Achieving a Common Market for Telecommunications Services in Australia and New Zealand *

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I. Introduction

Well before the World Trade Organization (WTO) was established[1] and the number of free trade agreements (FTAs)[2] began to explode,[3] Australia and New Zealand

* This paper was prepared pursuant to a research contract between the University of Melbourne and Telstra Corporation Limited (Telstra). We would like to thank Telstra for its assistance in our research for this paper, including provision of relevant background materials and helpful discussions with Matthew Cole, Wendy Dodd, Danny Kotlowitz, and Dr Tony Warren. We are grateful to Dr Martyn Taylor for his insightful comments and suggestions on an earlier draft of this paper. We also thank the Centre for Media and Communications Law of the University of Melbourne, especially Associate Professor Andrew Kenyon and Amy Harrington, for their advice and administrative support in relation to this research project, as well as the anonymous referee for valuable comments. Finally, thanks to Arlen Duke for helpful discussions on competition issues related to this paper and to Martin Vranken for his input. The views expressed here are those of the authors and do not necessarily reflect those of Telstra. Any errors are ours.

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1 Marrakesh Agreement Establishing the World Trade Organization, LT/UR/A/2 (15 April 1994) 1869 UNTS 190 (Marrakesh Agreement).

2 We use the term 'free trade agreements' to refer to bilateral and regional agreements between states or customs territories that focus at least in part on liberalising trade in services between the parties, as distinct from the multilateral system established under the WTO. We recognise that 'preferential trade agreements' is often a more appropriate description, given that trade under these agreements is never actually free and that these agreements may distort trade with non-parties.

3 See, eg, WTO, Consultative Board, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004) [60], [76]; World Bank, *Global Economic Prospects: Trade, Regionalism, and Development* (2005) 28-30; M Roy, J Marchetti and H Lim, 'Services Liberalization in the New Generation of Preferential Trade

signed the Australia New Zealand Closer Economic Relations Trade Agreement (CER).[4] The CER built on its predecessors, the New Zealand-Australia Free Trade Agreement [5] and the Australian-New Zealand Agreement, [6] consolidating the uncharacteristically solid bond between Australia and New Zealand by progressively eliminating barriers to trade in goods between the two countries. Since its signature in 1983, the CER has been subject to several reviews and expansions, and the Australian and New Zealand economies have become increasingly integrated, including through agreements to eliminate anti-dumping measures on goods originating in each other's territory[7] and to liberalise trade in services.[8]

In late 2006, two Australian parliamentary reports endorsed the continued strengthening of the Australia-New Zealand economic relationship specifically in the field of telecommunications. The House of Representatives Standing Committee on Legal and Constitutional Affairs explored the harmonisation of legal systems between Australia and New Zealand and recommended 'the legal harmonisation of the Australian and New Zealand telecommunications regulation frameworks with a view to fostering a joint telecommunications market'. [9] The Joint Standing Committee on Foreign Affairs Defence and Trade reviewed the CER and recommended that 'telecommunication be placed on the CER Work Program at the earliest opportunity'.[10] Also at the end of 2006, New Zealand introduced the first part of a telecommunications reform package that will bring its telecommunications regulation closer in line with that applicable in Australia.[11]

These events make it an opportune time to reflect on how a common market for telecommunications services in Australia and New Zealand could be achieved, further deepening the level of integration between the two countries and bringing us closer to the objective of a single economic market foreshadowed by the CER and recognised in the more recent Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law (MOU).[12] In advocating a 'common telecommunications market', we

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Agreements (PTAs): How Much Further than the GATS?', WTO Staff Working Paper ERSD-2006-07, (2006) 6-8.

4 (28 March 1983), ATS 1983, No 2.

5 (31 August 1965), [1966] ATS 1.

6 (21 January 1944), [1944] ATS 2.

7 Protocol to the Australia New Zealand Closer Economic Relations – Trade Agreement on Acceleration of Free Trade in Goods (18 August 1988), [1988] ATS 18, art 4.2.

8 Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (18 August 1988), [1988] ATS 1988 20.

9 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Harmonisation of Legal Systems Within Australia and Between Australia and New Zealand* (2006) [3.116] (Recom 9).

10 Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade, *Review of Australia-New Zealand Trade and Investment Relations* (2006) 34 (Recom 4).

11 Telecommunications Amendment Act (No 2) 2006 (NZ) (Royal Assent received 18 December 2006); 'First Reading: Telecommunications Amendment Bill' (*Hansard*, 29 June 2006).

12 Signed 22 February 2006, (replacing the MOU signed on 31 August 2000, which

refer to a regulatory system under which telecommunications networks and services in Australia and New Zealand are liberalised through removal of excessive or trade-restrictive government regulation. At the same time, the system must retain sufficient harmonised competition and telecommunications rules (consistent with international best practice) to promote market access in those markets that exhibit low contestability.[13] Although both countries have already benefited from increased liberalisation of trade in telecommunications (that is, through the removal of discriminatory or otherwise trade-restrictive domestic laws and regulations) and the harmonisation of general competition law, the potential for further economic gains in this area will remain unrealised unless Australia and New Zealand collaborate in reforming telecommunications regulation and in targeting private anti-competitive conduct specifically in the telecommunications sector.

In this paper, we first identify in Part II the benefits of a common telecommunications market in Australia and New Zealand, before explaining in Part III the extent to which these two countries are already subject to obligations to liberalise telecommunications and harmonise associated regulations. Part IV surveys the treatment of telecommunications services in certain FTAs other than the CER, while Part V examines some practical considerations that will arise in creating a common market of the kind envisaged, including the feasibility of harmonising telecommunications regulation, the need to ensure compliance with WTO obligations, and the formal structures that could be used to set out the parties' agreement. We do not purport to propose the optimal regulatory content for a common telecommunications market in these two countries; that is a matter for the respective governments and their constituencies. Nevertheless, we conclude that, as a first step, Australia and New Zealand could incorporate telecommunications expressly in the MOU work program, with a view to establishing in subsequent years a more permanent agreement on telecommunications in the CER. This would not only bring the two countries closer to their goal of a single economic market, but also potentially encourage greater telecommunications competition and liberalisation worldwide, with resulting benefits for both consumers and suppliers in Australia and New Zealand.

II. Why a Common Telecommunications Market?

In order to evaluate the benefits of a common market for telecommunications services in Australia and New Zealand, we must first understand the rationale for liberalising trade in telecommunications more generally, as well as the need for associated harmonisation of telecommunications regulation. In this section, we address the potential benefits of liberalisation and harmonisation in the telecommunications sector before turning to the specific proposal of a common telecommunications market in Australia and New Zealand.

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replaced the MOU signed on 1 July 1988) [3].

13 In Part II(c)(ii) below, we expand on our use of the term 'common market' in this context.

(a) Benefits of liberalising trade in telecommunications services

Barriers to trade in services typically involve 'prohibitions, quotas, and government regulation', all of which may (i) affect either the operations or the entry or establishment of service suppliers and (ii) be discriminatory or non-discriminatory against foreign services or service suppliers.[14] The benefits of liberalising trade in telecommunications services correspond with the benefits of liberalising trade in services more generally. According to the Organisation for Economic Co-operation and Development (OECD):

> The economic cost of protecting inefficient services is arguably of greater overall significance than that due to protectionism in the goods sector. … Services are essential inputs into the production of virtually all other goods and services, and producers depend on services to deliver their output to end users. Because the price and quality of the services available in an economy have major impacts on all sectors, service sector policies and efficiency-enhancing reforms – including regulatory and institutional changes – can have major effects on overall economic performance.[15]

Thus, the 'consumers' likely to benefit from liberalising trade in services (through improved quality, range and prices) include not only individual service consumers but also, on a significant scale, industrial users of services. Other beneficiaries include service sector employees and, of course, service firms wishing to compete in foreign markets.[16]

Turning to telecommunications services in particular, the OECD has stated: '[a]dopting a liberal trade and investment regime, and a pro-competitive regulatory stance in key infrastructural service sectors – telecommunications, finance, transport, energy – will be essential if countries are to maximise benefits from the internationalisation of services markets.'[17] Australia, together with several other WTO members, has highlighted the importance of telecommunications in driving economic growth, stimulating innovation, and supporting facilities such as the internet, e-commerce, and business process outsourcing, as well as virtually all other goods and services sectors.[18] The benefits of liberalising telecommunications are evidenced in the decline in prices and improvement in quality and productivity that have already occurred in various countries.[19] Together with appropriate

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14 B Hoekman, 'Liberalizing Trade in Services: A Survey', World Bank Policy Research Working Paper 4030 (October 2006) 16-17. See also G Verikios and Xiao-guang Zhang, 'The Economic Effects of Removing Barriers to Trade in Telecommunications' (2004) 27 *The World Economy* 435, 447.

15 OECD, *GATS: The Case for Open Services Markets* (2002) 23-24. See also P Dee, 'The Economy-Wide Effects of Services Trade Barriers' in OECD, *Enhancing the Performance of the Services Sector* (2005) 103, 103-12; Hoekman, above n 14, 24-25.

16 OECD (2002), above n 15, 30-33.

17 Ibid 23 (emphasis added). See also Hoekman, above n 14, 22.

18 WTO Council for Trade in Services: Special Session, *Communication from Australia, Canada, the European Communities, Japan, Hong Kong China, Korea, Norway, Singapore, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, and the United States: Liberalization of Telecommunication Services*, TN/S/W/50 (1 July 2005) [1].

19 Australian Competition and Consumer Commission, *Changes in prices paid for*

regulation, these effects may also assist in meeting universal service objectives by increasing access to telecommunications and promoting technological developments.[20]

In Australia, the Australian Communications and Media Authority has estimated that reforms in 1997 and subsequent developments improving price competition and innovation in the telecommunications sector led to benefits such as $15.2 billion in increased production by 2005-2006, consumer benefits of $1.9 billion in 2005-2006, and small business benefits of $444 million in 2005-2006. This is reflected in growth in internet and mobile subscription and use, falling internet, mobile and fixed-call prices, and a move away from fixed line to newer technologies.[21] These benefits flowed primarily from liberalising trade in telecommunications (ie permitting substantial market entry and investment by new carriers and carriage service providers) but also from regulatory measures that facilitated market access in key markets that exhibited low pre-existing contestability, as explained in the next section.

(b) Benefits of harmonising competition and telecommunications regulation

Liberalising trade in goods or services may be designed to increase efficiency and thereby enhance consumer and economic welfare, but it cannot achieve this end alone. As one of us has explained elsewhere, 'even if all barriers to international trade were removed, in the absence of complementary competition regulation, some markets would still be closed to new entrants because of anti-competitive conduct. These private barriers would replace the public barriers to market access removed by multilateral trade agreements.'[22] Thus, allowing foreign telecommunications

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telecommunications services in Australia, 2005-06 (2006); OECD, *OECD Communications Outlook* (2003) 17; C Fink, A Mattoo and R Rathindran (Development Research Group, World Bank), 'Liberalising Basic Telecommunications: Evidence from Developing Countries' in OECD, *Quantifying the Benefits of Liberalising Trade in Services* (2003) 85, 99; OECD (2002), above n 15, 29-30, 39; WTO Council for Trade in Services: Special Session, *Communication from the European Communities and their Member States – GATS 2000: Telecommunications*, S/CSS/W/35 (22 December 2000) [1]; WTO, Council for Trade in Services, *Telecommunication Services: Background Note by the Secretariat*, S/C/W/74 (8 December 1998) [3]. But see Dee, above n 15, 103, 113 (gains from services trade reform in telecommunications small relative to sectors like professional and distribution services).

20 P Xavier, 'Universal Access to Telecommunications in a Competitive Environment' in OECD and World Bank, *Liberalisation and Universal Access to Basic Services: Telecommunications, Water and Sanitation, Financial Services, and Electricity* (OECD Trade Policy Studies, no 19, 2006) 25, 33, 36.

21 Australian Communications and Media Authority, *ACMA Communications Report 2005-06* (2006) 207-14, 217-18. However, line rental rates have increased: Xavier, above n 20, 25, 36-37. On the growth of telecommunications markets, see in OECD countries, see OECD, *OECD Communications Outlook* (2003), above n 19, 13.

22 A Mitchell, 'Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO' (2001) 24 *World Competition* 343, 343. See also E Fox, 'The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition' (2006) 9 *Journal of International Economic Law* 271, 271-72;

service suppliers to provide domestic telecommunications services will not ensure an efficient domestic telecommunications market if, say, an incumbent or monopoly supplier prevents new entrants (whether foreign or domestic) from competing (eg by denying critical network interconnection). Appropriate government regulation can address this anti-competitive conduct.

Competition and trade law share the goal of achieving efficiency in production and consumption. Traditionally, they worked alongside each other, with international trade law operating at the border and competition law within the border. More recently, particularly with services trade liberalisation, trade law has increasingly extended beyond the border. Competition law faces a corresponding need to extend beyond domestic markets, for example, in order to address international cartels.[23] The possibility of an international competition law framework looks remote at present[24] and is beyond the scope of this paper. However, in the interim, several bilateral initiatives (including between Australia and New Zealand) already seek greater coordination in relation to competition law,[25] recognising that this may minimise inconsistencies, prevent duplication of effort and expense, encourage foreign business and investment,[26] and lead to optimal outcomes in both countries.

Particularly in telecommunications and other network-based service sectors, regulation may also be promulgated for a range of other reasons, including 'to address market failures or achieve social (noneconomic) objectives'.[27] For example, governments may decide they need to regulate to determine access to infrastructure, allocate scarce resources that are necessary to provide a telecommunications service, or ensure universal access to telecommunications including in remote regions and for disadvantaged customers.[28] The extent and type

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M G Desta and N J Barnes, 'Competition Law and Regional Trade Agreements: An Overview' in L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (2006) 239, 242-43.

23 Mitchell, above n 22, 346-47; M Taylor, *International Competition Law: A New Dimension for the WTO?* (2006) 35-43.

24 See below n 89 and corresponding text; 'OECD Committee Lacks Enthusiasm for Draft International Antitrust Code' (1993) 65 *Antitrust Trade and Regulation Report* 771; Fox, above n 22, 290-1; Desta and Barnes, above n 22, 239, 243.

25 Mitchell, above n 22, 354-56. See also J Rennie, 'Competition Regulation in SAFTA, AUSFTA and TAFTA: A Spaghetti Bowl of Competition Provisions' (2007) 13 *International Trade Law & Regulation* 30; A Guzman, 'International competition law' in A Guzman and A Sykes (eds), *Research Handbook in International Economic Law* (2007) 418, 425-28; E Elhauge and D Geradin, *Global Antitrust Law and Economics* (2007) 1188-202.

