

PRODUCTIVITY COMMISSION INQUIRY INTO BROADCASTING

SUBMISSION BY THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

The Department of Foreign Affairs and Trade (DFAT) welcomes the opportunity to contribute to the Productivity Commission's wide-ranging inquiry into broadcasting as part of the Government's commitment under the Competition Principles Agreement to review legislation for its anti-competitive effects.

This submission considers the significance of the emerging information economy and electronic commerce for Australia's international economic and trade competitiveness (as technological convergence will blur the distinction between broadcasting and communications industries). It also addresses the significance of Australia's cultural exports and specific international agreements referred to in the Productivity Commission's Issues Paper.

The importance of a competitive information economy

The competitiveness of Australia's emerging information economy will be a key determinant of Australia's economic and trade success in an increasingly technologically linked and globalised world trading environment. The extent to which business is able to take advantage of the efficiencies which new technology is capable of generating will be important in assisting Australia's exporters retain their competitive edge.

As DFAT has argued in its submission to the Productivity Commission's concurrent inquiry into international telecommunications market regulation, the communications industries have become increasingly important not only as a fast-growing sector of the Australian economy in their own right but also in facilitating growth in other sectors.

Technological convergence is likely to mean that the capacity to convey data, either as a simple broadcast or as an interactive exchange, will soon be possible via any of a number of digital mediums. Australia will need to manage smoothly and quickly the transition to a converged digital information environment. The speed and effectiveness of the transition will certainly contribute to Australia's international trading competitiveness in the next decade.

Australians have demonstrated themselves to be great adaptors to the technological age. Take-up rates of the Internet and associated technologies have helped drive what has proven, over the last couple of difficult years for the global economy, to be one of the world's standout national economies. The Australian economy grew by 4.8% in the twelve months to March 1999, faster than most developed economies. Indeed, Australia's recent strong productivity growth, which has contributed significantly to Australia's economic performance, has been linked by economists to Australia's propensity to invest in and to take up new information technology. Australia will need to continue to be at the forefront of technological take-up as convergence creates new standards for competitiveness in the global information economy.

Broadcasting and Electronic Commerce – Convergence and Competitiveness

Technological convergence potentially means even readier access to electronic commerce. These potential links to electronic commerce underline the importance of handling convergence well for Australia's international competitiveness.

Electronic commerce will be very significant for Australian exporters. Electronic commerce offers the promise of breaking down the tyranny of distance, not only from the rest of the world's markets, but from each other across a huge continent. The more "plugged in" Australia is, both in urban and rural Australia, the greater will be our capacity to increase our trade and investment links around the world. Staying at the forefront of technological capability will therefore be of great importance for Australia.

Electronic commerce has the potential to affect very positively the development of Australia's small and medium-sized businesses, particularly those in rural and regional communities. These can now become involved in export activities more easily, for example in handling, via the Internet, the sale and just-in-time distribution of agricultural products and livestock to consumers overseas. Electronic commerce also generates opportunities for other kinds of industries, such as call centres, to operate from regional areas. As electronic commerce becomes more accessible and cost-effective as a result of economies of scale generated by convergence of technologies, the competitive benefits of trading electronically will be even more widespread in Australia.

DFAT's research in this area (see **enclosed publications** - *Driving Forces on the New Silk Road* and *Creating a Clearway on the New Silk Road* (1999)) has revealed many examples of small companies, including in isolated parts of Australia, already using Internet-based commerce to reach customers all over the world.

For example, Bush Tucker Supply Australia (BTSAust) pioneered the bush food industry in Australia. A small firm, it uses e-mail, on-line order forms and stock records and a detailed website to manage arrangements with clients (restaurants and distributors) and suppliers. The suppliers are harvesters and growers in rural and remote Australia, including from Cape York, Tasmania and the Western Desert. The success of the website in reaching consumers is apparent as BTSAust products are available in stores like Sainsburys in the United Kingdom.

DFAT and Austrade have been actively contributing to strategies for developing Australia's electronic commerce. Australia entered into a bilateral collaborative agreement on information and communications technology with the Government of Singapore in February this year after establishing a similar agreement with the Hong Kong Special Administrative Region in June 1998. These agreements, which have a strong focus on trade and investment, establish formal communication channels with major players in the emerging information economy and will enable us to maintain dialogues on international telecommunications and information technology issues. Also, Austrade has recently appointed an E-commerce Adviser to pursue e-commerce opportunities for exporters.

