PRODUCTIVITY COMMISSION INQUIRY: REVIEW OF TELECOMMUNICATIONS SPECIFIC COMPETITION REGULATION

The Department of Foreign Affairs and Trade has responsibility for Australia's obligations under the WTO General Agreement on Trade in Services (GATS).

Value added telecommunication services have been subject to WTO disciplines since the entry into force of the GATS in 1995. Further sectoral negotiations on basic telecommunication services were successfully concluded in February 1997, with a total of 68 Members (the European Union counting as one) participating, covering 93% of world telecommunications trade. The results of these negotiations are contained in the Fourth Protocol to the GATS.

One of the important outcomes of the negotiations on basic telecommunications was the development of a set of pro-competitive regulatory principles, known as the Basic Telecommunications Reference Paper. The Reference Paper is legally binding for those Members which accepted it, and covers regulatory issues which have an important bearing on competitive conditions including competitive safeguards and interconnection. A total of 57 Members, including Australia, agreed to be bound by the Reference Paper.

Domestic Competition Regulation

The WTO Reference Paper does not specify the adoption of particular regulatory regimes or institutional structures. WTO Members retain the flexibility to apply their own diverse regulatory mechanisms to meet the objectives of the Reference Paper. Accordingly, some Members apply general competition principles to telecommunications (eg New Zealand), while others apply more telecommunications-specific regulation (eg the US).

Australia currently meets its GATS obligations through the telecommunications specific competition regulation under Parts XIB and XIC of the *Trade Practices Act 1974* (TPA) and certain provisions of the *Telecommunications Act 1997*.

This submission does not seek to address the issue of whether Parts XIC and XIB should be repealed. This issue has been addressed by the ACCC in previous submissions. This submission is focused on the more limited question of whether Parts IV and IIIA of the TPA would alone be sufficient to meet Australia's GATS obligations.

In summary, the Department of Foreign Affairs and Trade assesses that in general the application of Parts IV and IIIA of the TPA would be sufficient to fulfil Australia's GATS obligations, in the event that telecommunications-specific regulation were repealed. In this event, however, the Department of Foreign Affairs and Trade would need to be consulted to ensure the implementation of a GATS-consistent regime.

1. Competitive Safeguards

With regard to competitive safeguards, the Reference Paper provides as follows:

"1.1 Prevention of anti-competitive practices in telecommunications

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.

1.2 Safeguards

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
(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.*

The three competitive safeguards identified represent the first attempt to apply competition principles to a services sector under the GATS. As such the three safeguards are an important step forward. Australia has proposed, in the context of WTO services negotiations, that the current safeguards should be strengthened, with a view to making the principles more comprehensive.

Part IV of the TPA

The current obligations with respect to competitive safeguards could be met through the application of Part IV of the TPA. The main competition rules, applicable to the Australian economy as a whole, are included in Part IV of the TPA. Part IV prohibits contracts, arrangements or undertakings that have the purpose or the effect of substantially lessening competition[1], exclusive dealings[2], retail price maintenance[3], and price discrimination[4]. Other provisions prohibit a corporation which has a substantial degree of market power from taking advantage of that power for the purpose of eliminating a competitor or preventing the emergence of a competitor[5]. These provisions have a significantly broader application than the current competitive safeguards of the Reference Paper.

The most significant difference between Part IV and Part XIB with respect to Australia's obligations under the Reference Paper is that Part XIB prohibits an abuse of market power that has an anti-competitive effect, rather than purpose. Under Part IV misuse of market power is prohibited only when an anti-competitive purpose can be established[6]. In contrast, section 151AJ(2) under Part XIB prohibits conduct irrespective of purpose, so long as it has the effect, or likely effect, of substantially lessening competition.

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[1] Section 45
[2] Section 47
[3] Section 48
[4] Section 49
[5] Sections 46 and 50
[6] Section 46. Section 46(7) does however provide that the purpose of a corporation may be *inferred* from the conduct of a corporation, or of any other people and other relevant circumstances.

This raises the possibility that Australia could potentially be found to be in breach of the Reference Paper for failing to adopt an appropriate measure to prevent an anti-competitive effect. This could occur, for example, if a firm was found not to be liable under Part IV where it was acting anti-competitively but intention could not be established.