26 Rennie, above n 25, 37. See also D Medvedev, 'Beyond Trade: The Impact of Preferential Trade Agreements on Foreign Direct Investment Inflows', World Bank Policy Research Working Paper 4065 (November 2006) 4.

27 Hoekman, above n 14, 52.

28 Shin-Yi Peng, 'Trade in Telecommunications Services: Doha and Beyond' (2007) 41 *Journal of World Trade* 293, 305-6; A Mattoo, J Nielson and H K Nordås, 'Executive Summary' in OECD and World Bank, above n 20, 7, 11; Xavier, above n 20, 46-49; D Luff, 'Telecommunications and Audio-visual Services: Considerations for a Convergence Policy at the World Trade Organization Level' (2004) 38 *Journal of*

of intervention may change over time. Where regulation is intended to address market failures, it will typically diminish as the causes of these failures are removed (eg the market matures or becomes more competitive or technology develops).[29] In contrast, social regulation tends to be driven by societal preferences and the policies of the particular government in power at the time.

A failure to align competition and telecommunications regulation may undermine the purpose of liberalising trade in telecommunications by increasing business compliance costs and discouraging foreign entrants:

> [r]egulatory inefficiencies arising from 'differences in guidelines, timelines, and decision making and duplication of processes' associated with the administration of multiple competition laws represent a dead-weight economic loss for business. While increased transaction costs are the most blatant manifestation of inefficiency, productivity losses ought not to be discounted.[30]

The costs of these differences are imposed not only on businesses (and, in turn, consumers) but also on competition and telecommunications regulators themselves, as is the case with multiple competition laws more generally. Essentially, regulators in different countries needlessly duplicate effort and expense.[31] Pooling of expertise and resources through bilateral or multilateral collaboration is likely not only to reduce financial costs but also to increase the quality of regulatory decision-making and thus reduce the risk of harmful regulatory error. For example, Andrew Guzman points to the costs associated with '[r]egulatory bias', whereby domestic regulators may be tempted to apply facially neutral competition laws in a way that favours domestic over foreign firms, as well as distortion of domestic laws, whereby policy-makers creating competition laws may ignore the consequences of anti-competitive conduct by domestic firms except to the extent that they affect domestic consumers (rather than merely foreign firms).[32] In the telecommunications sector, all these costs could be diminished by aligning competition and telecommunications regulation.

Harmonising competition and telecommunications regulation need not mean adopting identical or uniform regulations. Some differences may be justified, for example, to reflect differences in the conditions or preferences of individual countries.[33]

World Trade 1059, 1060; OECD, *Restructuring Public Utilities for Competition* (2001) 44; WTO, Council for Trade in Services, above n 19, [30]-[33].

29 I Walden, 'European Union Telecommunications Law' in I Walden and J Angel (eds), *Telecommunications Law and Regulation* (2nd ed, 2005) 107, 112.

30 Rennie, above n 25, 37 (footnote omitted). See also G Walker, 'The CER Agreement and Trans-Tasman Securities Regulation: Part 2' (2004) 19 *Journal of International Banking Law and Regulation* 440, 440-41; G Raballand and E Aldaz-Carroll, 'How Do Differing Standards Increase Trade Costs? The Case of Pallets', World Bank Policy Research Working Paper 3519 (February 2005) 6; Taylor, above n 23, 48-51.

31 Guzman, above n 25, 428-29, 433-34.

32 Ibid 429-32. See also Elhauge and Geradin, above n 25, 1101; Taylor, above n 30, 43-48.

33 E-U Petersmann, 'International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the

(c) Benefits of a common market in Australia and New Zealand

Harmonising competition and telecommunications regulation may be desirable as a general matter, but is this true for Australia and New Zealand? Certain differences in the conditions of the two countries certainly suggest that complete harmonisation would not work. For instance, the meaning and significance of 'universal service' may be affected by the different geographical and population sizes of Australia and New Zealand, with more Australians living in remote areas and needing access to telecommunications services that might not otherwise be commercially viable. Similarly, the fact that Australian telecommunications markets have been open for longer[34] means market conditions in the two countries are not the same, and therefore that different regulatory approaches may be warranted. Specifically, New Zealand telecommunications markets are currently in a less competitive state than Australian markets, which may justify greater levels of regulation in New Zealand. The key point is that the two countries should apply similar levels of consistent regulation to markets in a similar state of competitive development.

In any case, Australian and New Zealand consumers' preferences may be less divergent in relation to telecommunications than in relation to other goods and services (and also possibly less divergent than consumers from other countries), reducing the potential 'negative consumer utility effect'[35] through harmonising telecommunications standards or regulations. Thus, for example, one might expect consumers in both countries to place a high value on price in relation to telecommunications, whereas distinctive cultural factors might play a bigger role in their consumption of agricultural products or novels (although further investigation would of course be necessary to confirm this). The growing similarity of Australian and New Zealand competition and telecommunications regulation and the successful pursuit of broader integration of the two countries to date, as discussed further below,[36] will also minimise this effect. Perhaps more importantly, harmonising competition and telecommunications regulation is consistent with the professed objective of the two countries of attaining a single economic market.

(i) The broader goal of a single economic market

The idea of a 'single economic market' within Australia and New Zealand is broader than the proposed common market for telecommunications services. The meaning of this kind of market and the alleged benefits for various stakeholders are revealed in a range of material.

The Productivity Commission has defined a single economic market as 'a geographic area comprising two or more countries in which there is no significant discrimination in the markets of each country arising from differences in the

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WTO' (1996) 72 *Chicago Kent Law Review* 545, 553-4; G Davies, 'Is Mutual Recognition an Alternative to Harmonization? Lessons on Trade and Tolerance of Diversity from the EU' in Bartels and Ortino (eds), above n 24, 265, 266-7.

34 See below Part V(a).

35 W Kerr, 'International Harmonization and the Gains from Trade' (2006) 7 *Estey Centre Journal of International Law and Trade Policy* 116, 119, 122.

36 See below Parts II(c), III(c), V(a).

policies and regulations adopted by each country'.[37] This definition makes clear that what is envisaged goes beyond the goal of removing or diminishing private anti-competitive conduct and government tariff and non-tariff trade barriers, targeting instead regulatory differences.

The word 'discrimination' here may be misplaced, or at least needs explanation. In the context of private anti-competitive conduct, discrimination would most obviously refer to disadvantages faced by new entrants in a market (whether foreign or national) when compared to the incumbent. In the context of international trade barriers, discrimination would normally refer to disadvantages faced by imported goods or foreign services or service suppliers when compared to domestically produced goods or local services or service suppliers. When it comes to differences in policies or regulations between two countries, in one sense, foreign products (be they goods or services) may be 'discriminated' against in a given country compared to local products, assuming that the local producers are operating solely in that country. Put differently, regulatory differences per se do not so much discriminate as create burdens in the form of monetary, human resource, and time costs for any actor (whether foreign or national) that wishes to conduct business in both rather than only one of the two countries.

In January 2004, Australian Treasurer Peter Costello and New Zealand Finance Minister Dr Michael Cullen, established the goal of achieving a 'single economic market based on common regulatory frameworks'.[38] More recently they have indicated that this would entail 'a situation where businesses face a single set of regulatory procedures whether they operate in Auckland or Sydney', resulting in 'wider benefits to investors and consumers'.[39] Following the 2005 review of the MOU, the New Zealand Ministry of Economic Development and the Australian Treasury accepted the suggestion made in some submissions to amend the text of the MOU to refer specifically to the aim of achieving a single economic market.[40] Paragraph 3 of the MOU now states that '[b]oth Governments have committed to the objective of a single economic market', with reference to the Productivity Commission's definition.

At its inaugural meeting in 2004, the Australian New Zealand Leadership Forum (which comprises 'Ministers, senior business representatives, academics and public sector and other community leaders')[41] also promoted the idea of working towards

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37 Productivity Commission, *Australian and New Zealand Competition and Consumer Protection Regimes* (16 December 2004) xii, 7.

38 P Costello, Australian Treasurer, 'Bilateral Progresses Single Economic Market Agenda', Press Release no 2 (29 January 2007) <www.treasurer.gov.au/tsr/content/pressreleases/2007/002.asp>; 'Joint Media Statement: Ministers Enhance the Trans-Tasman Business Environment', Press Release no 6 (30 January 2004) <www.treasurer.gov.au/tsr/content/pressreleases/2004/006.asp>.

39 Costello, above n 38.

40 New Zealand Ministry of Economic Development and Australian Treasury, *Review of the Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law* (2006) <www.treasury.gov.au/contentitem.asp?NavId=&ContentID=1073> 4; MOU, [3].

41 Australia New Zealand Leadership Forum, *Joint Statement by Co-Chairs Kerry*

a 'seamless trans Tasman business environment'.[42] According to the Co-Chairs following the 2005 meeting:

> Closer economic integration, including through joint regulation and harmonised standard setting, will facilitate trade and economic development in both countries. … [W]e need fewer barriers to trans-Tasman trade and a more efficient and competitive business environment if we are to compete successfully in regional and international markets.[43]

In conjunction with the latest meeting of the Australia New Zealand Leadership Forum in April 2007, the Forum's Co-Chairs and the two countries' Foreign Ministers held a joint press conference. There, Australian Foreign Minister Alexander Downer suggested that 'we are moving steadily towards a single economic market'.[44] This paper proceeds on the basis that the two countries continue to regard such a market as desirable and achievable.

(ii) Telecommunications on the path to a single economic market

In progressing towards a single economic market for goods and services generally in Australia and New Zealand, it may be possible to create 'common markets' or 'single markets' for specific sectors. This may enable testing and evaluation of various approaches while providing some of the benefits of a single economic market with fewer implementation difficulties. In relation to telecommunications in particular, the House of Representatives Standing Committee on Legal and Constitutional Affairs concluded in its recent report that 'greater harmonisation between Australia and New Zealand in this crucial sector will be highly important if the objective of a single economic market between the two countries is ever to be achieved'.[45] Telecommunications are especially significant for Australia and New Zealand in the age of e-commerce and given the geographic isolation of the countries' economies.

Perhaps a better way of explaining our notion of a common market in relation to telecommunications services in Australia and New Zealand, rather than simply adopting the Productivity Commission's definition of a 'single economic market', is to say that three things must be removed:

(i) barriers to trans-Tasman trade in telecommunications services in the form of government measures that discriminate in law or in fact against the other

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McDonald and James Strong (Auckland, 6 May 2006) <www.dfat.gov.au/geo/new_zealand/anzlf_joint_statement_2006.html>.

42 Australia New Zealand Leadership Forum, *Joint Statement by Co-Chairs Margaret Jackson and Kerry McDonald* (Wellington, 16 May 2004) <www.dfat.gov.au/geo/new_zealand/anzlf_joint_statement_2004.html>.

43 Australia New Zealand Leadership Forum, *Joint Statement by Co-Chairs Margaret Jackson and Kerry McDonald* (Melbourne, 30 April 2005) <www.dfat.gov.au/geo/new_zealand/anzlf_joint_statement_2005.html>.

44 A Downer, Australian Minister for Foreign Affairs, *Press Conference with NZ Minister for Foreign Affairs Winston Peters, and Australia-New Zealand Leadership Forum Co-Chairs James Strong and John Allen* (Sydney, 22 April 2007) <www.foreignminister.gov.au/transcripts/2007/0704122_nz. html>.

45 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 9, [3.115].

country's telecommunications suppliers or their services or that otherwise restrict such trade;

(ii) barriers to newer entrants in Australia or New Zealand in the form of anti-competitive conduct by incumbent suppliers, or insufficient or unreasonable terms of access to existing telecommunications networks or services; and

(iii) differences between Australian and New Zealand laws, policies, regulations or procedures that impose additional burdens in the form of monetary, human resource, or time costs on entities that wish to supply telecommunications networks or services in both Australia and New Zealand.

Of course, these barriers and differences will never be completely eliminated as long as Australia and New Zealand remain two sovereign nations. Different currencies and general laws and regulations will mean a telecommunications service supplier operating in both countries will need to adjust its operations to accord with each country's system. Indeed, even within a federal system like Australia, some such barriers and differences exist between states and territories. For example, having to comply with different tax schemes may make it harder for a telecommunications supplier to operate in more than one state. The ideal of a common market may nevertheless be achieved, provided that the remaining barriers and differences are justified in accordance with agreed standards. This could mean, for instance, allowing discriminatory or otherwise trade-restrictive government measures to the extent necessary for security purposes, or maintaining regulatory differences where the additional costs thereby incurred by telecommunications suppliers do not outweigh the costs that would be involved in regulatory harmonisation (including 'switching costs'[46] in the form of legal and practical impediments, and the danger of overregulation)[47] and the policy reasons for maintaining the differences.[48] Differences are more likely to be justified in relation to general regulation that affects telecommunications suppliers than in relation to regulation specific to telecommunications.

The MOU recognises the need to balance these competing considerations, referring to 'globalising factor[s]' such as 'the reduction of compliance costs and uncertainty to businesses trading across borders' and 'localising factors' such as 'a unique local condition',[49] as well as:

a. the desirability of ensuring for each particular situation, that a firm, ideally, will only have to comply with one set of rules, and have certainty as to the

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46 Kerr, above n 35, 120-21.

47 New Zealand Ministry of Economic Development and Australian Treasury, above n 40, 1.

48 See Productivity Commission, *Australian and New Zealand Competition and Consumer Protection Regimes* (16 December 2004) 78-83; MOU, [13]-[14]; Luff, above n 28, 1064-67.