As the distinction between broadcasting and the Internet is likely to be blurred in coming years, Australian exporters are likely to realise the efficiencies of having single units encompassing the features of television, radio and personal computers capable of accessing the Internet. This can only be beneficial for Australian exporters' competitiveness – provided Australia remains at the forefront of adapting to developing technologies.

The Significance of Australian Cultural Exports

A key objective for the Broadcasting Services Act (BSA), which it seeks to achieve through regulation of ownership and content, is “developing and reflecting a sense of Australian identity, character and cultural diversity” (BSA Act 3(e)).

DFAT recognises the importance of this objective. Australian audio-visual products are valuable exports in their own right but their significance clearly goes beyond their own significant export earnings (\$106 million in 1997-98). DFAT recognises that being able to project images of Australia which accurately portray our sophisticated multicultural society is an important part of Australia continuing to be able to exert influence around the globe. It is also an important part of continuing to succeed in international trade and investment. As well as signalling to other parts of the world the complexity and sophistication of contemporary Australian society successful Australian films and television programs in recent decades have generated significant investment interest in Australia as well as assisting other export industries, particularly tourism.

DFAT notes that successive Australian governments have provided support in various forms for a range of Australian cultural products, including through regulating Australian content under the BSA. DFAT recognises the complexity of the policy questions raised by convergence and its implications for the BSA. DFAT notes that technological convergence will raise challenges to sustaining the current regulatory approach on content if different delivery mechanisms mean that some content providers may not be subject to these regulations.

International Agreements

The Commission's Issues paper identified a number of international agreements which have had or have the potential to have an impact on Australia's broadcasting policy regime. The following addresses each of these agreements:

General Agreement on Trade in Services (GATS)

During the Uruguay Round of multilateral trade negotiations, Australia preserved its flexibility to regulate audiovisual services, in our national interest, by not scheduling these services among Australia's GATS commitments; and by taking out MFN exemptions to cover preferential coproduction agreements, and measures required to respond to unreasonable demands imposed on Australian services suppliers by another Member of the GATS. (A summary of the way in which the GATS operates is at Annex A)

Due to cultural policy concerns, the vast majority of Members did not make commitments on audiovisual services. Only 19 Members made commitments, and of those, only two covered all subsectors: the United States and the Central African Republic. New Zealand covered all subsectors except sound recording services, and Japan covered all subsectors except radio and television services and radio and television transmission services.

It is worth noting that Australia's audiovisual carve-out has not impeded trend growth in Australian imports of audiovisual services. Australian imports of audiovisual services were valued at A\$444 million in 1993-94; A\$462 million in 1994-95; A\$490 million in 1995-96; A\$467 million in 1996-97; and A\$563 million in 1997-98 (source: ABS). Moreover, despite specific US concerns about the Australian audiovisual carve-out, US exports of audiovisual services to Australia continued to grow after the end of the negotiations. In 1994-95, sales of US motion pictures to Australia by affiliates of US companies were worth US\$232 million; and in 1995-96 (latest available), US\$296 million. (Source: US Department of Commerce, Bureau of Economic Analysis, *Survey of Current Business*, October 1997 and October 1998).

The GATS provides for a review of the Agreement and of services commitments after five years, ie by 1 January 2000. We expect the WTO services negotiations to be launched at the Seattle WTO Ministerial Meeting on 30 November -3 December. The mandate of the negotiations is "achieving a progressively higher level of liberalisation". There will be pressure on all Members to improve their specific commitments in all sectors, including on Australia for audiovisual.

If Australia were to make a broad market-opening commitment of the audiovisual sector, Australia would have to respect market access and national treatment obligations towards foreign services suppliers. There are a number of regulations relating to the Australian audiovisual industry which would be potentially inconsistent with such obligations (see Annex B). Australia would either have to inscribe inconsistent measures in its schedule of specific commitments, or to remove or amend those regulations if it were to subscribe to GATS commitments for audiovisual services.

The Government is consulting widely before the 2000 services negotiations. Mr Fischer launched a series of public consultations on the next round of trade negotiations in February, and the Department of Foreign Affairs and Trade is now reviewing the submissions which were made, including a number from the Australian audiovisual industry. International negotiations involving audiovisual services are highly sensitive for Australia, as for other countries, because of the connection with cultural policy. In Australia, past protection for the cultural industries has stemmed partly from an objective to preserve and promote Australia's culture, values and national identity, and partly from decisions to protect fledgling companies against competition from foreign imports. After extensive consultation processes, the Government will be able to give appropriate weight to the special considerations raised by the sector, including cultural policy objectives, in determining and prosecuting Australia's negotiating strategy.

