Chapter 5

GATS: implications and impacts

5.1 It became clear to the Committee at an early stage in the inquiry that there was a significant level of public concern about a number of aspects of the GATS and the processes by which Australia would commit itself to liberalising access to various service sectors. These issues include:

- the GATS and public services;
- the impact of the GATS and governments' right to regulate, including the application of the necessity test;
- the transparency of and level of public consultation prior to and during the request and offer phase of the negotiations; and
- particular sectors of concern, including health, public education, the provision of water, postal services and cultural issues.

GATS and public services

5.2 As outlined in Chapter 4, the GATS applies to a broad range of services, with limited exceptions. An important exception, listed in Article I.3(b) is services 'supplied in the exercise of governmental authority'. A service supplied in the exercise of governmental authority is defined in Article I.3(c) as 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'

5.3 A number of submissions to the inquiry indicated a high level of concern about the nature and scope of this definition, and a degree of skepticism with regard to reassurances by the Department of Foreign Affairs and Trade (DFAT) that public services will not fall within the scope of the GATS.

5.4 The main argument made by those who are unconvinced about the scope of the exception in Article I.3 (believing it will be applied narrowly rather than broadly) is that in the economies of most developed countries, a range of public services supplied by governments, such as education and health, are often delivered alongside private sector entities providing similar services which could be found to be providing their service either on a commercial basis or in competition with the government supplier. The Australian Fair Trade and Investment Network (AFTINET) points out, for instance, that public services such as education, health, water, prisons, telecommunications, energy and many more are provided alongside private sector operators. [1]

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1 *Submission* 42, p. 19 (Australian Fair Trade and Investment Network (AFTINET))

5.5 The Australian Manufacturing Workers Union (AMWU) expressed disagreement with DFAT's interpretation of Article 1.3 of the GATS, arguing that, if public services are provided for a mix of social policy and other reasons, this does not of itself mean that those services cannot be supplied on a 'commercial basis' or 'in competition' with other service providers. Further, with regard to the interpretation of these phrases, it is not clear whether to fall within this exception services must be supplied only on a commercial basis, or whether this must be the dominant basis or part of a mix of reasons on which a service is delivered.[2]

5.6 AID/WATCH also indicated concern that the increased corporatisation of public services and the parallel provision of services such as health by public and private providers could mean that in the event of a dispute, the GATS could be interpreted as applying to publicly provided services.[3]

5.7 Trade Watch argues that a number of public services operate either on a commercial basis or in competition with one or more service providers and expresses concern that because of the built in agenda in the GATS to progressively liberalise the services sector, there will be increasing pressure brought to bear on governments to open access to services currently provided publicly.[4]

5.8 The Victorian Trades Hall Council notes the complexity of the provision of public services in Australia, pointing out that the simple division of public versus private services is unlikely to work in practice.[5] The Community and Public Sector Union indicated that it had 'significant concerns' about the operation of Article I.3, arguing that the capacity of this Article to exclude sectors such as job search, health or education is in considerable doubt.[6]

5.9 The Australian Council of Trade Unions (ACTU) indicates similar concerns with the definition of services supplied in the exercise of governmental authority, arguing that few Australian public services are supplied neither on a commercial basis nor in competition with other service suppliers. The issue is that there are different interpretations of the phrases 'on a commercial basis' and 'in competition with other suppliers.' The ACTU's submission refers to a paper by the Secretariat of the WTO Council for Trade in Services which acknowledges this problem, stating that it is not completely clear what the term 'commercial basis' means.[7]

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2 *Submission* 160, p. 50 (Australian Manufacturing Workers Union (AMWU))

3 *Submission* 165, p. 11 (AID/WATCH)

4 *Submission* 156, p. 10 (Trade Watch)

5 *Submission* 135, p. 7 (Victorian Trades Hall Council)

6 *Submission* 154, pp. 4–5 (Community and Public Sector Union (CPSU))

7 *Submission* 125, pp. 11–12 (Australian Council of Trade Unions (ACTU)). The quote in the submission is cited as being from the Background Note by the Secretariat on Environmental Services, 6 July 1998, paragraph 53.