49 MOU, [14]. For other examples of 'globalising forces' and 'localising forces' see D Goddard and NZIER, *CER: Business Law Co-ordination Potential: Discussion Paper* (Wellington, August 1999) <http://www.med. govt.nz/upload/4966/cerbuslaw. pdf> 4-5.

application of those rules in the other jurisdiction, and with which regulator (ie Australian or New Zealand) it needs to deal;

b. whether the situation should be regulated solely through domestic rules or whether a bilateral, or multilateral solution would be more appropriate; and

c. whether a good reason exists for the law in this area to be different between Australia and New Zealand.[50]

We note that economists typically use the term 'common market' to denote something slightly different than what we are proposing here. For example, in describing '[t]he spectrum of choices' involved in integrating two economies, Tony Cleaver (building on the work of Bela Balassa)[51] begins with independence and moves through a free trade area, a customs union, a common market, and an economic union, before finally reaching '[o]ne nation'.[52] Thus, a common market goes even further than a customs union (which entails free trade as well as common external tariffs and trade policy with respect to non-partner countries)[53] to incorporate the 'unrestricted movement and employment of labour and capital'. The two largest examples are the United States of America and the European Union (EU).[54]

The goal of a single economic market in Australia and New Zealand as described above may not fit neatly into any of these five categories, although it seems fairly clear that the two governments do not presently envisage a customs union or a common market to the extent of agreeing a common external trade policy. Similarly, in referring to a common telecommunications market, we do not mean to advocate a binding agreement with respect to the treatment of telecommunications services and suppliers from outside Australia and New Zealand (although most-favoured-nation (MFN) treatment for other WTO members may follow, as discussed further below).[55] However, our use of the term 'common market' does correspond with Cleaver's suggestion that 'a common market usually implies an increasing number of common policies … This implies that all the rules and regulations, different specifications and standards embodied in member countries' goods and services become "harmonised", or that mutual recognition is accepted.'[56]

As will be seen in the course of this paper, Australia and New Zealand have come a long way towards meeting the first conditions of a common market that we

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50 MOU, [13].

51 See B Balassa, *The Theory of Economic Integration* (1962) 2-3; D McCarthy, *International Economic Integration in Historical Perspective* (2006) 5.

52 T Cleaver, *Understanding the World Economy* (3rd ed, 2007) 94-95.

53 Note the difference between a 'free trade area' and a 'customs union' pursuant to General Agreement on Tariffs and Trade 1994, LT/UR/A-1A/1/GATT/1 (15 April 1994), 1867 UNTS 187 reprinted in (1994) 33 ILM 1153 (GATT 1994) art XXIV:8. See also below n 266.

54 McCarthy, above n 51, 164.

55 See below Part V(c).

56 Cleaver, above n 52, 94.

identified above: the first under the WTO and the CER umbrella and the second through each country's telecommunications and competition regulation, as well as the MOU as regards general competition regulation and the WTO to some degree. At this stage, the primary obstacle to a common telecommunications market is the third condition. Assessing the costs associated with particular regulatory differences and regulatory harmonisation or integration requires economic and empirical analysis that is beyond the scope of this paper. Similarly, the parties would need to agree on the precise scope of appropriate exceptions to harmonisation or integration on policy grounds. Rather than make detailed proposals in this regard, in this paper we simply aim to explore the desirability and feasibility of harmonising telecommunications regulation in Australia and New Zealand.

In summary, the perceived primary benefits of a common market for telecommunications services in Australia and New Zealand include:

- *lowering compliance costs* – in other words, minimising duplication of effort and expense by telecommunications suppliers wishing to operate in both Australia and New Zealand;
- *increasing market access and investment* between Australia and New Zealand, thereby increasing competition, improving productivity and other forms of efficiency, and ultimately increasing consumer welfare;
- *lowering administration costs* – in other words, minimising duplication of effort and expense by telecommunications regulators in Australia and New Zealand; and
- *improving regulatory approaches in both countries* through trans-Tasman consultation and coordination in reforming telecommunications regulation.[57]

III. International Obligations Affecting Telecommunications Services

Trade in telecommunications services between Australia and New Zealand is already significantly liberalised pursuant to obligations under the WTO agreements and the CER. Some coordination or harmonisation of telecommunications-related regulation also exists under the MOU. We consider these three sources of obligations affecting Australian and New Zealand telecommunications in turn, as a basis for determining how much further the two countries would have to go in order to achieve a common telecommunications market.

(a) WTO obligations

The primary obligations concerning telecommunications services in the WTO are contained in the General Agreement on Trade in Services (GATS).[58] In this section,

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57 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 9, [3.112]-[3.115] (relying on Telstra's submission); cf Walker, above n 30, 440-41. For a discussion of these and other potential benefits in the context of integrating trans-Tasman competition and consumer law, see Productivity Commission, above n 48, 74-78.

58 (15 April 1994) 1869 UNTS 183 reprinted in (1994) 33 ILM 1167.

we first outline the scope of the GATS and the classification of telecommunications under the GATS, before turning to the obligations of Australia and New Zealand under the GATS with respect to telecommunications services.

(i) Scope, modes and classification system

The GATS applies to 'measures by [WTO] Members affecting trade in services', including 'any service in any sector except services supplied in the exercise of governmental authority'.[59] GATS covers the supply of services through any of four (potentially overlapping) modes:

- *Mode 1* – cross-border supply: supply from the territory of one member into the territory of any other member;
- *Mode 2* – consumption abroad: supply in the territory of one member to the service consumer of any other member;
- *Mode 3* – commercial presence: supply by a service supplier of one member through commercial presence in the territory of any other member; and
- *Mode 4* – presence of natural persons: supply by a service supplier of one member through presence of natural persons of a member in the territory of any other member.[60]

Modes 1 and 2 correspond to 'traditional' conceptions of trade in services (often associated with 'free trade areas'), while modes 3 and 4 correspond to movement of factors of production, namely capital and labour respectively (often associated with a greater degree of integration in 'common markets' as mentioned above).[61]

Modes 1 and 3 may be particularly important for telecommunications. A significant proportion of trade in telecommunications services may be under mode 3, given that access to domestic networks will be necessary to compete in providing local or international telecommunications services. Major gains may arise from mode 3 liberalisation.[62] As regards mode 1, some debate exists. A 2004 WTO Panel suggested that when a consumer in one WTO member state makes and pays for an international call to someone in another WTO member state, the telecommunications provider in the first member state is supplying telecommunications services across the border under mode 1 (generally using a telecommunications provider in the second member state to terminate the call).[63]

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59 Ibid arts I:1, I:3(b).

60 Ibid art I:2.

61 See above nn 51-54 and corresponding text; Hoekman, above n 14, 12; Productivity Commission, above n 48, 7.

62 Verikios and Xiao-guang Zhang, above n 14, 441-42; G Verikios and Xiao-guang Zhang, 'Global Gains from Liberalising Trade in Telecommunications and Financial Services', Staff Research Paper, Productivity Commission (2001) 6, 13, 15. See also Medvedev, above n 26, 4; D Neven and P Mavroidis, 'El Mess in Telmex: A Comment on *Mexico – Measures Affecting Telecommunications Services*' (2006) 5 *World Trade Review* 271, fn 9; T Warren and C Findlay, 'Competition Policy and International Trade in Air Transport and Telecommunications Services' (1998) 21 *The World Economy* 445, 445-46, 449.

63 WTO Panel Report, *Mexico – Measures Affecting Telecommunications Services*,

Conversely, Damien Neven and Petros Mavroidis argue that this cannot be the case (even though it does involve the supply of telecommunications from the territory of one member into the territory of another) because the consumer and the supplier are both in the territory of the first WTO member.[64]

Uruguay Round negotiations leading to the GATS and subsequent WTO negotiations on telecommunications distinguished between 'value-added' and 'basic telecommunications' services.[65] Basic telecommunications such as voice telephony and certain data transmission services are contained in sub-sectors 2.c(a)-(g) and (o) of the services classification system that contracting parties were encouraged to follow during the Uruguay Round, which is contained in an informal note by the Secretariat of the General Agreement on Tariffs and Trade (GATT) that is sometimes known as 'Document W/120'.[66] Value-added services such as electronic mail and voice mail are contained in sub-sectors 2.C(h)-(n) and (o).[67] Document W/120 includes cross-references to corresponding items of the Central Product Classification (CPC), which is a United Nations system for classifying goods and services.[68] The relevant portion of Document W/120 reads:

WT/DS204/R (circulated 2 April 2004, adopted 1 June 2004 without appeal) [7.42], [7.45].

64 Neven and Mavroidis, above n 62, 272, 279-80, 282.

65 For discussion of the distinction between basic and value-added telecommunications services, see M Bronckers and P Larouche, 'Telecommunications Services' in P Macrory, A Appleton and M Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (2005) 989, 994-95; M Bronckers and P Larouche, 'Telecommunications Services and the World Trade Organization' (1997) 31 *Journal of World Trade* 5, 16-18.

66 Uruguay Round Group of Negotiations on Services, *Services Sectoral Classification List – Note by the Secretariat*, MTN.GNS/W/120 (10 July 1991).

67 WTO, Council for Trade in Services, above n 19, [7].

68 The CPC at the time of the Uruguay Round negotiations on trade in services was UN, *Provisional Central Product Classification*, Statistical Papers, Series M, No 77 (1991). The most recent revision is UN, *Central Product Classification Version 1.1*, Statistical Papers, Series M, No 77 (2004).

SECTORS AND SUB-SECTORS		CORRESPONDING CPC
2.	COMMUNICATION SERVICES	
C.	Telecommunication services	
a.	Voice telephone services	7521
b.	Packet-switched data transmission services	7523**
c.	Circuit-switched data transmission services	7523**
d.	Telex services	7523**
e.	Telegraph services	7522
f.	Facsimile services	7521**+7529**
g.	Private leased circuit services	7522**+7523**
h.	Electronic mail	7523**
i.	Voice mail	7523**
j.	On-line information and data base retrieval	7523**
k.	electronic data interchange (EDI)	7523**
l.	enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
m.	code and protocol conversion	n.a.
n.	on-line information and/or data processing (incl. transaction processing)	843**
o.	other	

The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (eg voice mail is only a component of CPC item 7523).

This classification system does not adequately reflect technological developments in telecommunications since it was created, as the WTO Secretariat recognised even in 1998.[69] In addition, some overlap exists between telecommunications and audiovisual services, and the GATS presently draws no clear distinction between them.[70] However, audiovisual services appear in a separate sub-sector (2.D) of Document W/120 and are often subject to fewer commitments and greater limitations than the services in sub-sector 2.C.[71]

(ii) Core obligations in connection with telecommunications

The MFN treatment obligation applies to all measures covered by the GATS except to the extent that a member has listed an inconsistent measure in the Annex on

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69 WTO, Council for Trade in Services, above n 19, [10]-[11]. See also Shin-Yi Peng, 'Trade in Telecommunications Services: Doha and Beyond' (2007) 41 *Journal of World Trade* 293, 297-300, 301-5.

70 See Luff, above n 28, 1078-82.

71 See generally T Voon, *Cultural Products and the World Trade Organization* (2007), including 72-73 in relation to the overlap between telecommunications and audiovisual services.

Article II Exemptions.[72] MFN means that members must accord to services and service suppliers of other members 'treatment no less favourable than that it accords to like services and service suppliers of any other country'.[73] Neither Australia nor New Zealand maintains an MFN exemption in relation to telecommunications (although both list an exemption for the related field of audiovisual services).[74] Accordingly, Australia and New Zealand must accord MFN treatment to each other and all other WTO members in relation to telecommunications services (whether value-added or basic),[75] unless some other WTO exception applies.

Other GATS obligations apply only in those service sectors in which a given member has made specific commitments (that is, commitments to provide national treatment or market access, or additional commitments).[76] A market access commitment means that, unless otherwise specified in a Member's Schedule, the member must not maintain measures such as limitations on the number of service suppliers or on the total value of service transactions, or restrictions on the type of legal entity through which a service supplier may supply a service or on the participation of foreign capital.[77] A national treatment commitment means that the member must 'accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers'.[78]

In sectors where a member has made a specific commitment, procedural obligations regarding domestic regulation also apply. In particular, members must 'ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner'[79] and apply licensing and qualification requirements and technical standards based on objective and transparent criteria.[80] In all service sectors, members must also provide tribunals for

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72 GATS, above n 58, art II:2.

73 GATS, ibid art II:1.

74 WTO, *Australia – Final List of Article II (MFN) Exemptions*, GATS/EL/6 (15 April 1994); WTO, *New Zealand – Final List of Article II (MFN) Exemptions*, GATS/EL/62 (15 April 1994). On the relationship between telecommunications and audiovisual services, see above n 70 and corresponding text.

75 However, except for specific commitments made to basic telecommunications in members' schedules at the end of the Uruguay Round, the MFN obligation and the need to list MFN exemptions did not apply to basic telecommunications until the *Fourth Protocol to the General Agreement on Trade in Services* entered into force on 5 February 1998, as discussed below: GATS, Annex on Negotiations on Basic Telecommunications, [1]-[2]; WTO Ministerial Conference, *Decision on Negotiations on Basic Telecommunications* [5]; WTO, *Fourth Protocol to the General Agreement on Trade in Services*, S/L/20 (30 April 1996) [3].

76 GATS, above n 58, art XVIII.

77 GATS, ibid art XVI:2.

78 GATS, ibid art XVII:1.

79 GATS, ibid art VI:1.

80 GATS, ibid arts VI:4(a), VI:5(a)(i); see also WTO, *Annual Report of the Working Party on Domestic Regulation to the Council for Trade in Services (2006)*, S/WPDR/9 (20 November 2006).

objective and impartial review of administrative decisions affecting trade in services.[81]

The Annex on Telecommunications applies to 'all measures of a Member that affect access to and use of public telecommunications transport networks and services',[82] excluding 'measures affecting the cable or broadcast distribution of radio or television programming'.[83] However, the primary obligations apply only in service sectors in which a Member has made a specific commitment. These obligations are directed towards ensuring that service suppliers in those sectors have access to and use of a member's 'public telecommunications transport networks and services on reasonable and nondiscriminatory terms and conditions'.[84] Thus, they are not intended to facilitate trade in telecommunications services or to prevent discrimination with respect to telecommunications services; nor are they dependent on a member having made a specific commitment in relation to telecommunications services. A member that has made a specific commitment in the banking sector, but not the telecommunications sector, will still need to ensure that banking suppliers have access to telecommunications networks in accordance with the Annex.

In its original GATS Schedule, Australia made market access and national treatment commitments to telecommunications services without limitation in modes 1 to 3, but only to value-added services rather than basic telecommunications.[85] New Zealand made similar commitments, with a mode 3 national treatment limitation regarding foreign shareholdings in and foreign Board directors of Telecom Corporation of New Zealand Limited.[86] However, negotiations on telecommunications continued after the GATS entered into force, and Australia and New Zealand were among the members that added additional commitments to their GATS Schedules in respect of telecommunications when these negotiations concluded, as explained in the next section.

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81 GATS, above n 58, art VI:2(a).

82 A 'public telecommunications transport network' is defined as 'the public telecommunications infrastructure which permits telecommunications between and among defined network termination points'. A 'public telecommunications transport service' is defined as 'any telecommunications transport service required … by a Member to be offered to the public generally', including for example 'telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information'.