Closer Economic Relations Agreement (CER)

With regard to the comments in the issues paper under the sub-heading "Closer Economic Relations Agreement" (page 30), in April 1998 the High Court decided in *Project Blue Sky v Australian Broadcasting Authority* that the Australian Content Standard for commercial television in force at that time was unlawfully determined by virtue of its inconsistency with section 160(d) of the BSA (this differs from the explanation given in the issues paper).

The explanatory memorandum to the BSA makes clear that s.160(d) was enacted to require the ABA as a statutory authority to act in conformity with Australia's international obligations, in particular, with the 1988 Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement ("the CER Services Protocol"). The High Court in its *Project Blue Sky* decision found that clause 9 of the Australian Content Standard was inconsistent with Articles 4 and 5(1) of the CER Services Protocol. These provisions require Australia to grant to New Zealand persons and services provided by them market access and national treatment in Australian markets no less favourable than that accorded in like circumstances to Australians.

The CER Services Protocol does not allow either party unilaterally to make reservations, to add inscriptions or to otherwise amend the text of the Protocol. The only feasible way for Australia to change its CER Services Protocol obligations would be through the renegotiation of the Protocol, which would of course require the agreement of the New Zealand Government.

The New Zealand Government has indicated that it regards the new Australian Content Standard which entered into force on 1 March 1999 as implementing the High Court's *Blue Sky* decision in an appropriate way and in a manner consistent with the CER Services Protocol. The New Zealand Government might thus be expected to resist any attempt on Australia's part to amend the Protocol with the intention of excluding New Zealand programs from the Standard. In addition to any effect which it may have on our bilateral relations with New Zealand, such a move might also be expected to have implications for Australia's broader trade objectives and credentials.

In DFAT's view, the new Australian Content Standard for free-to-air television demonstrates that it is possible for the Australian Content Standard to achieve consistency with Australia's CER obligations, while still meeting the requirements of section 3(e) of the BSA (which gives as one of the objects of the BSA the promotion of the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity). The Department also notes that no credible arguments have been advanced which would suggest that the industry would be at risk from New Zealand productions by virtue of Australia's CER Services Protocol obligations.

The Commission's attention is drawn to Senator Alston's press release of 19 March 1999, which refers to the Government's commitment to the Australian film and TV industry and its recognition of the important role which Australian content regulation has played in achieving the Government's cultural objectives for the industry. Senator Alston's press

release also refers to the Government's intention that Australia will continue to meet its obligations to New Zealand under the CER Services Protocol.

International agreements relating to intellectual property rights, including TRIPS

In line with its package of WTO commitments, Australia is in full compliance with the intellectual property standards set by the TRIPS Agreement.¹ (A summary of TRIPS is at Annex C). Australia is also a party to other intellectual property treaties with direct bearing on the broadcasting industry, in particular the Berne Convention on the Protection of Literary and Artistic Works and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention). This international framework provides a firm basis for the use of the intellectual property system, particularly copyright and related rights, to promote social, cultural and economic aspects of the public interest in relation to broadcasting services.

In addition, most of Australia's key markets for broadcasting and related services are either already in compliance with TRIPS, or are well advanced in the process of implementing that Agreement (developing countries and economies in transition are mostly due to comply with TRIPS by January 2000; Least Developed Countries are due by 2006): this again provides a steadily strengthening framework for the export of Australian broadcasting services and the export of cultural products generally, and helps ensure that Australian exporters can secure effective market access. The practical benefits of comprehensive TRIPS implementation in key Asian markets, in particular, should begin to be felt in the coming few years.

Australia is bound under the TRIPS Agreement to apply the principles of national treatment and most-favoured nation in the protection of intellectual property rights, including copyright and the rights of broadcasting organisations, which may contribute to a competitive framework for broadcasting services in Australia.

TRIPS, and other international agreements, currently create no obligations on the question of parallel importation, or the exhaustion of intellectual property rights. The recent amendments to the Australian Copyright Act to allow limited forms of parallel importation were thus in accordance with our international obligations. This issue was considered in the Uruguay Round negotiations that led to TRIPS, and there is a possibility that the question will be pursued again in the overall review of TRIPS that is scheduled for 2000. This may lead to pressure for international rules limiting parallel importation, although it is not yet clear how the issue could be progressed given the outcome on this issue in the original TRIPS negotiations. This is particularly so given the recent transformations in the use of communications and digital technology.