5.10 There are two 'limbs' to the definition in paragraph (c) of Article I.3, which refers to 'commercial basis' and to 'competition with one or more service suppliers'. Leaving aside for a moment questions about the meaning of 'commercial basis', it could be argued that, even if a public provider of a service is considered not to be supplying it on a commercial basis, it could still be supplying that service in competition with other suppliers.[8]

5.11 The ACTU acknowledges the argument made in response to this, namely that, even if private sector bodies are providing similar services to government providers, the government services are supplied for a range of policy reasons, so the purpose of the supply is different—for example, a public supplier of a service may have certain universal access obligations. However, the ACTU suggests that this argument is almost like saying that unless public suppliers of a service are operating on a commercial basis, they are not in competition with private providers of the same service that do not operate on such a basis. It is important to note that the wording of Article I.3(c) does not conflate these two requirements but refers to services supplied on a commercial basis **or** in competition with other suppliers as separate cases.[9]

5.12 The ACTU points out that in scheduling commitments in 1994, the Australian government did not simply rely on the current interpretation of Article I.3 when it included education services in Australia's schedule of commitments. Commitments on education services were limited to private higher education and private secondary education.[10]

5.13 The Castan Centre for Human Rights Law argues that the exclusion in Article I.3 applies only to government–run monopolies, and even then may not apply if the monopoly runs at a profit and possibly even if any charge is applied to the service, depending on the interpretation of 'on a commercial basis'. On the narrowest reading of Article I.3, a government service provider that applies a charge to one kind of service in order to subsidise another would not fit within the exclusion for government services. All services that do not fit within this exclusion are subject to the obligations set out in Part II of the GATS, which means that any government regulation of these services must comply with the GATS rules.[11]

5.14 If this was the case, the Castan Centre points out that some of the services that have an impact on human rights and which could fall within the scope of Part II of the GATS include water and power utilities, sewerage and waste disposal, health services, education, telecommunications, prisons and detention centres and security services.[12]

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8 *Submission* 125, p. 12 (ACTU)

9 *Submission* 125, p. 12 (ACTU)

10 *Submission* 125, p. 12 (ACTU)

11 *Submission* 58, p. 4 (Castan Centre for Human Rights Law)

12 *Submission* 58, p. 4 (Castan Centre for Human Rights Law)

5.15 A further complicating factor in considering the definition of Article I.3 and the application of Part II of the GATS is that governments are frequently under pressure to privatise social services or to implement 'full cost recovery', where the charge for a service is required to at least meet the cost of supplying that service. Arguably, this makes such a service a supply 'on a commercial basis' and within the scope of the GATS.[13]

5.16 The Victorian Greens raise some interpretive difficulties with Article I.3, arguing that from a legal perspective, the critical terms are 'commercial' and 'competition', neither of which are defined in the GATS. In the event of a dispute, the meaning of these terms will be decided by a WTO dispute settlement panel. As to the ordinary meaning of these words, 'commercial' generally means engaged in commerce, pertaining to commerce or trade, buying and selling of goods for money or equivalent. Tertiary education and many health services, it is argued, are supplied on a fee for service basis which could bring those services within the definition of 'commercial'.[14]

5.17 The ordinary meaning of 'competition' is 'rivalry in the market', or 'the act of competing or contending with others'. Universities, for example, whether public or private, compete for students, and public and private health services compete for patients. Therefore, arguably, these services would not necessarily be excluded under Article I.3(b). It is also argued that the use of 'nor' in Article I.3(b) suggests that to protect a public service from the operation of the GATS it must be demonstrated that both qualifications apply, i.e., the service is provided *neither* on a commercial basis *nor* in competition with other service providers.[15]

5.18 The Victorian Greens refer to WTO Secretariat Background Notes which raise concerns about the scope of Article I.3 and the meaning of 'in competition with' in this context. The Background Note of the WTO Secretariat on Health and Social Services (which is quoted) comments on the hospital sector, which in many countries is made up of government and private providers operating on a commercial basis, charging the patient or the patient's insurance for treatment. The Background Note goes on to state that '[i]t seems unrealistic in such cases to argue for continued application of Article I.3 and/or maintain that no competitive relationship exists between the two groups of suppliers or services'. The conclusion drawn from these

13 *Submission* 58, p. 4 (Castan Centre for Human Rights Law). The Castan Centre goes on to point out that for developing countries seeking loans from the World Bank or the International Monetary Fund, where privatisation and commercialisation are common conditions for assistance, it is questionable whether the application of the general obligations in Part II of the GATS to privatised services is genuinely consensual, especially where these conditions are imposed after the country acceded to the GATS.

14 *Submission* 114, p. 4 (Victorian Greens)

15 *Submission* 114, p. 9 (Victorian Greens)

comments is that Article I.3(b) and (c) will have a narrow application and will not protect a number of public services.[16]

5.19 Suggestions to lessen the interpretive difficulties and the ambiguity in Article I.3(b) and (c) are proposed in the Victorian Greens' submission. The first suggestion is the adoption of a restrictive interpretation. If a term is ambiguous, then the meaning of the term which involves less general restrictions on the sovereignty of the Member should be used.