83 GATS, above n 58, Annex on Telecommunications, [2(a)] [2(b)].

84 GATS, ibid Annex on Telecommunications, [5(a)]. On the use of telecommunications services by suppliers of other goods and services, see Productivity Commission, *International Benchmarking of Australian Telecommunications Services* (March 1999) xxvi.

85 WTO, *Australia – Schedule of Specific Commitments*, GATS/SC/6 (15 April 1994) 24-25.

86 WTO, *New Zealand – Schedule of Specific Commitments*, GATS/SC/62 (15 April 1994) 12.

(iii) The fourth protocol and the reference paper

The GATS contains only limited obligations in relation to anti-competitive conduct. These relate primarily to monopolies and exclusive service suppliers and are partially restricted by the service sectors in which a member has made specific commitments.[87] The members recognise that other business practices of service suppliers may also 'restrain competition and thereby restrict trade in services', but the obligation regarding such practices is simply to 'accord full and sympathetic consideration' to a request for consultations with a view to eliminating these kinds of practices and to provide non-confidential information regarding the matter.[88] Therefore, in telecommunications as in other sectors, the original GATS provisions have little impact on private anti-competitive conduct of service suppliers. WTO members have also agreed to exclude competition policy in general from the ongoing negotiations in the Doha Round.[89]

However, many WTO members have more recently agreed on some competition principles in the telecommunications sector and included these in their GATS Schedules. Negotiations on telecommunications continued after the conclusion of the GATS.[90] In 1997, 70 members (including the European Communities (EC)[91] and its member states) reached an agreement on further commitments under GATS in the telecommunications sector, sometimes described as the 'Basic Agreement on Telecommunications'. [92] The agreement took the form of supplements to the members' GATS Schedules that were attached to the Fourth Protocol to the General Agreement on Trade in Services (Fourth Protocol).[93] As well as achieving new or improved national treatment and market access commitments, particularly in relation to basic telecommunications, most members incorporated additional commitments in their Schedule in the form of a 'Reference Paper'.[94] Among other things, the Reference Paper imposes minimum standards to address the problem of under-regulation of the incumbent telecommunications supplier, which may

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87 GATS, above n 58, art VIII.

88 GATS, ibid art IX.

89 WTO Ministerial Conference, *Ministerial Declaration adopted on 14 November 2001*, WT/MIN(01)/DEC/1 (20 November 2001) [23]-[25]; WTO General Council, *Decision Adopted by the General Council on 1 August 2004*, WT/L/579 (2 August 2004) 3. See also Fox, above n 22, 271; Mitchell, above n 22, 343; Petersmann, above n 33, 545.

90 See WTO Ministerial Conference, above n 75; WTO Council for Trade in Services, *Decision on Commitments in Basic Telecommunications*, S/L/19, [3], [6].

91 The EC (rather than the European Union) is a member of the WTO: see Marrakesh Agreement, Art IX:1. Its member states are also separate members of the WTO.

92 For further discussion of this agreement and the negotiations leading to it, see OECD, *Trade and Competition Policies for Tomorrow* (1999) 13-16, 79-91.

93 S/L/20 (adopted 30 April 1996, entered into force 5 February 1998). See also WTO Council for Trade in Services, *Decision on Commitments in Basic Telecommunications*, S/L/19 (30 April 1996).

94 WTO Negotiating Group on Basic Telecommunications, *Reference Paper* (24 April 1996). The reference paper is attached to WTO, 'The WTO Negotiations on Basic Telecommunications', Press Release (6 March 1997), <www.wto.org/english/news_e/pres97_e/refpap-e.htm>. It is also reproduced at WTO, *World Trade Organization: Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)* (1997) 36 ILM 354, 367.

effectively deny market access to foreign firms. Without such standards, it could be difficult to prove a WTO violation through such a regulatory approach, even if national treatment commitments existed, because of the de facto nature of the resulting discrimination.

With the entry into force of the Fourth Protocol in 1998, Australia and New Zealand both incorporated the Reference Paper into their GATS Schedules (as an additional commitment) and made national treatment and market access commitments to basic telecommunications services and 'other services' such as paging services, cellular services, and mobile data services (sub-sector 2.c(o) of Document W/120) in modes 1 to 3, with some limitations in mode 3. The New Zealand limitations are national treatment limitations in relation to Telecom as described above.[95] The Australian limitations are for market access and national treatment, relating to foreign ownership and control of Telstra, Optus and Vodafone.[96] Australia has proposed clarifying and strengthening the obligations in the Reference Paper as well as other GATS disciplines in relation to telecommunications services.[97]

The Reference Paper contains various substantive and procedural obligations, several of which relate only to 'major suppliers', which are defined as suppliers that have 'the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of: (a) control over essential facilities; or (b) use of its position in the market'. The Reference Paper defines essential facilities as facilities of a public telecommunications transport network or service that are exclusively or predominantly provided by a limited number of suppliers and that cannot be economically or technically substituted in order to provide a service.[98]

The three main substantive obligations are:

- *Competitive safeguards*: Members must maintain appropriate measures to prevent major suppliers 'from engaging in or continuing anti-competitive practices', including 'anti-competitive cross-subsidization', … 'using information obtained from competitors with anti-competitive results', and 'not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services'.[99] 'Anti-competitive' cross-subsidisation might involve, for example, using profits

95 See above p 166.

96 WTO, *Australia – Schedule of Specific Commitments: Supplement 3*, GATS/SC/6/Suppl.3 (11 April 1997); WTO, *New Zealand – Schedule of Specific Commitments: Supplement 1*, GATS/SC/62/Suppl.1 (11 April 1997).

97 WTO Council for Trade in Services: Special Session, *Communication from Australia: Negotiating Proposal for Telecommunication Services*, S/CSS/W/17 (5 December 2000).

98 *Reference Paper*, Definitions, above n 94.

99 Ibid *Reference Paper*, [1.1]-[1.2].

from an area of operations in which a major supplier has a dominant position in order to finance another area.[100]

- *Interconnection*: Where a member undertakes specific commitments in a given telecommunications service sub-sector, it must ensure that interconnection[101] with major suppliers is available 'at any technically feasible point in the network' and, 'upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities'. The interconnection must be timely, 'sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided', and 'of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates' (in other words, meeting national treatment and MFN standards). In addition, the terms and conditions (including technical standards and specifications) and the rates must be non-discriminatory, transparent, and reasonable, having regard to economic feasibility. The rates must also be 'cost-oriented'. [102] Additional procedural obligations attach to the interconnection obligation: procedures for interconnection to major suppliers must be publicly available; members must ensure that major suppliers make publicly available either their 'interconnection agreements or a reference interconnection offer', and service suppliers requesting interconnection with a major supplier must have recourse 'to an independent domestic body … to resolve disputes' regarding the terms, conditions and rates for interconnection.[103]
- *Universal service*: The Reference Paper leaves it up to members to define any universal service obligations they wish to maintain. However, these must be 'not more burdensome than necessary for the kind of universal service' that the member has defined, and they must be 'administered in a 'transparent, non-discriminatory and competitively neutral manner'.[104]

The three more procedural obligations are:

- *Licensing criteria*: If a licence is required, members must make 'publicly available' licensing criteria, the period of time normally required to decide on a licence application, and the terms and conditions of individual

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100 Bronckers and Larouche, in Macrory, Appleton and Plummer (eds), above n 65, 989, 1003.

101 Interconnection means 'linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier': Reference Paper, [2.1].

102 *Reference Paper*, [2.2], above n 94.

103 Ibid *Reference Paper*, [2.2]-[2.5].

104 Ibid *Reference Paper*, [3].

licences, and to provide an applicant on request reasons for denying a licence.[105]

- *Regulator*: The telecommunications regulatory body must be 'separate from, and not accountable to, any supplier of basic telecommunications services' and must make decisions and use procedures that are 'impartial with respect to all market participants'.[106]
- *Scarce resources:* Members must carry out procedures for allocating scarce resources 'including frequencies, numbers and rights of way … in an objective, timely, transparent and non-discriminatory manner'.[107]

The Panel in *Mexico – Measures Affecting Telecommunications Services* explored certain aspects of the Reference Paper as well as the GATS Annex on Telecommunications.[108] As will be seen in the following sections, these WTO obligations go significantly further than the CER as regards telecommunications. However, they are nevertheless arguably outdated and uncertain, leaving significant discretion to national regulators.[109]

(b) CER obligations

The Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (Protocol) of 1988[110] extended the CER so that it now encompasses not only trade in goods but also trade in services. The Protocol applies to 'any measure, in existence or proposed, of a Member State that relates to or affects the provision of a service by or on behalf of a person of the other Member State within or into the territory of the first Member State',[111] subject to each country's 'foreign investment policies'[112] (although Australia and New Zealand are currently discussing the possibility of including an 'investment protocol' in the CER)[113] and excluding services 'inscribed by' that country in the Annex.[114]

In other words, the Protocol adopts a 'negative list' or 'top down' approach, similar to that under GATS with respect to the MFN obligation[115] but distinct from the GATS 'positive list' or 'bottom up' approach to national treatment and market access as discussed above.[116] Although Australia and New Zealand initially

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105 Ibid *Reference Paper*, [4].
106 Ibid *Reference Paper*, [5].
107 Ibid *Reference Paper*, [6].
108 WTO Panel Report, above n 63.
109 Shin-Yi Peng, above n 69, 300-1, 306-7.
110 Above n 8.
111 Ibid art 2.3.
112 Ibid art 2.2.
113 P Costello, Australian Treasurer, 'Joint Press Conference with Dr Michael Cullen, New Zealand Finance Minister' (29 January 2007) <www.treasurer.gov.au/tsr/content/transcripts/2007/001.asp>.
114 Above n 8, art 2.4. These services are subject to an MFN obligation under art 6.
115 GATS, above n 58, art II.
116 GATS, ibid arts XVI:1, XVII:1. See above Part III(a)(ii). For further discussion of the difference between negative lists and positive lists in the context of services FTAs, see C Findlay, S Stephenson and F J Prieto, 'Services in Regional Trading Arrangements' in P Macrory, A Appleton and M Plummer (eds), *The World Trade Organization:*

inscribed various telecommunications services in the Annex to the Protocol, they have progressively removed[117] these inscriptions so that today telecommunications falls entirely within the scope of the Protocol (although Australia maintains an inscription for broadcasting and television). The Protocol does not refer to the GATS modes (having been concluded before GATS) but appears broad enough to cover all four modes, except to the extent that it is subject to each country's foreign investment policies (in connection with mode 3).[118]

Accordingly, the key obligations that apply to telecommunications services pursuant to the Protocol include, subject to certain exceptions:[119]

- *Market access*: 'Each Member State shall grant to persons of the other Member State and services provided by them access rights in its market no less favourable than those allowed to its own persons and services provided by them.'[120]
- *National treatment*: 'Each Member State shall accord to persons of the other Member State and services provided by them treatment no less favourable than that accorded in like circumstances to its persons and services provided by them.'[121]
- *Commercial presence*: 'Each Member State shall accord to persons of the other Member State the right to select their preferred form of commercial presence, which shall be in accordance with the applicable laws and regulations of that Member State.'[122]
- *Discriminatory or restrictive measures*: '[N]either Member State shall introduce any measure, including a measure requiring the establishment or commercial presence by a person of the other Member State in its territory as a condition for the provision of a service, that constitutes a means of arbitrary or unjustifiable discrimination against persons of the other Member State or a disguised restriction on trade between them in services.'[123]
- *Licensing and certification*: 'Each Member State shall endeavour to ensure that licensing and certification measures shall not have the purpose or effect of impairing or restraining, in a discriminatory manner, access of persons of the other Member State to such licensing or certification.'[124]

Legal, Economic and Political Analysis (2005) 293, 297-98.

117 Above n 8, pursuant to art 10.

118 WTO, Committee on Regional Trade Agreements, *Draft Report on the Examination of the Protocol on Trade in Services of the Australia New Zealand Closer Economic Relations Trade Agreement: Note by the Chairman*, WT/REG40/W/1 (28 September 2000) [11] (referring to statements by Australia and New Zealand).

119 Above n 8, art 18.

120 Ibid art 4.

121 Ibid art 5.1.

122 Ibid art 7.

123 Ibid art 8.

124 Ibid art 9.1.

Apart from the current exclusion of 'foreign investment policies' from the Protocol as mentioned above,[125] the Protocol thus provides a fairly comprehensive set of obligations ensuring that telecommunications service suppliers in Australia have non-discriminatory access to the New Zealand market, and vice versa. However, these obligations govern solely public measures that restrict trade or discriminate against foreign services or service suppliers. They do not preclude private anti-competitive conduct that may hinder the ability of telecommunications suppliers from actively competing in either country. Nor do they address practical impediments to trade in telecommunications services arising from differences in regulatory approaches between the two countries.

(c) MOU obligations

Article 12 of the CER contemplates the harmonisation of certain Australian and New Zealand regulations. It imposes a 'soft' obligation to 'examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labeling and restrictive trade practices' and, 'where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements'.[126] The MOU takes this further. The current MOU recognises that Australia and New Zealand have already achieved significant coordination in certain areas of business law including competition and consumer protection laws.[127] Indeed, according to one commentator, 'Trans-Tasman competition regulation is regularly lauded as "world's best practice". Although there are differences, the degree of co-ordination between the two systems is universally regarded as extraordinary.'[128]

The two governments have also agreed under the MOU to 'examine further the scope for coordination of business laws and regulatory practices' in areas set out in the work program in the annex,[129] including:

k) Coordination of competition law in the following areas:
   - Consideration of cross appointments between competition regulators;
   - Other cooperative arrangements such as a single track procedure for business acquisition applications;

l) Where appropriate, joint participation in policy, research, compliance and education programmes on consumer issues relating to business law and explore the potential for sharing work and coordination of work on enhancing financial literacy.