Technological convergence and the increasing use of international digital networks as a means of disseminating copyright material are likely to make jurisdiction-based restrictions on distribution of copyright material increasingly meaningless or practically difficult to enforce. The expected growth in the use of the Internet as an effective means

¹Agreement on Trade-Related Aspects of Intellectual Property Rights

of broadcasting to global audiences will create considerable challenges for those seeking to limit distribution on a geographic basis.

The WIPO 'Internet' Treaties of 1996² sought to update rules for the protection of copyright and related rights for the digital environment, and these give support to the trend towards convergence and technological neutrality in the protection of copyright, whereby a general right of making available to the public may supplant existing distinctions between separate rights of broadcasting, cable transmission, reproduction and public communication. The Government has introduced legislation which would give domestic effect to the WIPO Copyright Treaty. The forthcoming review of TRIPS may see elements of these treaties recognised in the framework of TRIPS obligations. This process of evolution of standards of intellectual property protection to respond to the challenges of digital technology will be of direct practical relevance to the operational environment, continuing competitiveness and export profile of broadcasting industries in Australia.

Conclusion

Australian industry, and particularly Australian exporters, rely heavily on access to competitively priced international communications services as an important business input. Lower costs in this area are important not only in terms of their immediate impact on the profitability of companies but also because access to cost-effective electronic commerce will increasingly be a determinant of success for exporters around the world. This will be the case not only in terms of identifying new markets but also in sourcing cost-effective inputs as part of global supply chains.

To the extent that convergence means that businesses will have greater and more cost-effective choice in accessing the Internet and electronic commerce, successful management of the transition to a converged digital environment will be very important as a determinant of the competitiveness of Australia's information economy. Policy makers will need to keep this in mind in addressing any possible changes to the BSA.

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²The WIPO Copyright Treaty and the WIPO Performances and Phonographs Treaty

The General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS), which entered into force in January, 1995, introduced a set of multilateral rules for trade in services. The GATS, like other WTO agreements, is subject to the dispute settlement mechanism introduced following the Uruguay Round of trade negotiations.

The GATS covers the vast majority of traded service sectors and applies to all measures affecting trade in services taken by all levels of government or non-governmental bodies exercising powers delegated to them by government. (An exception exists for Government Procurement.) It applies to services supplied across the border, through the establishment of a commercial presence and through movement by individual consumers and suppliers across borders.

The GATS principles and rules comprise general obligations which apply, with limited exceptions, to all services in all sectors, as well as particular obligations which apply only to those services where a Member has made a specific commitment in its schedule. One of the most important general obligations is the requirement for most-favoured-nation (MFN) treatment. This requires a Member to give to services and service suppliers from any other Member treatment no less favourable than it gives to like services and suppliers from any other country. Other important general obligations include transparency of laws and regulations; providing foreign service suppliers with access to review of administrative decisions; and non-discriminatory application of criteria for recognising foreign standards and qualifications.

Additional rules apply only to sectors in which a Member has made a binding commitment in its country schedule, that is, a specific commitment. The most important of these are market access and national treatment.

Negotiated Commitments

Members' schedules of commitments identify the service sectors in which they will grant market access and national treatment to trading partners and any qualifications applying to those commitments. They also contain details of sectors in which Members have withheld application of MFN. (As a key principle of fair trade, however, Members are discouraged from suspending MFN.) These schedules contain the results of multilateral negotiations. The commitments entered in these schedules represent the *minimum* level of access Members are willing to make themselves legally bound to provide. Members frequently accord a greater level of access in reality.

Annex A

The commitments and limitations are entered with respect to each of four modes of supply embodied in the definition of trade in services. The four modes are:

Cross-border supply - non-resident service firms supplying services cross-border into the Member's territory

Consumption abroad - Member's residents purchasing services in the territory of another Member

Commercial presence - foreign services suppliers establishing, operating or expanding a commercial presence in the Member's territory, such as a branch, agency or wholly-owned subsidiary

Presence of natural persons - entry and temporary stay in the Member's territory of foreign individuals in order to supply a service

POTENTIAL INCONSISTENCY OF AUSTRALIAN REGULATIONS IN THE AUDIOVISUAL INDUSTRY WITH BROAD GATS COMMITMENTS IN THE AUDIOVISUAL SECTOR.

The audiovisual sector was defined in services negotiations under the Uruguay Round as covering: motion picture and video tape production and distribution; motion picture projection services; radio and television services; radio and television transmission services; sound recording services; and other services.

