

# EXPOSURE DRAFT OF THE TELECOMMUNICATIONS LEGISLATION AMENDMENT (INTERNATIONAL MOBILE ROAMING) BILL 2014

## EXPLANATORY MATERIAL

### Background

International mobile roaming (IMR) services allow mobile devices, such as phones or tablets, to be used when travelling in other countries. Although the prices of IMR services have started to trend down over recent years, they remain high compared to prices for comparable domestic services, as well as policy directions for IMR in Europe and other countries that have entered into bilateral arrangements. Regulatory intervention requires bilateral coordination as wholesale and retail IMR services are supplied from different countries.

At the 30<sup>th</sup> anniversary of Closer Economic Relations in 2013, Australia and New Zealand jointly announced that both countries would work together to address the high cost to business and consumers of using mobile roaming services across the Tasman.

If introduced, the draft of the Telecommunications Legislation Amendment (International Mobile Roaming) Bill 2014 (the Draft Bill) would form part of the Australian Government's response to the investigation into trans-Tasman mobile roaming conducted by the then Department of Broadband, Communications and the Digital Economy and the New Zealand Ministry of Business, Innovation and Employment. The Draft Bill complements consumer protection measures introduced by the *Telecommunications (International Mobile Roaming) Industry Standard 2013*.

The final report of the investigation recommended that the Australian and New Zealand governments expand the remedies available to their respective competition regulators, the Australian Competition and Consumer Commission (the ACCC) and the New Zealand Commerce Commission (NZCC), to investigate markets for trans-Tasman roaming services and intervene on a coordinated bilateral basis where necessary.

### Overview of the Draft Bill

The Draft Bill would give effect to the recommendations of the final report of the investigation, including enabling the ACCC to take coordinated regulatory action with the NZCC where necessary. The reforms would empower the ACCC to:

- monitor the wholesale and retail prices and margins for IMR services;
- publish an annual report on retail prices and margins for IMR services as well as industry compliance with any retail and wholesale price-control arrangements in force for IMR services;
- impose wholesale price caps (or other price-control arrangements) on IMR services sold to New Zealand operators and suppliers as part of coordinated trans-Tasman action;
- impose wholesale access obligations on IMR services sold to New Zealand operators and suppliers as part of coordinated trans-Tasman action; and
- impose retail price caps (or other price-control arrangements) on IMR services sold to Australian customers travelling overseas.

Prior to imposing any price-control arrangements or access obligations the ACCC would be required to conduct an inquiry involving public consultation. However, if prices for TTMR services continue to converge with domestic prices, the necessity for the ACCC to impose price regulation using the measures contained in the Draft Bill will likely diminish.

The access, monitoring and reporting measures in the Draft Bill would extend existing telecommunications provisions in the *Competition and Consumer Act 2010* (the CCA) to apply to IMR services. The proposed new price-control provisions are based on existing regulatory processes in Part XIC of the CCA to avoid imposing unfamiliar regulatory mechanisms on the industry.

The proposed wholesale regulatory powers would only be exercised for wholesale IMR services connected with a designated country. Subject to finalisation of treaty amendments, the first designated country would be New Zealand. The list of designated countries would be able to be extended by the Minister at a later date to other countries with which the government establishes bilateral arrangements for coordinated regulatory action without further legislative amendment.

The Draft Bill contains proposed amendments to the CCA, the *Telecommunications Act 1997* (the Tel Act) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Consumer Protection Act). The Draft Bill also contains a proposed consequential amendment to the *Telecommunications (Interception and Access) Act 1979* (the Interception Act).

A review of the operation of the proposed reforms would be conducted by the end of 2018.

## **IMR Services**

The coverage of mobile networks is generally limited to a single country. An IMR service enables an end-user to use a mobile service supplied by their domestic mobile supplier while using a network that is located in their destination country and operated by a different operator to their domestic network. This enables the end-user to use their home country phone number and billing arrangements whilst overseas.