The MOU thus reflects the considerable alignment of competition laws in Australia and New Zealand. However, it does not impose any coordination or harmonisation obligations specifically in relation to the telecommunications sector,

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125 See above p 170.
126 Above n 4, art 12.1.
127 MOU, above n 12, [8(a)], [8(b)]. See also Productivity Commission, above n 48, 13-18; New Zealand Ministry of Economic Development and Australian Treasury, above n 40, 21.
128 Rennie, above n 25, 30-31.
129 MOU, above n 12, [12].

although Telstra Corporation Limited and its New Zealand subsidiary TelstraClear Limited proposed in their submission upon the latest MOU review that telecommunications be included in the MOU work program.[130]

(d) Table I: Summary of obligations between Australia and New Zealand

	WTO: GATS	CER: Protocol	MOU
Exclusions	Art I:3(b): services in the exercise of governmental authority Art XIV: exceptions	Art 2.2: foreign investment policies; Art 2.4: services inscribed in Annex except as indicated (includes broadcasting for Australia); Art 15: taxation; Art 18: exceptions	—
General services disciplines: MFN	Art II: no exemption listed for telecommunications	Art 6: for services inscribed in Annex	—
Market access	Art XVI: modes 1-3, with some limitations for mode 3	Art 4: access rights no less favourable than for own suppliers/services	
National treatment	Art XVII: modes 1-3, with some limitations for mode 3	Art 5.1	
Domestic regulation	Art VI: review of decisions; licensing objective, not more burdensome than necessary	Art 9.1: 'endeavour to ensure' non-discriminatory licensing and certification	
Access to public telecommunications transport networks and services	Annex on Telecommunications: for committed sectors	—	

130 *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) 9.

Summary of obligations between Australia and New Zealand (cont)

	WTO: GATS	CER: Protocol	MOU
Commercial presence	Mode 3	Art 7: right to select form in accordance with applicable laws and regulations	—
Arbitrary/unjustifiable discrimination or disguised restriction on trade	Art XIV: conditions in chapeau for falling within general exception	Art 8: including requiring commercial presence as condition for supplying service Art 18: conditions in chapeau for falling within exception	
General competition disciplines: Monopolies, exclusive service suppliers	Art VIII: acting inconsistently with Article II or specific commitments; abuse of position for committed sectors	Art 12: for services inscribed in Annex	[12], Annex (k)-(l): examine further coordination of competition and consumer protection laws
Other business practices	Art IX: consultations, transparency	—	
Specific telecommunications disciplines: Competitive safeguards	Reference Paper [1]: prevent anti-competitive practices of major suppliers	—	—
Interconnection	Reference Paper [2]: ensured for committed sectors with major suppliers on reasonable, non-discriminatory terms and at cost-oriented rates; transparent procedures, independent review		
Universal service	Reference Paper [3]: transparent, non-discriminatory administration; not more burdensome than necessary		
Transparency and procedure	Reference Paper [4]-[6]: public availability of licensing criteria, independent regulator, non-discriminatory allocation of scarce resources		

As Table I shows, the GATS and the Protocol already mandate significant liberalisation of telecommunications trade in Australia and New Zealand, thus satisfying the first condition for achieving a common market identified above (trade liberalisation).[131] The second condition (competition and access) is also largely met through the Reference Paper, as well as the existing competition and telecommunications regulations maintained within Australia and New Zealand as discussed further below.[132] However, although general competition regulation between the two countries has been substantially harmonised and the MOU envisages further coordination in this regard, this third condition of a common market (harmonisation) will require further steps.

IV. Learning from Other FTAs

Several FTAs concluded after the post-GATS negotiations in the WTO have extended services liberalisation beyond that achieved in the GATS (sometimes described as 'GATS-plus' FTAs), in telecommunications as well as other sectors.[133] These may provide illustrations of how Australia and New Zealand could structure further agreements or discussions regarding telecommunications services in order to move towards a common market in this sector, keeping in mind that the negotiation of an FTA is, of course, dependent on a variety of factors arising from the parties' particular relationship. In the following section, we first consider three FTAs to which Australia is a party, before turning to two FTAs to which Australia and New Zealand are non-parties.

(a) Australian FTAs

Two Australian agreements provide examples of GATS-plus FTAs: the Australia-United States Free Trade Agreement (AUSFTA)[134] and the Singapore-Australia Free Trade Agreement (SAFTA).[135] Below, we consider these agreements in turn, followed by the third Australian FTA that contains provisions specifically referring to telecommunications, namely the Thailand-Australia Free Trade Agreement (TAFTA),[136] which is much less advanced in terms of commitments in telecommunications than the other two. A review of the telecommunications-specific provisions under the AUSFTA and the SAFTA reveals that, although the CER was once ahead of its time as far as goods and services liberalisation, at least in the area of telecommunications services, it is now clearly lagging behind other FTAs, including some Australian FTAs.

FTAs to which Australia is a party may provide a more appropriate basis for assessing the potential for an Australia-New Zealand telecommunications market than do non-Australian FTAs, since they represent bargains that the Australian

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131 See above p 158.
132 See below Part V(a).
133 Hoekman, above n 14, 44-45. On telecommunications, see Roy, Marchetti and Lim, above n 14, 44-46.
134 (18 May 2004) [2005] ATS 1.
135 (17 February 2003) [2003] ATS 16.
136 Agreement on Bilateral Cooperation between the Government of Australia and the Government of the Kingdom of Thailand (5 July 2004) [2004] ATNIA No 18.

government was prepared to accept. At the same time, Australia may have done so due to pressure from the other party (particularly in the case of the United States, given its importance in world trade and commerce), and New Zealand would not necessarily accept the same kind of arrangement. Nevertheless, these agreements indicate some possibilities for increasing telecommunications integration between Australia and New Zealand.

(i) Australia-United States Free Trade Agreement

In addition to the general obligations regarding cross-border trade in services in Chapter 10, and investment in Chapter 11, of the AUSFTA, Chapter 12 imposes specific obligations on the parties in relation to telecommunications services (which generally excludes broadcast or cable distribution of radio or television programming).[137] These include obligations to ensure that suppliers of public telecommunications services[138] provide number portability for fixed telephony,[139] dialing parity,[140] and interconnection with public telecommunications suppliers of the other party,[141] as well as a number of obligations regarding the conduct of 'major suppliers' of public telecommunications services, where a major supplier is defined as 'a supplier of a public telecommunications service that has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for public telecommunications services as a result of control over essential facilities or use of its position in the market'.[142]

Obligations regarding major suppliers include ensuring that these suppliers do not discriminate against suppliers of the other party by treating them less favourably than their own subsidiaries, affiliates, or non-affiliated suppliers in respect of certain matters such as interconnection.[143] In addition to being non-discriminatory, the conduct of major suppliers must meet certain minimum standards. For example, each party must ensure that its major suppliers offer 'for resale, at reasonable rates', services that they supply 'at retail to end users' to suppliers of the other party.[144] Similarly, the rates that major suppliers charge suppliers of the other party for 'interconnection for … facilities and equipment',[145] 'physical co-location of

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137 Above n 134, art 12.1.2.

138 Ibid meaning 'any telecommunications service that a Party requires, explicitly or in effect, to be offered to the public generally': art 12.25.13.

139 Ibid meaning 'the ability of end-users of public telecommunications services to retain, at the same location, existing telephone numbers when switching between suppliers of like public telecommunications services': art 12.25.11.

140 Ibid meaning 'the ability of an end-user to use an equal number of digits to access a like public telecommunications service, regardless of the public telecommunications service supplier chosen by such end-user and in a way that involves no unreasonable dialing delays': art 12.25.3.

141 Ibid art 12.3.1.

142 Ibid art 12.25.8.

143 See, eg, ibid arts 12.7, 12.11. Interconnection means 'linking with suppliers providing public telecommunications services in order to allow the users of one supplier to communicate with the users of another supplier and to access services provided by another supplier': art 12.25.6.

144 Ibid art 12.9.1(a).

145 Ibid art 12.11.1(d).

equipment necessary for interconnection or access to unbundled network elements',[146] or 'access to poles, ducts, conduits, and rights of way'[147] must be 'cost-oriented', 'reasonable' and 'transparent'. 'Cost-oriented' means 'based on cost, and may include a reasonable profit, and may involve different cost methodologies for different facilities or services'.[148]

Each party must also 'maintain appropriate measures' to prevent major suppliers from engaging in 'anti-competitive practices' such as anti-competitive cross-subsidisation or withholding information from other suppliers.[149] The parties have discretion in determining the precise nature of these measures. Finally, although the parties need not require that major suppliers provide suppliers of the other party 'access to network elements for the provision of public telecommunications services on an unbundled basis', they must provide their respective 'telecommunications regulatory bod[ies] with the authority' to impose this requirement.[150]

In addition to requiring parties to ensure that their telecommunications suppliers comply with certain standards, Chapter 12 imposes other obligations on how parties regulate telecommunications within their territory. These relate to matters such as transparency and independence of telecommunications regulators,[151] administration of any universal service obligation in a 'transparent, non-discriminatory, and competitively neutral manner',[152] provision of review and appeal processes for resolving telecommunications disputes,[153] mechanisms for enforcing compliance with measures a party has adopted pursuant to certain obligations in Chapter 12,[154] and allocation of scarce telecommunications resources 'in an objective, timely, transparent, and non-discriminatory manner'.[155]

Side letters to the AUSFTA explain the ownership structure of Telstra[156] and the need to engage in regular review and consultation in relation to communications and information technology.[157]

(ii) Singapore-Australia Free Trade Agreement

Chapter 10 of the SAFTA deals specifically with telecommunications services (which exclude distribution of broadcasting and audio-visual services),[158] supplementing the general obligations on trade in services in Chapter 7 and on

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146 Ibid art 12.13.1.
147 Ibid art 12.14.1.
148 Ibid art 12.25.2.
149 Ibid art 12.8.
150 Ibid art 12.10.
151 Ibid arts 12.17, 12.19.
152 Ibid art 12.18.
153 Ibid art 12.22.
154 Ibid art 12.21.
155 Ibid art 12.20.
156 Side letter from Mark Vaile (Australian Minister for Trade) to Robert Zoellick (United States Trade Representative) dated 18 May 2004.
157 Side letters from Mark Vaile (Australian Minister for Trade) to Robert Zoellick (United States Trade Representative) and from Robert Zoellick to Mark Vaile dated 18 May 2004.
158 Above n 135, art 2.2.

investment in Chapter 8. As in the AUSFTA, parties must ensure interconnection between public telecommunications networks[159] and that their suppliers of public telecommunications services provide number portability (but only for services designated by the party).[160] Under SAFTA, parties must also maintain general competitive safeguards to prevent suppliers from engaging in anti-competitive practices such as anti-competitive horizontal or vertical arrangements, anti-competitive mergers and acquisitions, or misuse of market power.[161]

The SAFTA also includes, like the AUSFTA, several additional obligations on major suppliers.[162] These include ensuring non-discrimination against the other party's telecommunications suppliers in relation to things such as: the availability of technical interfaces;[163] maintaining measures to prevent major suppliers from engaging in anti-competitive practices;[164] ensuring that major suppliers provide the other party's facilities-based suppliers with access to network elements on an unbundled basis, interconnection, access to poles and other rights of way, and physical co-location of equipment.[165] Parties must also ensure that major suppliers allow the other party's suppliers to purchase designated telecommunications services at reasonable rates for the purpose of resale.[166]

Also like the AUSFTA, the SAFTA includes procedural obligations relating to matters such as transparency and independence of telecommunications regulators,[167] provision of dispute settlement, review and appeal processes for resolving telecommunications disputes,[168] mechanisms for enforcing domestic measures relating to Chapter 10 obligations,[169] and carrying out procedures for the allocation of scarce telecommunications resources 'in an objective, timely, transparent and non-discriminatory manner'.[170] SAFTA also requires parties to facilitate the involvement of telecommunications suppliers in the development of industry standards.[171] It does not mention a universal service obligation.

(iii) Thailand-Australia Free Trade Agreement

The TAFTA contains no separate chapter on telecommunications. However, the general chapter on Trade in Services and the side letter on services contain some specific references to telecommunications.

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159 Ibid ch 10, art 8.
160 Ibid ch 10, art 10.
161 Ibid ch 10, art 7.
162 Ibid defined in ch 10, art 1.2(e). The definition is essentially the same as under the AUSFTA. See above n 142 and corresponding text.
163 Ibid ch 10, art 9.1.
164 Ibid ch 10, art 9.2.
165 Ibid ch 10, arts 9.3, 9.4, 9.6, 9.7.
166 Ibid ch 10, art 9.5.
167 Ibid ch 10, arts 4-5.
168 Ibid ch 10, art 6. See also ch 10, art 9.8.
169 Ibid ch 10, art 14.
170 Ibid ch 10, art 12.
171 Ibid ch 10, art 13.

Under Chapter 8, the parties make national treatment and market access commitments in respect of the sectors inscribed in Annex 8 and subject to the limitations specified in that Annex.[172] Article 807 states that relevant GATS provisions, including those on domestic regulation,[173] monopolies and exclusive service suppliers,[174] and the Annex on Telecommunications,[175] apply between the parties as if the inscriptions in Annex 8 were made in their GATS Schedules. Under Annex 8, largely adopting the Document W/120 classification system discussed above,[176] Australia makes commitments to most value-added telecommunications services without limitation, and to basic telecommunications (apart from with respect to entry of natural persons) subject to limitations regarding foreign ownership of Telstra and the requirement that entities holding a new carrier licence be a 'public body or a constitutional corporation under Australian law'. Thailand's communications services commitments are more restricted. They cover only telecommunications equipment sales services, telecommunications consulting services, telecommunications terminal equipment leasing services, database access services, and domestic very small aperture terminal (VSAT). They are subject to various limitations such as restrictions on foreign equity participation.

Article 812(1) provides for continued negotiations between the parties 'with the aim of enhancing the[ir] overall commitments', and a side letter on services indicates that this will include negotiations on telecommunications.[177]

These three FTAs (see Table II below) demonstrate the kinds of obligations that Australia appears willing to accept with respect to telecommunications and, given its close relationship with New Zealand, the minimum level of disciplines that would be appropriate in the CER or related agreements between Australia and New Zealand. The AUSFTA and the SAFTA, in particular, go further than the WTO, CER and MOU obligations between Australia and New Zealand, especially in mandating telecommunications access regulations and competition disciplines. In this way, they target the first and second conditions of a common market identified earlier in this paper: removing trade barriers in the form of government regulations and private anti-competitive conduct respectively.

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172 Ibid ch 8, arts 809-810.
173 GATS, above n 58, arts VI:1, VI:2, VI:3, VI:5.
174 GATS, ibid arts VIII:1, VIII:2, VIII:5.
175 GATS, ibid Annex on Telecommunications, [1]-[5].
176 See above p 163.
177 Side letters from Watana Muangsook (Thai Minister of Commerce) to Mark Vaile (Australian Minister for Trade) and from Mark Vaile to Watana Muangsook.