5.20 The second suggestion is to adopt an effective interpretation or purposive approach, looking at the goal of the treaty and treating all objectives equally. Hence, although the overarching objective of the GATS is to liberalise trade in services, the preambular statements of the GATS also refer to the right to regulate the supply of services. This would lead to an interpretation of Article I.3(c) which is narrower in scope than the meaning obtained from a textual approach. The interpretation then applied would mean that the overall objectives of the GATS would be to liberalise trade in services while securing the sovereign rights of Members to regulate the supply of those services.[17]

5.21 A third suggestion involves examining legislative approaches to narrow the scope of the reference in Article I.3 to public services. This would involve an amendment to the GATS either through an interpretive understanding or an authoritative decision of the Ministerial Conference or the General Council of the WTO, to narrow the scope of Article I.3 by specifying meanings for 'commercial basis' and 'in competition'.[18]

5.22 A number of other submissions to the inquiry expressed similar concerns to those discussed above in relation to the potentially narrow scope of the application of Article I.3, and therefore the potential for a number of public services in Australia to be caught by the provisions of the GATS.[19]

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16 *Submission* 114, pp. 4–5 (Victorian Greens) The Background Notes quoted in the submission are from the Secretariat on Health and Social Services, 18/9/98 S/C/W/50 and the Secretariat on Environmental Services 6/7/98, S/C/W/46.

17 *Submission* 114, p. 6 (Victorian Greens). The suggestions referred to are credited to Markus Krajewski, a Visiting Attorney at the Centre for International Environmental Law in Geneva.

18 *Submission* 114, p. 6 (Victorian Greens)

19 See for example *Submission* 8 (Australian Pensioners and Superannuants' League Qld Inc.), *Submission* 17 (Combined Pensioners and Superannuants Association of NSW Inc), *Submission* 22 (The United Trades and Labor Council of South Australia), *Submission* 26 (Waddington), *Submission* 35 (Little), *Submission* 33 (Clifford), *Submission* 34 (Maguire), *Submission* 41 (Bracken) *Submission* 43 (National Centre for Epidemiology and Population Health), *Submission* 107 (Mr Arnold Rowlands), *Submission* 118 (Earthworker), *Submission* 119 (StopMAI Coalition (WA)), *Submission* 127 (Dee Margetts MLC), *Submission* 142 (O'Connell), *Submission* 145 (Bradley and Nielsen), *Submission* 146 (Copeman), *Submission* 156 (Trade Watch)

5.23 In response to these concerns, DFAT maintains that the GATS does not force governments to privatise or open up public services to competition and that, in the context of GATS, Member countries remain free to determine which sectors will be reserved for the state or state–owned enterprises. The corollary of this is that Members are also free to decide which sectors they will open to outside competition and make binding commitments to in their GATS schedules.

5.24 DFAT further maintains that there is no doubt that, when the GATS was being negotiated during the Uruguay Round, Member governments believed that public services were to be excluded from the scope of the GATS, and that this position has been reinforced during current negotiations.[20]

5.25 In evidence to the Committee, Mr Bruce Gosper referred to the exception in Article I.3 and submitted that the GATS framework is based on the right of governments to provide, fund and regulate public services, and that the negotiating parties did not intend to infringe on this right. The Department's view is that the GATS provides adequately for the co–existence of publicly and privately provided services, even in the same sector. [21]

5.26 It is argued that the purposes underpinning the provision of public services differ from the purposes for which privately delivered services are supplied, even where those services exist in parallel. Public education or public health services are provided for a broad set of public policy reasons, whereas similar services in the private sector are provided for a narrower set of reasons. The Committee notes this argument but questions whether this fact in itself would be sufficient, in the event of any dispute about a public service, to prove that that service is not provided on a commercial basis nor in competition with other providers.

5.27 For these reasons, DFAT argues, Australia has made commitments on private secondary and private tertiary education, but not on public education. Australia is seeking commitments from other WTO Members in the Doha Round on private health and private aged care but not on public services in these sectors. In doing so, Australia has acknowledged that in the health, education and social services sectors, the main providers are publicly owned. This recognition is emphasised in Australia's October 2001 negotiating proposal on education services which assert that governments must retain their sovereign right to determine their own domestic funding and regulatory measures.[22]

5.28 In terms of Australia's negotiating position, DFAT argues that Australia's commitments in the Uruguay Round were structured so that we are able to discriminate between foreign and domestic suppliers should the question about the provision of public services become an issue.