The wholesale and retail elements of an IMR service are supplied by operators or suppliers in different countries. Operators of mobile networks, or suppliers of services using those networks, act simultaneously as both a buyer and seller at the wholesale level. As a buyer, this enables the operator or supplier to supply their domestic customers with a retail service that enables end-users to roam on other networks overseas. As a seller, this is reversed; it enables overseas operators and suppliers to sell their own retail services.

The Draft Bill defines wholesale IMR services and retail IMR services as those services supplied by Australian carriers or carriage service providers. The foreign equivalents of these services are not defined in the Draft Bill, as jurisdiction for their regulation lies with the country from which the suppliers of these services operate. However, for the purposes of this explanatory material, these services are referred to as foreign wholesale IMR services and foreign retail IMR services.

For example, a wholesale IMR service using a network in Australia is needed to supply a foreign retail IMR service that allows New Zealand end-users to roam when travelling to Australia. Conversely, a foreign wholesale IMR service using a network in New Zealand is needed to supply a retail IMR service that allows Australian end-users to roam when travelling to New Zealand.

The relationship between wholesale and retail IMR services is set out in the table below:

**Table 1: Description of relationship between IMR services in Australia and New Zealand**

<b>Scenario</b>	<b>Wholesale Service</b>	<b>Retail Service</b>
Australian traveller in New Zealand or other designated country	Foreign wholesale IMR service	Retail IMR service
Traveller from New Zealand or other designated country in Australia	Wholesale IMR service	Foreign retail IMR service

### **Arrangements for coordinated regulatory action on roaming**

As outlined above, the wholesale and retail services that enable an end-user to roam whilst overseas are supplied from different countries. This presents challenges for a regulator that wishes to intervene at the wholesale level for the benefit of the end-users of IMR services travelling from the regulator’s country. In order to intervene effectively at the wholesale level, mechanisms that facilitate reciprocal regulation between two or more countries are necessary.

Under the Draft Bill, the Minister would have the power to declare, by legislative instrument, that Australia has entered into arrangements with another country to take coordinated regulatory action at the wholesale level with that country. The ACCC would only be able to use the measures introduced by the Draft Bill to regulate wholesale IMR services connected with a designated country.

#### *Bilateral arrangements between Australia and New Zealand*

The Australian and New Zealand governments have entered into arrangements providing for the competition regulators of both countries to undertake coordinated regulation, if necessary, of trans-Tasman markets for wholesale IMR services supplied from Australia and foreign wholesale IMR services supplied from New Zealand. These arrangements would be formalised through an amendment to the Protocol on Trade in Services to the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Subject to this amendment, and finalisation of domestic treaty implementation processes, the Minister would be able to declare that New Zealand is the first designated country for the purposes of the wholesale measures proposed to be introduced by the Draft Bill.

The Draft Bill would implement Australia's commitments as part of these bilateral arrangements with New Zealand. It would empower the ACCC to regulate wholesale IMR services supplied to operators of telecommunications networks in New Zealand, or persons that supply carriage services using such networks that enable them to supply their customers with foreign retail IMR services, for the benefit of New Zealand end-users travelling to Australia.

Reciprocally, the NZCC would be empowered to regulate foreign wholesale IMR services supplied to Australian carriers or carriage service providers that enable them to supply their customers with retail IMR services, for the benefit of Australian end-users travelling to New Zealand.

#### *Future arrangements*

In the future, the government could seek to enter into arrangements with other countries to take coordinated regulatory action on IMR services. In considering any future arrangements on IMR services, the government would prioritise entering into arrangements with destinations popular with Australian travellers. If the government were to make any future arrangements, the Minister would be able to declare that a country is a designated country. This would activate the ACCC's regulatory powers for wholesale IMR services connected with that newly designated country without requiring further legislative amendment.

#### **Monitoring and reporting measures relating to IMR services**

If implemented, Division 3 of Part 1 of Schedule 1 to the Draft Bill would require the ACCC to publish an annual report on the cost to consumers of retail IMR services, as well as the retail margins for these services. The ACCC would also be required to report on the compliance of carriers and carriage service providers with wholesale and retail IMR price-control arrangements, where such arrangements are in place.