(iv) Table II: Summary of Australia's Telecommunications-Specific Obligations in FTAs

	AUSFTA	SAFTA	TAFTA
Access to/use of public telecommunications services	Art 12.2	Ch 10, art 3	Art 807(2), Annex 8 (limited)
Access to buildings	—	Ch 10, art 11	—
Suppliers: Interconnection	Art 12.3	Ch 10, art 8	—
Number portability	Art 12.4: for fixed telephony and any other designated service	Ch 10, art 10: for designated services	—
Dialing parity	Art 12.5	—	—
Access to submarine cable systems	Art 12.6	—	—
Major suppliers: MFN and national treatment	Art 12.7	Ch 10, art 9.1	Arts 809-810, Annex 8 (limited and not restricted to major suppliers)
Competitive safeguards	Art 12.8	Ch 10, art 9.2	—
Resale	Art 12.9	Ch 10, art 9.5	—
Unbundling	Art 12.10	Ch 10, art 9.3	—
Interconnection	Art 12.11	Ch 10, art 9.7	—
Leased circuit services	Art 12.12	—	—
Co-location	Art 12.13	Ch 10, art 9.4	—
Access to poles etc	Art 12.14	Ch 10, art 9.6	—
Dispute settlement	—	Ch 10, art 9.8	—
Other regulatory issues: Independent regulator	Art 12.17	Ch 10, art 5	—
Administration of universal service obligation	Art 12.18	—	—
Transparency	Art 12.19	Ch 10, art 4	—
Allocation and use of scarce resources	Art 12.20	Ch 10, art 12	—
Enforcement	Art 12.21	Ch 10, art 14	—
Dispute settlement, review, appeal	Art 12.22	Ch 10, art 6	—
Industry participation	—	Ch 10, art 13	—
General competitive safeguards	—	Ch 10, art 7	—

The AUSFTA and the SAFTA therefore provide examples of obligations that could usefully be incorporated in the Australia-New Zealand relationship in order to move towards a common telecommunications market. Broadly speaking, this would include obligations that are specific to telecommunications and not merely general competition and services disciplines as found in the GATS, the CER and (to a lesser extent) the MOU. For instance, whereas the existing Australia-New Zealand agreements impose obligations regarding monopolies in general, they do not

articulate the kind of anti-competitive conduct that may be particularly problematic in the context of telecommunications to the extent that the AUSFTA and the SAFTA do, and they may therefore be ineffective in preventing such conduct. Thus, GATS Article VIII:2 requires WTO members to ensure that monopoly suppliers competing in other sectors subject to specific commitments do not abuse their monopoly position inconsistently with those commitments. In contrast, Article 12 of the AUSFTA requires parties to ensure specifically that telecommunications suppliers provide number portability and dialing parity; failure to do so could be one way for such a supplier to abuse its market dominance or position as the incumbent.

As regards the third condition for a common telecommunications market (reducing costs arising from regulatory differences), none of these three agreements go as far as would be necessary to achieve a common telecommunications market. Thus, for example, the AUSFTA requires parties to administer any universal service obligation in a non-discriminatory manner, without specifying the level or type of universal service required. This means the parties could have no universal service obligation at all or very different obligations from each other, which may impose unnecessary costs on firms operating in both territories. Even the GATS Reference Paper goes further, as mentioned above, precluding any universal service obligation from being more burdensome than necessary to achieve the kind of universal service chosen by the relevant WTO member. Accordingly, we now turn to certain non-Australian FTAs to determine whether they provide additional guidance on how to minimise unwarranted regulatory differences.

(b) Non-Australian FTAs

In this section, we first consider the North American Free Trade Agreement (NAFTA),[178] which provides some disciplines analogous to those in the AUSFTA and the SAFTA, without going as far as those two agreements. We then turn to the EU, which probably represents the most integrated telecommunications market in the world. As foreshadowed above, lessons arising from these FTAs may be less apparent than those arising from Australian FTAs, given that, for example, the EU is more integrated on the whole than are Australia and New Zealand. On the other hand, this means these agreements may offer helpful illustrations of more extensive market opening than found in Australian FTAs.

(i) North American Free Trade Agreement

Like the AUSFTA and the SAFTA, most of the obligations in the NAFTA's specific chapter on telecommunications (Chapter 13) do not apply to measures 'adopted or maintained by a Party relating to cable or broadcast distribution of radio or television programming'.[179]

Article 1302 plays a similar role to the GATS Annex on Telecommunications (as well as corresponding provisions in the AUSFTA, the SAFTA, and the

178 32 ILM 289 and 605 (17 December 1992).
179 Ibid art 1301(2).

TAFTA),[180] requiring the parties to 'ensure that persons of another Party have access to and use of any public telecommunications transport network or service, including private leased circuits, offered in its territory or across its borders for the conduct of their business, on reasonable and non-discriminatory terms and conditions'. [181] This provision includes additional details of the terms and conditions required and allowed. Transparency and procedural obligations apply with respect to 'licensing, permit, registration or notification procedure that [a party] adopts or maintains relating to the provision of enhanced or value-added services'[182] and publication of 'measures relating to access to and use of public telecommunications transport networks or services'.[183] The parties also agree to consult with regard to further telecommunications liberalisation and to 'cooperate in the exchange of technical information, the development of government-to-government training programs and other related activities' in order to 'encourage the development of interoperable telecommunications transport services infrastructure'.[184]

At a more substantive level, the NAFTA includes provisions specific to monopoly suppliers, which may correspond to the (perhaps broader) category of major suppliers in the AUSFTA and the SAFTA. Parties must ensure that a monopoly competing directly or through affiliates in the provision of certain telecommunications services 'does not use its monopoly position to engage in anticompetitive conduct in those markets … in such a manner as to affect adversely a person of another Party. Such conduct may include cross-subsidization, predatory conduct and the discriminatory provision of access to public telecommunications transport networks or services.' [185] To prevent such conduct, Members must maintain effective measures such as 'requirements for structural separation' or rules requiring the monopoly to provide access 'on terms and conditions no less favorable than those it accords to itself or its affiliates'.[186]

The NAFTA also limits the standards-related measures that a party may adopt regarding 'the attachment of terminal or other equipment to the public telecommunications transport networks' and provides that conformity assessment procedures must be transparent and non-discriminatory.[187] Although it does not expressly require that parties adopt the same or similar telecommunications standards, a separate Chapter promotes harmonisation of standards in general. It requires parties, 'to the greatest extent practicable, [to] make compatible their respective standards-related measures, so as to facilitate trade in a good or service between the Parties'.[188] In addition:

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180 AUSFTA, above n 134, art 12.2; SAFTA, above n 135, ch 10, art 3; TAFTA, above n 136, art 807(2), annex 8.
181 Above n 178, art 1302(1).
182 Ibid art 1303(1).
183 Ibid art 1306.
184 Ibid art 1309.
185 Ibid art 1305(1).
186 Ibid art 1305(2).
187 Ibid art 1304(1), (5).
188 Ibid art 906(2).

> Each Party shall use, as a basis for its standards-related measures, relevant international standards or international standards whose completion is imminent, except where such standards would be an ineffective or inappropriate means to fulfill its legitimate objectives, for example because of fundamental climatic, geographical, technological or infrastructural factors, scientific justification or the level of protection that the Party considers appropriate.[189]

The international standard-setting bodies relevant to telecommunications would include the International Telecommunications Union and the International Organization for Standardization.[190] These NAFTA obligations regarding standards-related measures appear to go beyond the disciplines regarding technical regulations and technical barriers to trade in the WTO, the CER, the AUSFTA, the SAFTA, and the TAFTA, in that the latter disciplines are directed primarily towards trade in goods,[191] whereas the NAFTA provisions extend to standards-related measures affecting trade in services.[192]

Referring to international standards in connection with telecommunications, as shown in the NAFTA, provides one way of encouraging or mandating harmonisation and thereby reducing the regulatory burden on telecommunications suppliers conducting business in more than one jurisdiction. This is an important lesson that Australia and New Zealand may wish to draw from the NAFTA, particularly as it may also diminish the risk of WTO-inconsistent conduct arising from a common telecommunications market, as discussed further below.

(ii) European Union

Like the proposed common telecommunications market for Australia and New Zealand, the EU aims at an 'internal market for electronic communications networks and services'[193] based on both liberalisation and harmonisation. The current regime comprises a series of directives, most of which were enacted in 2002. It excludes 'services providing, or exercising editorial control over, content transmitted using electronic communications networks and services' as well as

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189 Ibid art 905(1).

190 See generally K Lee, 'Cooperative Standard-Setting: The Road to Compatibility or Deadlock? The NAFTA's Transformation of the Telecommunications Industry' (1996) 48 *Federal Communications Law Journal* 487.

191 Agreement on Technical Barriers to Trade, LT/UR/A-1A/10 (15 April 1994) art 1.3; Memorandum of Understanding Between the Government of Australia and the Government of New Zealand on Technical Barriers to Trade (16 August 1988); Letters from John Kerin, Australian Minister for Trade and Overseas Development, to Philip Burdon, New Zealand Minister for Trade Negotiations, and from Philip Burdon to John Kerin, (6 October 1992); AUSFTA, above n 134, art 8.11; SAFTA, above n 135, ch 5, art 1.1(a); TAFTA, above n 136, art 702(a).

192 NAFTA, above n 178, art 901(1).

193 European Parliament and Council of the European Communities, *Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)*, OJ L108, 33 (24 April 2002) (Framework Directive) preamble [36].

'information society services', and it operates without prejudice to the EU regimes for content regulation, audiovisual policy, and telecommunications equipment.[194]

The Framework Directive establishes certain broad procedural requirements, such as the need for each member state to (i) ensure the existence of an independent national regulatory authority to carry out tasks impartially and transparently[195] and (ii) provide a right of appeal from decisions of that authority.[196] The tasks of national regulatory authorities include 'promot[ing] competition in the provision of electronic communications networks, electronic communications services and associated facilities and services', 'contribut[ing] to the development of the internal market',[197] and allocating radio frequencies and national numbers.[198] Members must also take certain steps to enhance competition in recognition of the difficulties that new entrants may face. For example, they must require undertakings with an annual turnover of €50M or more in relevant activities to achieve accounting and structural separation where they 'provid[e] public communications networks or publicly available electronic communications services [and] have special or exclusive rights for the provision of services in other sectors in the same or another Member State'.[199]

The Framework Directive refers to four other 'Specific Directives',[200] namely:

- the *Authorisation Directive*, which generally precludes member states from preventing undertakings from providing electronic communications networks or services except that member states may require such undertakings to submit a notification of an intention to do so in order to obtain a 'general authorisation';[201]
- the *Access Directive*, which 'harmonises the way in which member states regulate access to, and interconnection of, electronic communications networks and associated facilities',[202] for example, by requiring member states to ensure that national regulatory authorities conduct a market analysis in order to determine whether to amend or maintain existing obligations on undertakings providing public communications networks or services concerning access and interconnection,[203] and by detailing the kinds of obligations that national regulatory authorities may impose (such

194 Ibid arts 1(3), 1(4), 2(c) (emphasis added).
195 Ibid art 3.
196 Ibid art 4.
197 Ibid arts 8(2), 8(3).
198 Ibid arts 9(1), 10(1).
199 Ibid art 13(1).
200 Ibid art 2(l).
201 European Parliament and Council of the European Communities, *Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)*, OJ L108, 21 (24 April 2002) art 3.
202 European Parliament and Council of the European Communities, *Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)*, OJ L108, 7 (24 April 2002) (Access Directive).
203 Ibid art 7.

as interconnection) and the conditions that such obligations must meet (such as transparency and non-discrimination);[204]

- the *Universal Service Directive*, which 'defines the minimum set of services of specified quality to which all end-users have access, at an affordable price in the light of specific national conditions, without distorting competition';[205] and
- a directive on data privacy, which 'harmonises the provisions of the member states required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community'.[206]

A separate directive deals with competition in telecommunications networks and services markets. Among other things, it prohibits member states from granting exclusive or special rights for the establishment or provision of directory services, electronic communications networks or publicly available electronic communications services, or for the use of radio frequencies for the provision of such services,[207] and it requires member states to ensure that vertically integrated public undertakings that provide such networks and 'are in a dominant position do not discriminate in favour of their own activities'.[208]

According to one commentator, the current EU telecommunications regime 'attempt[s] to address the worst of the variabilities and inconsistencies, through greater Commission oversight', although '[n]ational electronic communications markets continue to exhibit a high degree of variation, both in terms of market

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204 Ibid art 5 (see also arts 9-13).

205 European Parliament and Council of the European Communities, *Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights to electronic communications networks and services (Universal Service Directive)*, OJ L108, 51 (24 April 2002) art 1(2).

206 European Parliament and Council of the European Communities, *Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)*, OJ L201, 37 (31 July 2002) art 1(1) (replacing European Parliament and Council of the European Communities, *Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector*, OJ L24, 1 (30 January 1998)), as amended by European Parliament and Council of the European Communities, *Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC*, OJ L105, 54 (13 April 2006).

207 Commission of the European Communities, *Commission Directive 2002/77/EC of 7 September 2002 on competition in the markets for electronic communications networks and services*, OJ L249, 21 (17 September 2002) arts 2(1), 4(1), 5.

208 Ibid art 3.

development, as well as regulatory structures and intervention'.[209] Nevertheless, the goals of harmonisation and creating an internal telecommunications market are clearly reflected in the existing directives. The Access Directive and the Universal Service Directive, in particular, provide examples of how even complicated telecommunications-specific regulation may be streamlined across borders. It is true that the EU is more integrated than Australia and New Zealand (as demonstrated by the euro) and some aspects of these directives may depend on that greater level of integration. At the same time, the EU member states are both more numerous and more diverse than Australia and New Zealand, so other aspects of a common telecommunications market should be less complex in the latter context.

V. Crafting a Solution

If we accept the objective of achieving a common telecommunications market in Australia and New Zealand for the reasons identified above,[210] and that the current international obligations affecting telecommunications in our two countries do not go far enough,[211] the next question is how to create such a market for the future. In answering this question, although we can learn from and build on the Australian and other FTAs discussed earlier,[212] we must also consider the specific circumstances that would arise in an Australian-New Zealand telecommunications market. Accordingly, in this section we begin by considering the feasibility of attempting to harmonise telecommunications services regulation in Australia and New Zealand, taking into account the existing systems. Next, we highlight the WTO rules that would apply to a common telecommunications market in Australia and New Zealand, in order to ensure that such a market would not create any WTO violation. Finally, we touch on the main options for the formal legal framework establishing a market of this kind, starting from the basis of the existing CER and MOU.