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20 *Submission* 54, p. 30 (DFAT)

21 *Committee Hansard,* 2 October 2003, p. 427 (Mr Bruce Gosper, DFAT)

22 *Submission* 54, p. 30 (DFAT)

5.29 With regard to the understanding of Article I.3 by WTO Members, Mr Gosper pointed out that since the GATS was adopted in 1994, no Member has 'chosen to contend these matters in dispute settlement or … in any other WTO process'. In response to a question from the Committee regarding the concerns expressed to the Committee about the interpretation of Article I.3, Mr Gosper went on to emphasise this point:

> The first comment I would make is that, as I said originally, we have now got nine years of experience of this agreement. We know what was intended when it was negotiated and we know how WTO members view the agreement. That is well demonstrated by the fact that it has not been raised as an issue or tackled in any meaningful way—certainly not through dispute settlement or otherwise. The critics of this provision—those who are most concerned about it—do not refer to anything that has actually happened or is happening but to the potential for some implication to arise from this clause.[23]

5.30 Mr Gosper acknowledged the concerns about the way in which Article 1.3 could be interpreted in terms of the delivery of similar services by public and private entities:

> I will not deny that there is ambiguity that can be read into this clause. That is not least because, to be very frank, the character of public services in most modern developed economies—in fact, I would say all—involves both public and privately delivered services. Most of these things exist side by side to some extent now in all economies—certainly in all developed economies and certainly in our own. So that raises a complexity to it.

5.31 However, Mr Gosper explained that, accepting that there was ambiguity in these words, the first question to ask is whether this causes a real problem at the moment, bearing in mind that the interpretation of this Article will only become an issue if a WTO Member brings a case against another Member using the dispute settlement process. The response to this question was that at present, this is not a problem, and has not been so in nine years of operation of the GATS. The second question is whether this ambiguity in Article I.3 can be easily remedied; the answer to this being that it is not clear that it can be easily resolved—the ambiguity may be perpetuated or worsened.[24]

5.32 It was acknowledged that this provision has not been tested in a dispute settlement process before the WTO, and that there has only been one dispute (not yet resolved) with respect to the services regime since the GATS came into force. However, DFAT asserted that, notwithstanding the lack of a ruling by the WTO on

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23 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

24 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

this point, '[w]e know what it means. We are a member government of the WTO, and our view on what it means seems to be shared by other WTO member governments.'[25]

5.33 Further, when this issue was discussed by Member governments of the WTO, the question was not one of how the ambiguity in this Article could be resolved amongst Members but how to raise 'comfort level' of civil society groups and others with respect to this Article. There is said to be no indication amongst WTO Members that they do not understand exactly what this Article means, and no move by any Member to request clarification on this point.[26]

5.34 The issue of subsidies is intertwined with the concerns about provision of public services. The argument is that, if public services and private services in the same sector are regarded as being in competition, the private provider may be able to seek a share of any subsidies provided to the public sector by the government, in accordance with the national treatment requirements of the GATS.

5.35 The rule on national treatment, contained in Article XVII of the GATS essentially requires that once a sector has been scheduled for foreign access, a Member country must not discriminate between foreign and domestic services and suppliers; that is, in those sectors scheduled, and subject to any conditions and qualifications set out in the schedule, foreign suppliers must not be given treatment any less favourable that domestic suppliers.

5.36 In this context, DFAT considers the concerns about access to subsidies are overstated, apart from its view that public and private services are not provided in competition, because:

> [f]irstly the issue could only ever arise if a member had made a mode 3 [commercial presence] commitment in a sector with public and private elements, and secondly the argument assumes that the payments to the public sector are in fact subsidies. The work on subsidies in the GATS has barely started, but if the rules of the WTO Agreement on Subsidies and Countervailing Measures were to be applied, it seems unlikely, under the specificity provisions, that a payment by a government to the public sector would be characterised as a subsidy.[27]

5.37 DFAT indicated that the possible future impact of the GATS on the provision of public services will need to be kept under review, with a view to adopting the most effective approach to removing doubts about the 'exclusion from the GATS of public services and of public payments for service provision'.

> Article XV (Subsidies) requires members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid the trade distortive effects of subsidies. Article XV also notes (recognising the likely

25 *Committee Hansard,* 2 October 2003, p. 431 (Gosper, DFAT)

26 *Committee Hansard,* 2 October 2003, p. 432 (Ms Lisa Filipetto, DFAT)

27 *Submission* 54, p. 31 (DFAT)

> complexity of developing subsidies disciplines, including because of the public provision of many services) that the negotiations should take into account the needs of Members for flexibility in this area.[28]

5.38 DFAT noted that the work on subsidies continues to proceed very slowly, and emphasised the Australian government's commitment to doing nothing in the negotiations that would limit the right of WTO Members to regulate and fund public services for social policy reasons.[29]

5.39 The Committee takes some reassurance from these statements about the meaning of Article I.3 and the certainty with which they are expressed, and notes the government's position of principle on maintaining the right of WTO Members to regulate and fund public services. The Committee accepts that much of the concern expressed in evidence to this inquiry about the applicability of the GATS to public services is about the unknown, about outcomes which have not yet occurred and may not occur, and are based on possibilities rather than actualities.