Some of Australia's regulatory regime for audiovisual services would potentially be inconsistent with broad market access and national treatment commitments. Where a GATS Member makes a sectoral commitment, Article XVI of the GATS provides for the removal of limitations to **market access** such as:

- limitations on the number of service suppliers;
- limitations on the total value of service transactions or assets;
- limitations on the total number of service operations
- limitations on the total number of foreign service suppliers that may be employed in a particular service sector or that a service supplier may employ;
- measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- limitations on the participation of foreign capital

The BSA's limitations on foreign control of television and foreign ownership of subscription television broadcasting licences, and the restrictions on entry into Australia of foreign actors for the purpose of employment in film and television productions could be inconsistent with market access obligations

A broad commitment on audiovisual services would also require Australia to grant foreign service suppliers **national treatment**, ie "treatment no less favourable than that it accord to its own like services and service suppliers" (GATS Article XVII). This concerns all other forms of discrimination against foreign service suppliers. The BSA's requirements on Australian content of commercial and subscription television and children's programs; and special assistance measures such as certification and tax advantages under Division 10BA and 10B of the Income Tax Assessment Act and the Film Licensed Investment Company scheme; eligibility for Film Finance Corporation investment; or for support by the Australian Film Commission and various State film offices could, for example, be inconsistent with national treatment obligations.

Annex B

In sectors, where Members have entered commitments, they are also obliged to ensure that their **domestic regulation** is administered in a reasonable, objective and impartial manner.

Regardless of developments on audiovisual market access and national treatment commitments, the GATS requires that **MFN exemptions** be re-examined in 2000 and, in principle, that they be removed by 2005.

Overview of the TRIPS Agreement

During the Uruguay Round multilateral trade negotiations which established the WTO, it was recognised that intellectual property was an increasingly important component of international trade, and that different levels of protection of intellectual property rights can impede trade and investment. This led to the conclusion of the TRIPS Agreement - the Agreement on Trade-Related Aspects of Intellectual Property Rights as part of the package of agreements constituting the WTO system.

TRIPS seeks to maximise the contribution of intellectual property systems to economic growth through trade and investment. It does this by:

- establishing minimum standards for protection of intellectual property rights in the national systems of WTO members³ - for instance, it requires each WTO member to protect computer software through the copyright system
- establishing standards for the administration and enforcement of intellectual property rights - for instance, it requires members to establish a system for seizure at the border of counterfeit and pirated goods and to provide other remedies for infringement of IPRs
- creating a transparency mechanism - each WTO member is required to provide details of their national IP laws and systems, and to answer questions about their protection of IPRs
- creating a predictable, rules-based system for the settlement of disputes about intellectual property trade issues between WTO members - for instance, the WTO has considered a dispute between the US and India on the protection of pharmaceutical patents
- supporting other complementary objectives, such as repressing unfair competition, facilitating the transfer of technology, and promoting health and environmental protection

Australia's intellectual property system was largely in conformity with the new TRIPS standards when the Agreement was concluded in 1994, although some adjustments were required (for instance, extending the term of patent protection to 20 years).

The year 2000 TRIPS review

TRIPS has a 'built-in' agenda: that is to say, it was concluded subject to agreement that there would be a subsequent review of some of its own provisions, to be followed by an overall review of the Agreement itself. Currently under way are reviews on:

- biotechnology intellectual property, specifically the protection of plant and animal inventions, through patents and *sui generis* systems such as plant variety rights

³ The WTO has 134 Members, comprising almost all of Australia's major trading partners, with several others - for instance, China, Vietnam and Russia - actively in the process of becoming members.

- protection of geographical indications

Annex C

- the scope and nature of trade-related intellectual property disputes between countries that the WTO can deal with.

The overall review of TRIPS is due in 2000. It is not yet clear what the review will entail. It could be limited to an exchange of information about implementation, with some debate about the more contentious or ambiguous provisions. But the review may also be seen by some WTO Members as an opportunity to renegotiate specific parts of the Agreement or to introduce new IP issues. If a comprehensive round of multilateral trade negotiations is launched at the WTO Seattle Ministerial Conference in November this year, the TRIPs review would probably be drawn into this broader process, and elements of the Agreement may similarly be opened up for renegotiation. There is also likely to be some resistance to opening up the TRIPs text for renegotiation, because of the possibility of unravelling the valuable consensus and balance of interests struck in the Uruguay Round negotiations.