(a) Feasibility of harmonising telecommunications services regulation

Harmonising telecommunications services regulation in Australia and New Zealand has been rendered more feasible in recent years due to the increasing alignment of the two countries' competition and telecommunications regulatory systems. As mentioned earlier, competition laws in Australia and New Zealand are already significantly harmonised. [213] However, until recently, telecommunications regulation was quite different.

Historically, New Zealand stood out among countries with liberalised telecommunications markets as having done so without significant legal intervention and primarily through the application of general competition law.[214]

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209 Walden, above n 29, 149. Walden's chapter provides further general discussion of the EU telecommunications regime, history and broader context.

210 See above Part II.

211 See above Part III.

212 See above Part IV.

213 See above Part III(c).

214 I Walden, 'Telecommunications Law and Regulation: An Introduction' in Walden and Angel (eds), above n 29, 3, 8-9, 19. See also Productivity Commission, *International Benchmarking of Australian Telecommunications Services* March 1999) 92;

This approach led to delays caused by 'lengthy recourse to judicial intervention'.[215] Following a Ministerial Inquiry in 2000 recognising these and other problems,[216] the Telecommunications Act 2001 (NZ) (TA) was passed, accepting the Inquiry's recommendation of 'light-handed industry specific regulation'[217] in which the incumbent Telecom retained considerable flexibility. Among other things, the Act established a Telecommunications Commissioner (a member of the Commerce Commission, which enforces competition and consumer protection legislation in New Zealand including the Commerce Act 1986 (NZ) and the TA), introduced universal service obligations, and provided for arbitration and dispute settlement.[218] Nevertheless, a government benchmarking exercise at the end of 2005 for telecommunications in New Zealand concluded that 'in general there is a significant gap between New Zealand pricing performance and that of countries in the top half of the OECD, and there is significant potential to improve relative performance'.[219]

In 2006, New Zealand introduced substantial amendments to its telecommunications regime in the form of the Telecommunications Amendment Act (No 2) 2006 (NZ) (TAA).[220] Although many significant differences between the Australian and New Zealand regimes remain, the reform process in New Zealand means the two are drawing closer as regards the level and stringency of intervention, particularly in connection with the treatment of the incumbent (Telecom in New Zealand and Telstra in Australia). In fact, whereas the New Zealand system was previously at the 'light-handed' end of the regulatory continuum among OECD member countries (and certainly much easier on the incumbent than Australia),[221] the new system envisaged by the TAA will move New Zealand to a position more appropriate for the relatively non-competitive state of its telecommunications markets. Notably, the TAA at last introduces local loop

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Ministerial Inquiry into Telecommunications: Final Report (27 September 2000) <www.teleinquiry. govt.nz/reports/final/final.pdf> 16, 20.

215 Walden, above n 214, 19 (citing *Telecom Corporation of NZ Ltd v Clear Communications Ltd* (1992) 4 NZBLC).

216 *Ministerial Inquiry into Telecommunications: Final Report* (27 September 2000) <www.teleinquiry.govt.nz/reports/final/final.pdf> 24-25. See also Paul Swain, New Zealand Minister of Communications, 'Telecommunications Inquiry Report Release', Press Release (4 October 2000); *Ministerial Inquiry into Telecommunications: Issues Paper* (April 2000) <www.teleinquiry.govt.nz/reports/issues/index.html>; Hugh Fletcher, Chairman, Ministerial Inquiry into Telecommunications, 'Telecommunications Inquiry Issues Paper Released', Press Release (6 April 2000).

217 *Ministerial Inquiry into Telecommunications: Final Report* (27 September 2000) <www.teleinquiry.govt.nz/reports/final/final.pdf> 25, 104 (Recom 2). See generally Paul Swain, New Zealand Minister of Communications, 'Government announces "world-leading" telecommunications reform', Media Release (20 December 2000) and attached documents comprising the Government Response to the Ministerial Inquiry into Telecommunications <www.med.govt.nz/upload/9431/response.pdf>.

218 See, eg, Telecommunications Act 2001 (NZ) ss 9, 20, 70.

219 Ministry of Economic Development report to the Minister of Communications, *Benchmarking the Comparative Performance of New Zealand's Telecommunications Regime*, POL/1/27/10/1 (20 December 2005) [117(a)].

220 Royal Assent received 18 December 2006; 'First Reading: Telecommunications Amendment Bill' *Hansard* (29 June 2006).

221 See the comparisons in OECD, *OECD Communications Outlook* (2003) 47-56.

unbundling, improves access to regulated rather than negotiated dispute settlement, strengthens enforcement mechanisms such as pecuniary penalties, and establishes a progressive process to introduce accounting and operational separation of Telecom.[222]

Upon introducing the bill for the TAA to the House of Representatives, the Minister for Communications David Cunliffe explained that the bill was 'the keystone of a package of measures designed to improve the performance of the New Zealand communications sector', which included:

> first, this legislation, which will deliver an effective wholesaling regime; second, measures to encourage infrastructure-based competition, including developing a package for rural communities and ensuring we have a competitive cellular market; third, the future-proofing of the regulatory environment to technology change, including by reviewing telecommunications service obligations and preparing for next-generation networks; and fourth, the continued development and implementation of the Government's digital strategy to encourage the smart use of information and communications technology. The package is a commitment to make New Zealand a world leader in information and communications technology.[223]

The Commerce Commission recently published a discussion paper clarifying the relationship between the amended TA and the general competition provisions under the Commerce Act 1986 (NZ), given that both may apply to telecommunications in different circumstances, and highlighting its wish, 'to the fullest extent possible, to remove barriers to entry and promote competition in telecommunications markets'.[224]

The Australian telecommunications sector has been progressively opened to competition since 1989.[225] Today, as in New Zealand, it is governed by both general competition law and industry-specific competition disciplines in the Trade Practices Act 1974 (Cth) (administered by the Australian Competition and Consumer Commission) as well as a regulatory framework set out in the Telecommunications Act 1997 (Cth) (administered by the Australian Communications and Media Authority). These are federal laws passed pursuant to the Commonwealth Parliament's legislative powers under the Australian Constitution.[226] Accordingly, difficulties of harmonisation with New Zealand arising from Australia's federal system of government[227] should be minimal in this context.

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222 See, eg, Telecommunications Amendment Act (No 2) 2006 (NZ) ss 13, 32, 54, and sch 1, pt 3; Telecommunications Act 2001 (NZ) ss 30A-30ZD, ss 69A-69ZH, 156A, 156ZJ and sch 1, pt 2.

223 'First Reading: Telecommunications Amendment Bill' *Hansard* (29 June 2006).

224 Commerce Commission, *Discussion Paper: The Interrelationship Between Part 2 of the Commerce Act 1986 and the Telecommunications Act 2001* (2 April 2007).

225 H Raiche, 'The Policy Context' in A Grant (ed), *Australian Telecommunications Regulation* (3rd ed, 2004) 1, 4-18; H Coonan, Australian Minister for Communications, Information Technology and the Arts, 'Telstra's not happy, but consumers the real winners', Media Release no 102/07 (3 August 2007).

226 Primarily s 51(v) and (xx).

227 G Walker, 'The CER Agreement and Trans-Tasman Securities Regulation: Part 1'

If regulation of telecommunications suppliers in Australia and New Zealand is converging, does this mean that harmonisation is not only feasible but also a natural process that will inevitably take place without government coordination? Unfortunately not. Even though we can expect the two countries' broad aims in this area to be similar, a variety of regulatory approaches could be used to achieve those aims and, without a concerted effort by both governments, unjustified and costly differences are bound to arise. In view of these differences, the House of Representatives Standing Committee on Legal and Constitutional Affairs considered harmonisation a feasible goal, 'recommend[ing] that the Australian Government propose to the New Zealand Government the legal harmonisation of the Australian and New Zealand telecommunications regulation frameworks with a view to fostering a joint telecommunications market'.[228]

Harmonisation need not mean identical laws, as already discussed.[229] However, governments and agencies in Australia and New Zealand would need a degree of flexibility and openness to ideas in order to proceed along this path. One valuable technique would be to use international standards, where available, as a neutral reference point, perhaps in a manner similar to NAFTA Article 905(1).[230] This might reduce debate and also provide greater potential for multilateralising the outcome, both through applying the same regulations to other WTO members on an MFN basis (as discussed below)[231] and through encouraging other countries to adopt similar standards. The goal would be to agree on the level and type of regulation appropriate to telecommunications markets functioning at a given level of competition.

It is beyond the scope of this paper to specify which international standards should apply or otherwise to put forth a blueprint for competition disciplines or more general regulation of the telecommunications sector in a common Australia-New Zealand market. As mentioned above, the substance of such regulation and the extent of harmonisation would depend on an empirical analysis of the preferences of consumers in the two countries, democratic debate on the possible options, and the regulatory and competitive environment in both jurisdictions at the time of pursuing a common market (given that this is a constantly evolving area).[232] The existing regulatory regimes and trends in their development suggest that moving towards a common market is feasible and therefore that this process of determining how to go about it can now begin.

(2004) 19(10) *Journal of International Banking Law and Regulation* 390, 391; G Walker, 'The CER Agreement and Trans-Tasman Business Law Coordination: From "Soft Law" Approach to "Hard Law" Outcome' (2003) 21 *Law in Context* 75, 77.

228 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 9 [3.116] (Recom 9).

229 See above Parts II(c)(ii) and IV(b)(ii).

230 See above n 189 and corresponding text.

231 See below Part V(c)(i).

232 See, eg, H Coonan, Australian Minister for Communications, Information Technology and the Arts, 'Telco Red Tape Reduction', Media Release no. 90/07 (27 June 2007).

(b) Formal structure for achieving a common market

If the existing competition and telecommunications regimes in Australia and New Zealand and their likely future direction make it feasible to consider achieving a common market for telecommunications, the next question is how this should be done. In particular, what formal or legal structure should be used to harmonise telecommunications regulation in the two countries?

(i) Telecommunications under the MOU and the CER

The MOU seems the most appropriate candidate for harmonisation of regulation in Australia and New Zealand, at least initially. The MOU is to be reviewed every five years, meaning that the next review is not scheduled until early 2011.[233] However, telecommunications coordination and harmonisation could begin before the official review of the MOU, a holistic review could be conducted earlier, or the MOU could be amended to add telecommunications to the work program (for example, simply through an exchange of letters). The MOU specifically provides that the 'understandings set out in this Memorandum are not intended to preclude the possibility of earlier coordination in any area of business law or regulatory practice'[234] and that:

> when either Government considers that a difference between their respective business laws or regulatory practices gives rise to an impediment to the development of the trans-Tasman relationship, the two Governments will consult with a view to resolving the impediment, whether or not the area of law is already included in the programme and regardless of the priority accorded to the matter at the time.[235]

The MOU also expresses the hope 'that Australian and New Zealand officers and regulators in each sphere will meet together annually to discuss issues of mutual interest'.[236] Thus, the current drafting of the MOU does not prevent the two governments from examining telecommunications as another area of regulation that would benefit from increased coordination or harmonisation.

Australia and New Zealand decided to exclude telecommunications regulation from the work program in the latest MOU on the basis that 'there has been considerable reform in the telecommunications regulatory regime in both countries, which is still bedding in'.[237] In its recent report, the Joint Standing Committee on Foreign Affairs Defence and Trade noted Telstra's position that this reason for the exclusion is 'implausible given that the Australian regime has been in place for almost a decade and New Zealand is doing a "regulatory stocktake"'.[238] New Zealand's recent telecommunications reform represents a major regulatory overhaul, and several years may be required for it to be fully refined and implemented. More minor regulatory changes can be expected to continue in both

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233 MOU, above n 12, [20].
234 MOU, ibid [21].
235 MOU, ibid [15].
236 MOU, ibid [18].
237 New Zealand Ministry of Economic Development and Australian Treasury, above n 40, 9.
238 Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade, above n 10, [2.16].

countries for the foreseeable future. The need for continued reform of telecommunications regulation in Australia and New Zealand should not be seen as an impediment to further coordination or harmonisation in this sector. On the contrary, the fact that New Zealand's telecommunications regime in particular is in a state of flux makes it all the more appropriate for the two countries to discuss possibilities and interests, pooling expertise and ideas rather than proceeding along separate paths that may needlessly diverge.

The House of Representatives Standing Committee on Legal and Constitutional Affairs saw 'merit in the suggestion' that telecommunications be added to the MOU work program but 'consider[ed] that such an addition would more properly be pursued subsequent to the establishment of … ministerial dialogue'.[239] Both that Committee and the Joint Standing Committee on Foreign Affairs Defence and Trade recommended the introduction of regular, formal ministerial-level discussions on telecommunications.[240] The latter Committee also recommended that telecommunications be 'placed on the CER Work Program at the earliest opportunity'.[241]

If telecommunications is added to the MOU (whether before or after the establishment of formal and regular 'ministerial dialogue'), this may be seen as a stepping stone towards eventual inclusion of a telecommunications annex in the Protocol (or otherwise attached to the CER). Although regulatory coordination or harmonisation may be distinct from liberalisation of trade in services (which the Protocol already largely achieves in relation to telecommunications), these are related concepts and, as seen from other FTAs and the GATS as discussed above, the Protocol could provide a suitable vehicle for deeper integration efforts in this sector. Including agreements on telecommunications regulation in the Protocol itself could promote transparency (since the Protocol is notified to the WTO, as discussed further below)[242] and encourage similar arrangements among other WTO members.

(ii) Other options

Australia and New Zealand have pursued a significant degree of coordination and harmonisation in a number of areas related to the CER, demonstrating the various ways of structuring such agreements independently of the MOU or CER and Protocol, as well as their potential content and significance. Here we consider a few of the relevant initiatives.

The Arrangement between Australia and New Zealand Relating to Trans-Tasman Mutual Recognition (TTMRA)[243] relates to trade in goods as well as the recognition of individuals' qualifications (and thereby the movement of labour,

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239 House of Representatives Standing Committee on Legal and Constitutional Affairs, above n 9 [3.118].

240 Ibid [3.119] (Recom 10); Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade, above n 10, [3.39] (Recom 3) (referring to a 'Telecommunications Ministerial Council').