This Division would also enable the ACCC to use its current record-keeping rule powers to require carriers to keep records relating to both wholesale and retail IMR services for the purposes of the operation of both the wholesale and retail price-control regimes, as well as for access obligations relating to wholesale IMR services.

The ACCC's record-keeping powers and reporting requirements for IMR services would operate as a minor extension of its existing powers under Part XIB of the CCA. These measures would provide an important toolkit for the ACCC to monitor the state of wholesale and retail markets for IMR services. This would inform the ACCC as to whether or not regulatory action is necessary.

#### **Regulation of wholesale IMR services**

The Draft Bill would enable the ACCC to impose price-control arrangements upon the supply of a wholesale IMR service, and to declare a wholesale IMR service under Part XIC of the CCA.

Division 1 of Part 1 of Schedule 1 to the Draft Bill would introduce new Division 5A of Part XIB of the CCA, which would empower the ACCC to make price-control determinations that impose price-control arrangements to regulate the pricing of

wholesale IMR services. This could include imposing price caps to limit the prices carriers or carriage service providers may charge when supplying specified wholesale IMR services. The ACCC would also be able to make price-control determinations imposing price-control arrangements other than price caps, or setting principles that carriers and carriage service providers must comply with when altering their prices.

The ACCC would also be able to impose access obligations, and make access determinations, setting default price and non-price terms and conditions for access to declared wholesale IMR services. If implemented, Division 2 of Part 1 of Schedule 1 to the Draft Bill would provide for these access obligations to operate under the existing telecommunications access regime contained in Part XIC of the CCA, with some minor amendments.

#### *Conditions for the regulation of wholesale IMR services*

The ACCC would only be able to use the measures introduced by the Draft Bill to regulate wholesale IMR services connected with a designated country. Subject to finalisation of amendments to ANZCERTA, and domestic treaty implementation processes, New Zealand would be the first designated country.

In order to regulate a wholesale IMR service under the measures proposed by the Draft Bill, the ACCC would be required to be satisfied that the regulation will promote the long-term interests of end-users of carriage services. This is the existing test for the regulation of carriage services under Part XIC of the CCA. For wholesale IMR services, this test would also require the consideration of markets in and end-users from the designated country. The proposed extension of the ACCC's record-keeping powers under the Draft Bill relating to wholesale IMR services would assist the ACCC in determining whether the regulation of any of these services is necessary. Additionally, before the ACCC could impose a regulation on a wholesale IMR service it would be required to hold a public inquiry. Further information about the proposed inquiry process for regulating IMR services is detailed later.

Regulation of wholesale IMR services by the ACCC would only directly benefit end-users from a designated country using IMR services while travelling to Australia. As a result, a further condition of regulating a wholesale IMR service would be that such regulation could only be imposed where the ACCC is satisfied that the regulatory action may promote foreign wholesale IMR services using a network in the designated country becoming available on equivalent terms and conditions. This would be known as the reciprocity test. This would ensure Australian wholesale markets would only be regulated where the ACCC expects that benefits will also flow to Australian end-users.

In determining the reciprocity test, the ACCC would be required to consider the terms and conditions for the supply of relevant wholesale IMR services and any relevant designated country foreign wholesale IMR services. The ACCC would also be able to take into account other relevant matters, such as any wholesale intervention that has been introduced or is proposed to be introduced in the designated country, e.g. regulatory action taken by the NZCC.

However, the regulation of wholesale IMR services by Australia and New Zealand or any other designated country would be taken using a coordinated, rather than joint, approach. Accordingly, whilst regulatory action could be necessary in both countries,

this would not have to be imposed on either a parallel or equal basis. Prevailing market conditions in one of the two countries could mean that regulatory action would only need to be imposed in one country in order to achieve equivalent availability of both Australian and the foreign wholesale IMR services. It would remain a matter for the competition regulators of both countries to independently determine what, if any, regulatory action in each regulator's respective country would be warranted.

Prior to imposing any regulation of wholesale IMR services, the ACCC would be required to notify the Minister and the Minister for Trade and Investment of the proposed regulatory action.