In the event that Part XIB were repealed, the Department of Foreign Affairs and Trade would need to be consulted to ensure the implementation of a GATS-consistent regime.

2. Interconnection Principles

With regard to Interconnection Principles, the Reference Paper provides as follows:

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates 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
(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and 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
(c) 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.

In adopting the Reference Paper, Australia noted that it would meet its obligations with regard to interconnection by means of the interconnection regime introduced from 1 July 1997. Australia noted that the regime would provide access on terms and conditions which are fair and reasonable to all parties and which do not unfairly discriminate between users. Access rights would be guaranteed by legislation and the terms and conditions of access would be established primarily through processes of commercial negotiation or by reference to access undertakings given by access providers which may draw upon an industry code of practice. Any code of practice and each access provider's undertaking will be subject to approval by an independent regulator.

Australia also noted that non-discrimination is taken to mean on an MFN and National Treatment basis. The rate at which interconnection is provided would be determined by negotiation. Both negotiating parties would have recourse to an independent arbitrator which will make a decision based on transparent criteria to

ensure that rates are fair and reasonable in the circumstances. An independent arbitrator would resolve any dispute on what costs are relevant in determining rates.

Part IIIA of the TPA

Part XIC is based on Part IIIA but contains additional refinements. In particular, the Government introduced:

- different criteria for the declaration of services and determining terms and conditions of access under Part XIC
- standard access obligations which become operative once a service is declared under Part XIC.

We consider that Australia's obligations with respect to Interconnection principles could be met by the application of Part IIIA of the TPA.

Part IIIA provides a general mechanism for service providers seeking to access facilities with natural monopoly characteristics. The types of services included under Part IIIA are defined broadly by section 44B of the TPA.

For Part IIIA to apply to a service it must first be declared under Part IIIA, which requires an application to the National Competition Council (NCC). Although (in contrast to Part XIC) a public inquiry is not required, there is nevertheless provision for both a review of written submissions from those with a direct interest, and informal meetings with the NCC.

Section 44G(2) sets out 6 criteria which must be met before the NCC will consider a declaration:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service
(b) that it would uneconomical for anyone to develop another facility to provide the service
(c) that the facility is of national significance
(d) that access to the service can be provided without undue risk to human health or safety
(e) that access to the service is not already the subject of an effective access regime
(f) that access (or increased access) to the service would not be contrary to the public interest.

While some of the criteria for declaring a service may be more difficult to establish under Part IIIA than Part XIC, an application of these criteria under Part IIIA would be sufficient to meet Australia's obligations under the Reference Paper.

Second, a declaration under Part IIIA meets the requirement of consideration by an independent regulator. Part IIIA differs from Part XIC in that it provides a right to negotiate access, rather than a right of access. Nevertheless, if a negotiated outcome can not be reached, the ACCC can make a determination.

Third, Part IIIA does not discriminate on either an MFN or National Treatment basis. It is our view that the application of Part IIIA would not lead to discriminatory treatment with respect to terms of Interconnection.

Finally, although Part IIIA does not set out standard access obligations (in contrast to Part XIC), we consider that the application of Part IIIA would meet the objective of ensuring interconnection services were provided on a cost-oriented basis. Section 44X requires the ACCC to take into account the direct costs of providing access to the service.

RESPONSE TO PRODUCTIVITY COMMISSION QUERY ON COMMENTS BY OPTUS ON IDPS

Since companies are obliged to enter into IDPs in order to obtain carrier licences, it is necessary to ensure that those IDPs do not contravene Australia's obligations under the Agreement Establishing the World Trade Organization (WTO). (International commitments could involve other countries such as New Zealand under CER.) Through its Membership of the WTO, Australia has a range of commitments in respect of goods and services.

For goods, the relevant commitments in this situation are essentially those involving national treatment, under Article III of GATT 1994 and the Agreement on Trade-Related Investment Measures (TRIMS). It would be a breach of national treatment if a company entered into undertakings with the Government on giving preference in one way or another to domestic goods over imported goods, as part of the conditions for obtaining an advantage such as a licence. This includes expressions of preference where domestic and imported goods are equivalent in quality and price.

For services there are analogous commitments undertaken by Australia on national treatment of telecommunication service suppliers and on market access under Articles XVII and XVI, respectively of the General Agreement on Trade in Services (GATS).