241 Trade Sub-Committee of the Joint Standing Committee on Foreign Affairs Defence and Trade, above n 10, 34 (Recom 4).

242 See below Part V(c).

243 (14 June and 9 July 1996).

which would fall under GATS mode 4). The TTMRA's two guiding principles are as follows:

> a Good that may legally be sold in the Jurisdiction of an Australian Party may legally be sold in New Zealand and a Good that may legally be sold in New Zealand may legally be sold in the Jurisdiction of any Australian Party.[244]
>
> a person who is Registered to practise an occupation under a law of an Australian Party will be entitled to practise an Equivalent occupation under the law of New Zealand and a person Registered to practise an occupation under a law of New Zealand will be entitled to practise an Equivalent occupation under the law of any Australian Party.[245]

The TTMRA is conceived as an 'arrangement' (rather than an agreement or treaty) between New Zealand and the 'Australian Parties', namely the Commonwealth of Australia plus the six states and two territories. It takes note of the CER and builds on the '1992 Mutual Recognition Agreement between the Commonwealth, States and Territories of Australia',[246] demonstrating the viability of reaching a trans-Tasman understanding even on issues that may affect Australian states and territories in different ways.[247]

At the other end of the spectrum, in terms of formality, is the binding international treaty or Agreement between the Government of Australia and the Government of New Zealand Relating to Air Services (Air Services Agreement),[248] which builds on the Australia-New Zealand Single Aviation Market Arrangements.[249] The Air Services Agreement covers a range of rights and obligations, including: the right of airlines of the other party and airlines authorised to operate in the Single Aviation Market (SAM airlines) to fly across or stop in the territory of either party and to determine its own tariffs;[250] the mutual recognition of certificates and licences issued by the other Party;[251] and the exemption of aircraft and component parts from import restrictions, customs duties, and excise taxes.[252] These examples show that the Air Services Agreement is directed towards both liberalisation of trade in goods and services related to aviation as well as deeper levels of integration.

Several agreements between Australia and New Zealand go to the extent of establishing or working towards institutions run jointly by authorities of the two countries. These include the Agreement between the Government of Australia and

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244 Ibid [4.1.1] (see also preamble [G1]).
245 Ibid [5.1.1] (see also preamble [G2]).
246 Ibid preamble [D], [F].
247 For further discussion see generally Q Hay, 'Trans-Tasman Mutual Recognition: A New Dimension in Australia-New Zealand Legal Relations' (1997) 3 *International Trade Law & Regulation* 6; Commonwealth of Australia, *A Users' Guide to the Trans-Tasman Mutual Recognition Arrangement (TTMRA) Between the Commonwealth of Australia the Australian States and Territories and New Zealand* (May 1998).
248 (8 August 2002) [2003] ATS 18.
249 (19 September 1996).
250 Ibid arts 3, 10.
251 Ibid art 5.
252 Ibid art 9.

the Government of New Zealand Concerning a Joint Food Standards System,[253] which led to the 'first truly bi-national government agency between Australia and New Zealand', the Australia New Zealand Food Authority (now Food Standards Australia New Zealand),[254] and the Agreement between Australia and New Zealand Concerning the Establishment of the Governing Board, Technical Advisory Council and Accreditation Review Board of the Joint Accreditation System of Australia and New Zealand,[255] establishing the Joint Accreditation System of Australia and New Zealand to provide 'accreditation of conformity assessment bodies in the fields of certification and inspection'.[256] More recently, the two governments have been developing the Australia New Zealand Therapeutic Products Authority[257] pursuant to the Agreement between the Government of Australia and the Government of New Zealand for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products.[258]

Evidently, establishing a joint institution or institutions would be among the most ambitious, difficult and costly approaches to achieving a common telecommunications market in Australia and New Zealand, and this degree of alignment may not be necessary to achieve this goal. However, it is worth keeping in mind this possibility for the longer term.

(c) Ensuring compliance with WTO obligations

The CER and associated agreements between Australia and New Zealand supplement the WTO rules and must comply with those rules. In particular, the provision of preferential treatment for trade in services between the parties would ordinarily violate the MFN obligation in GATS Article II mentioned above,[259] to the extent that other WTO members are excluded from such treatment. The main relevant exceptions to this obligation are through each member's list of MFN exemptions and through GATS Article V, which allows 'agreement[s] liberalizing trade in services' subject to certain conditions.[260] Australia and New Zealand list MFN exemptions for audiovisual services (in relation to film co-production agreements) but not telecommunications services.[261] Accordingly, the main question surrounding Australia and New Zealand's WTO obligations in connection

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253 [1996] ATS 12 (5 December 1995), as amended 1 July 2002 by an exchange of letters at [2002] ATS 13.

254 See <www.foodstandards.gov.au/aboutfsanz/historyoffsanz.cfm>.

255 (25 March 1998), replacing the Agreement between Australia and New Zealand concerning the Establishment of the Council of the Joint Accreditation System of Australia and New Zealand (30 October 1991) [1998] ATS 16.

256 See <www.jas-anz.com.au>.

257 See <www.anztpa.org>.

258 (10 December 2003) [2003] ATNIF 22. For further discussion see generally T Faunce, K Johnston and H Bambrick, 'The Trans-Tasman Therapeutic Products Authority: Potential AUSFTA Impacts on Safety and Cost-Effectiveness Regulation for Medicines and Medical Devices in New Zealand' (2006) 37 *Victoria University of Wellington Law Review* 365.

259 See above p 164.

260 GATS, above n 58, art V:1.

261 WTO, *Australia* – above n 74; WTO, *New Zealand* – above n 74.

with a common telecommunications market as advocated in this paper relates to GATS Article V. If not exempt under GATS Article V, any advantages the parties provide to each other in relation to telecommunications must be accorded to all other WTO members pursuant to GATS Article II. The parties would also need to ensure compliance with Article VII in relation to mutual recognition. We consider Articles V and VII in turn.

(i) GATS Article V: exception for economic integration agreements

According to a WTO Panel, 'the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential arrangements'.[262] Thus, under Article V:1, the GATS does not prevent members from being a party to or entering into 'an agreement liberalizing trade in services between or among the parties to such an agreement', provided that the agreement:

(a) has substantial sectoral coverage[1], and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

  (i) elimination of existing discriminatory measures, and/or

  (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable timeframe, except for measures permitted under Articles XI, XII, XIV and XIV bis.

1 This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply.

In assessing compliance with these conditions, Article V:2 provides that 'consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned'. In addition, to be exempt under Article V:1, Article V:4 states that an FTA 'shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement'.

Australia and New Zealand notified the Protocol to the Council for Trade in Services on 22 November 1995 in accordance with Article V:7(a) of the GATS.[263] On 30 October 1996, the Council for Trade in Services referred the Protocol to the Committee on Regional Trade Agreements (CRTA) to examine it and report on its consistency with GATS Article V.[264] In 2000, the CRTA Chairman circulated a

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262 Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (11 February 2000) [10.271] (this issue not appealed).

263 WTO, Council for Trade in Services, *Australia New Zealand Closer Economic Relations Trade Agreement: Joint Communication from Australia and New Zealand*, S/C/N/7 (22 November 1995).

264 WTO, Council for Trade in Services, *Report of the Meeting Held on 30 October 1996: Note by the Secretariat*, S/C/M/14 (5 December 1996) [28]-[29].

draft report that concludes that the Protocol complies with GATS Article V, noting that 'the Protocol did not require any change to the treatment accorded by any of the Parties to its trade in services with third countries', and that the parties confirmed 'that no such modification had taken place'.[265]

Although the CRTA has not adopted the draft report and therefore this conclusion does not necessarily represent most WTO members' views of the Protocol, this state of affairs is symptomatic of the broader hiatus in relation to FTAs in the WTO and does not necessarily indicate a potential problem with the Protocol. One difficulty with FTAs in the WTO (in both the goods and services contexts) is the ambiguity of the relevant exception provisions.[266] Another is the politically sensitive nature of FTAs for nearly all members, particularly the proliferation of FTAs over the years.[267] According to the latest information provided by the WTO, the Protocol is one of 44 agreements notified to the WTO under GATS Article V. The CRTA has not adopted a report on any of these agreements, and the Protocol is one of those that have proceeded the furthest. Consultations continue on the draft report.[268]

Leaving to one side the question whether the Protocol as it currently stands complies with GATS Article V, we turn to consider the implications for the two countries' WTO obligations of amending the CER or the Protocol or related agreements to achieve a common telecommunications market. Harmonising competition and telecommunications regulation in Australia and New Zealand would not increase the sectoral coverage of the Protocol within the meaning of GATS Article V:1(a), since telecommunications services are not inscribed in either country's annex and are therefore already subject to the Protocol obligations. Nor would it reduce the 'discrimination' targeted in GATS Article V:1(b), since the national treatment requirement in Article 5.1 of the Protocol already applies to telecommunications.

However, especially if this regulatory harmonisation were eventually incorporated into the Protocol, this could positively influence the compatibility of the Protocol with GATS Article V in three ways. First, greater protection and guaranteed non-discrimination for telecommunications service suppliers operating through commercial presence (mode 3) would strengthen the argument that no mode is *a priori* excluded from the Protocol, as precluded in GATS footnote 1, despite the Protocol being subject to each country's 'foreign investment policies'.[269] (Including these suppliers would also prevent any suggestion that

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265 WTO, Committee on Regional Trade Agreements, above n 118, [18], [20].

266 In the context of art XXIV of the GATT 1994 (which is broadly analogous to GATS art V), see generally N Lockhart and A Mitchell, 'Regional Trade Agreements under GATT 1994: An Exception and its Limits' in A Mitchell (ed), *Challenges and Prospects for the WTO* (2005) 217; J Mathis, 'Regional Trade Agreements and Domestic Regulation: What Reach for "Other Restrictive Regulations of Commerce"?' in Bartels and Ortino (eds), above n 33, 79.

267 See above n 3.

268 WTO, *Notifications of RTAs in Force to GATT/WTO as of 1 March 2007* <www.wto.org/english/ tratop_e/region_e/regfac_e.htm>.

269 See above nn 112-113, 118, and corresponding text.

suppliers supplying under mode 3 are being discriminated against, which could be contrary to GATS Article V:1(b).)[270] Second, a common telecommunications market would reinforce the notion that the Protocol is part of 'a wider process of economic integration or trade liberalization among the countries concerned' pursuant to GATS Article V:2. Third, it would confirm that the Protocol is designed to facilitate trade between the parties in accordance with GATS Article V:4. In any case, the common telecommunications market envisaged in this paper would be unlikely to introduce any further doubts as to the legitimacy of the Protocol under GATS Article V.

Australia and New Zealand would need to notify the WTO Council for Trade in Services of 'any enlargement or any significant modification of' the CER[271] as well as any consequential withdrawal or modification of a specific GATS commitment[272] (which would be subject to other substantive obligations as well).[273] However, the types of changes envisaged in this paper would be unlikely to require changes to either country's GATS commitments. New regulatory approaches would be best extended to other WTO members on an MFN basis, in order to simplify the system in each country, encourage international competition and thereby enhance efficiency, and promote telecommunications liberalisation within other members or multilaterally.[274] This would also ensure that inclusion of the common telecommunications market in the Protocol did not lead to a violation of GATS Article V:4 by 'rais[ing] the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement' in respect of any other WTO member.

(ii) GATS Article VII: mutual recognition

Under GATS Article VII, if a common telecommunications market in Australia and New Zealand involved each country recognising 'the education or experience obtained, requirements met, or licenses or certifications granted' in the other country for the purpose of fulfilling the first country's 'standards or criteria for the authorization, licensing or certification of service suppliers',[275] they would need to notify the Council for Trade in Services and give other interested members adequate opportunity to accede to the agreement or negotiate a similar agreement.[276]

Finally, Article VII:5 provides:

> Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and nongovernmental organizations towards the establishment

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270 A WTO Panel has suggested that the reference to discrimination in art V:1(b) could include discrimination *between* service suppliers of an FTA party: Panel Report, above n 262, [10.270] (this issue not appealed).
271 GATS, above n 58, art V:7(a).
272 GATS, ibid art V:5.
273 GATS, ibid art XXI.
274 See Findlay, Stephenson and Prieto, above n 116, 293, 301, 308 (cf 305).
275 GATS, above n 58, art VII:1.
276 GATS, ibid arts VII:2, VII:4.

> and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions.

The repetition of the word 'appropriate' in this provision highlights that it is a fairly 'soft' obligation that would be difficult to breach. However, we have already suggested relying on international standards in a common telecommunications market where possible.[277] This would ensure compliance with GATS Article VII:5 and make it easier for each country to provide the same treatment to other WTO members.

VI Conclusion

Australia and New Zealand, as founding members of the WTO and its predecessor,[278] and pioneers in the FTA field through the CER, are well aware of the benefits of liberalising trade, including trade in services. As the CER has developed through a number of associated arrangements over the years, the two countries have also acknowledged the importance of harmonising or at least coordinating regulatory approaches in particular areas. Australia's federal structure has not precluded this from occurring. Yet telecommunications has been left behind. Building on the experiences and examples from the Australia/New Zealand relationship as well as other FTAs, telecommunications should be added to the MOU work program as a first step towards formally incorporating telecommunications in the CER through the Protocol. In particular, work should begin on adding obligations regarding market access and anti-competitive conduct that are specific to telecommunications, as in the AUSFTA and the SAFTA. Increased harmonisation, for example regarding access and universal service obligations as in the EU, should also be pursued.

The WTO obligations of Australia and New Zealand do not pose a major obstacle to achieving a common telecommunications market in the two countries. However, the countries will need to keep these obligations in mind in moving towards such a market. Coordinating or harmonising telecommunications regulation on an MFN basis would reduce the risk of violating WTO laws in the process of creating a common market for telecommunications in Australia and New Zealand, while at the same time promoting greater competition and market access in this sector among other WTO members. A successful result in Australia and New Zealand could also provide a template for further multilateral negotiation, particularly if the two countries pay close attention to relevant international standards and bodies in crafting the regulatory framework, as illustrated in the NAFTA.

Perhaps more importantly, a common telecommunications market would bring Australia and New Zealand closer to the two governments' express goal of forming a single economic market. The present anomaly of a CER without a specific telecommunications chapter of the kind found in WTO law as well as other Australian FTAs is a clear impediment to achieving that goal.

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277 See above p 189.

278 General Agreement on Tariffs and Trade, LT/UR/A-1A/1/GATT/2 (30 October 1947) 55 UNTS 194. Australia was a contracting party to the GATT 1947 from 1 January 1948, and New Zealand was a contracting party from 30 July 1948.