Comments on Productivity Commission draft report "Telecommunications Competition Regulation" issued March 2001.

The Department of Foreign Affairs and Trade (DFAT) would like to provide an additional comment on the following statements in the draft report (5.41 Box 5.7):

- "*The Reference Paper itself does not define anti-competitive conduct by reference to any threshold test such as purpose or effect (section 1.6);*

- *If the anti-competitive conduct provisions of Part XIB were repealed, the sole test for anti-competitive conduct in telecommunications markets under the TPA would be that set out in Part IV – if a breach of Part IV by a firm could not be established because purpose could not be established then, by definition, the firm was not acting anti-competitively*."

DFAT agrees that the Reference Paper itself does not define anti-competitive conduct by reference to any threshold test such as purpose or effect. We also agree that if a breach of section 46 of the *Trade Practices Act* 1974 (C'th) (TPA) could not be established because the requisite purpose could not be established, then a firm would not be acting anti-competitively under section 46 of Part IV of the TPA. However, these two facts combined do not mean that Australia could not be in breach of its obligations under the Reference Paper if Part XIB were repealed, and only Part IV applied in telecommunications markets.

While the Reference Paper does not define 'anti-competitive practices', this does not mean that each Member can substitute its own domestic definition of 'anti-competitive practices' to satisfy the requirements of the WTO Reference Paper. DFAT considers that the examples of 'anti-competitive practices' provided in paragraph 1.2 (see Background below) combined with the general WTO practice of focusing on the effects of a particular measure rather than the intent behind its imposition could support an 'effects test' interpretation of Australia's obligations under the WTO Reference Paper.

First, the examples of 'anti-competitive practices' in paragraph 1.2 of the Reference Paper do not require an anti-competitive purpose. For instance, sub-paragraph 1.2(b) proscribes the use of competitor information if such use has 'anti-competitive results' but does not state that an anti-competitive intent must also be established.

Second, in WTO practice it is generally accepted that in determining whether a measure is inconsistent with commitments under the WTO Agreements, it is necessary to examine that measure's practical effect. For example, if a measure is discriminatory in effect, although not in intention, then this alone can be sufficient for such a measure to be considered inconsistent with WTO commitments.

If this interpretation were correct, then paragraph 1.1 of the Reference Paper would require Australia to maintain measures to prevent 'anti-competitive practices' regardless of the purpose of the major supplier in engaging in such practices. By requiring the additional element of anti-competitive purpose under section 46, Australia may be considered to have reduced its protection against anti-competitive

practices in the telecommunications market to the extent that it was failing to maintain 'appropriate measures for the purpose of preventing …major suppliers from engaging in anti-competitive practices'. Such an argument would be supported by evidence that a major supplier had engaged in anti-competitive practices such as those described in paragraph 1.2 (for example, using information obtained from a competitor with anti-competitive results) but had been found not to have breached section 46 because of the absence of anti-competitive intent . The Productivity Commission's draft report does not discuss this possibility, as it appears to discount the possibility that such an interpretation could be applied to the WTO Reference Paper.

DFAT does not wish to overstate the risk that a repeal of Part XIB could have implications for Australia's international obligations. Clearly the matter is open to debate as there are arguments that Part IV alone would continue to constitute 'appropriate measures' for the prevention of 'anti-competitive practices'. However, DFAT does not consider that the current wording of the draft report adequately reflects the substantive issue.

Background

Australia has agreed to comply with the regulatory principles in the WTO Reference Paper as part of its schedule of commitments to the General Agreement on Trade in Services. As part of the WTO Agreements, Australia's compliance with the terms of the Reference Paper is subject to the enforceable dispute settlement procedures of the World Trade Organization (WTO). Any WTO Member may initiate dispute settlement proceedings against another WTO Member if it considers the Member to be acting inconsistently with its WTO commitments.

Specifically, Australia has made the following commitments in relation to the telecommunications sector:

> ***"Paragraph 1.1 Prevention of anti-competitive practices in telecommunications***
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> *Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.*
>
> ***Paragraph 1.2 Safeguards***
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> *The anti-competitive practices referred to above shall include in particular:*
> *(a) engaging in anti-competitive cross-subsidization;*
> *(b) using information obtained from competitors with anti-competitive results;and*
> *(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services."*