### **Regulation of retail IMR services**

Separately to regulation at the wholesale level, if implemented, Part 2 of Schedule 1 to the Draft Bill would introduce new Part 9AA of the Consumer Protection Act. Proposed new Part 9AA would empower the ACCC to make price-control determinations that impose retail price-control arrangements to regulate the pricing of retail IMR services. This could include imposing a price cap, which is a limit on the prices that may be charged by carriage service providers in supplying retail IMR services to customers. The ACCC would also be able to make price-control determinations imposing price-control arrangements other than price caps, or setting principles that carriage service providers would be required to comply with when altering their prices.

#### *Conditions for the regulation of retail IMR services*

The ACCC would only impose a retail price-control arrangement if it believed the prices in the market for a particular retail IMR service are too high, and that a price-control arrangement should be imposed to remedy this. The proposed extension of the ACCC's record-keeping powers under the Draft Bill relating to retail IMR services would assist the ACCC in determining whether the regulation of any of these services is necessary.

The ACCC would determine whether regulation is necessary using criteria similar to those used in previous reviews of retail price control arrangements for certain services supplied by Telstra under Part 9 of the Consumer Protection Act. This would include requiring the ACCC to consider the state of competition in relevant markets for retail IMR services, as well as the expected effects of a proposed price-control determination. Additionally, before the ACCC could impose a price-control arrangement on a retail IMR service it would be required to hold a public inquiry. Further information about the proposed inquiry process for regulating IMR services is detailed later.

The ACCC would also be required to seek the agreement of the Minister in order to make price-control arrangements for a retail IMR service.

Unlike with the wholesale measures outlined above, retail price-control arrangements would be able to be imposed whether or not the retail IMR service relates to a designated country, such as New Zealand. This is because the service is supplied by Australian carriage service providers directly to Australian consumers.

As a result, price-control arrangements would be able to be imposed on retail IMR services both as part of coordinated action pursuant to an arrangement with a designated

country, or by the ACCC acting unilaterally. However, the ACCC's ability to effectively remedy pricing issues could be limited by the pricing of foreign wholesale IMR services that are used to supply retail IMR services.

### **Process for regulating wholesale and retail IMR services**

The ACCC would be required to conduct public inquiries under Part 25 of the Tel Act about proposals for regulating retail and wholesale IMR services.

The inquiry process for imposing access obligations on wholesale IMR services would use the existing processes required prior to declaring a service or making an access determination under the existing Part XIC of the CCA, with some minor amendments specific to coordinated action on IMR services.

The proposed inquiry process for making price-control determinations for wholesale or retail IMR services is based on these Part XIC processes. Firstly, the ACCC would be required to hold a service specification inquiry to determine whether or not a particular retail or wholesale IMR service should be subject to price-control arrangements. If the ACCC decided to proceed with regulating the service, the ACCC would then be required to hold a price-control inquiry to determine the particular price-control arrangements that would apply to the specified service.

There are two important differences between the proposed inquiry process for price-control determinations and the existing inquiry processes in Part XIC. Firstly, the ACCC would have the discretion to combine both the service specification and price-control inquiry to conduct them concurrently. Secondly, unlike when declaring a service under Part XIC, the ACCC would not make an instrument after holding a positive service specification inquiry.

### **Consequential amendments**

Division 3 of Part 1 of Schedule 1 to the Draft Bill contains proposed consequential amendments to Parts XID and XII of the CCA relating to the ACCC's proposed extended record-keeping powers and reporting requirements.

Part 3 of Schedule 1 to the Draft Bill contains proposed consequential amendments to the Tel Act. It would provide that compliance with the wholesale price-control arrangement regime in new Division 5A of Part XIB of the CCA is a carrier licence condition and service provider rule. It would also amend the definition of carriage service provider, to include persons who supply, or arrange for the supply of retail IMR services. This amendment would address the fact that not all retail IMR services are listed carriage services.

Part 4 of Schedule 1 to the Draft Bill contains a proposed consequential amendment to the Interception Act that would preserve the definition of carriage service provider for that Act.