's reform process at an early stage. Again, Telstra proposes that this requirement could be extended so that it is clear that it applies in relation to telecommunications regulation.

F. Conclusions

As identified in this submission, Australia and New Zealand would both 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 are currently significant adverse divergences in regulatory approach. There is considerable scope for greater co-ordination.

Partly in recognition of the importance of telecommunications to each nation, the MOU already includes work programmes relating to electronic transactions, and consumer protection in electronic commerce. The MOU also relevantly contemplates a work programme in relation to the application and enforcement of competition law. In this manner, three of the eight work programmes in the Annex to the MOU are already directly relevant to telecommunications regulation.

The incorporation of a work programme relating to telecommunications into the MOU would be entirely consistent with, and could build upon, these existing work programmes.

Telstra therefore urges the Australian and New Zealand governments to expressly contemplate, within the MOU, efforts directed towards the greater co-ordination of telecommunications regulation. Telstra believes that the measures it has suggested in this submission would go a considerable way towards realising a single trans-Tasman telecommunications market.

Attachment : 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[5]. 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.

	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.

[5] Telstra notes that the New Zealand government has initiated a review of the New Zealand Telecommunications Act 2001 and has announced changes which, if enacted, would go some way to addressing the differences identified above. Whilst the Australian Government has signalled imposing increased regulation on Telstra in Australia.

	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. • 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.	• Regulatory access determinations can only be enforced by the party to the determination, potentially at considerable cost. • 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. Key codes can be given binding statutory effect.	• New Zealand has been less active in its promotion of industry codes, although these are likely to be developed. Only two industry codes exist in New Zealand that are comparable to those in Australia. Key codes cannot be given binding statutory effect.

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."* [6]

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