5.40 The Committee acknowledges too that the government has confirmed that it will not be making offers in these negotiations with regard to public health, public education and ownership of water.[30] However, it is always possible that there will be pressure in the future to liberalise access to these services given the built in agenda of the GATS which requires a commitment to increasing liberalisation.

5.41 It is clear that there remains a significant level of concern about the potentially broad-ranging impact of the GATS on public services. Reassurances that all Members of the WTO are certain of the meaning of Article I.3, may mean that it is unlikely that there will be a dispute. However, the Committee remains unconvinced that, in the event of a dispute, Article I.3 would be interpreted in the broad or inclusive way suggested by DFAT. This would mean that public services now said to be exempt from the GATS could be found to be subject to the obligations under Part II.[31]

5.42 Further, as pointed out by DFAT, the negotiations for the development of rules on subsidies as required under Article XV of the GATS have not yet been finalised and are progressing very slowly, partly because of the large number of services provided publicly. The fact that the rules on such an important issue have not been finalised, yet Members are making binding commitments under the GATS, suggests that there is all the more reason to be cautious in making any commitments which could impact on the provision of public services.

5.43 In the Committee's view, perhaps more could be done to 'raise the comfort level' of civil society groups and the community in general with regard to whether

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28 *Submission* 54, p. 31 (DFAT)

29 *Submission* 54, p. 31 (DFAT)

30 See *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

31 Such services could, for example, include sewerage and waste disposal, telecommunications, water, prisons, and energy.

public services are excluded from the GATS or not. There may be some comfort provided in recognition or acknowledgement by the government of the ambiguity in Article I.3 and therefore adopting a conservative approach to making commitments in sectors where publicly funded services are involved.

5.44 In its assessment of the interpretive issues surrounding this Article, the Victorian Greens submission suggests three different approaches to resolving the ambiguity, discussed above. Two of these suggestions do not involve changes to the GATS itself but involve adopting different approaches to the interpretation of the treaty. The Committee considers that these proposals, in particular the first two suggestions, do have the potential to lessen the ambiguity surrounding this clause and are worthy of further consideration.

Recommendation 4

5.45 **The Committee recommends that the government clearly define and make public its broad interpretation of Article I.3 of the GATS so that the public is aware of the basis on which future negotiations are undertaken.**

GATS and the right to regulate

5.46 The potential restrictions that the GATS places on Members' right to regulate domestically is related to the question of the applicability of the GATS to public services. Evidence received by the Committee during the course of this inquiry indicates similar concerns about the impact of the GATS on the right to regulate domestically to achieve desired policy outcomes.

5.47 Whilst supportive of trade liberalisation which leads to improvements in market access for services exporters and improvements in the level and quantum of services provided to local communities, the Australian Local government Association indicated that it would oppose any 'proposal that may have the potential to undermine the or weaken public governance arrangements in Australia. Specifically, local government would oppose any proposal that would reduce the capacity of local authorities to make appropriate regulations on behalf of their communities.'[32]

5.48 AFTINET argues that Australia's regulation at all levels of government could be subject to challenge by another Member under the GATS. Article XXIII (Dispute Settlement and Enforcement) provides that any Member may seek a ruling from the WTO's Dispute Settlement Body (DSB) if that Member considers that any benefit it could reasonably have expected to accrue to it under a specific commitment of another Member is being is being nullified or impaired as a result of the application of any measure.

5.49 If the DSB determines that the measure has nullified or impaired a benefit, the Member affected is entitled to a mutually satisfactory adjustment, which may include

32 *Committee Hansard,* 22 July 2003, pp. 186–187 (Mr Ian Chalmers, ALGA) See also *Submission* 120, p. 2 (ALGA)

the modification or withdrawal of the measure. If the parties cannot agree on a mutually satisfactory adjustment, Article XXIII provides that Article 22 of the Dispute Settlement Understanding is to apply, which allows affected members to apply measures against the country in question.

5.50 The effect of this, AFTINET argues, is that 'great economic and political pressure can be brought to bear on Australia' as to how the government should regulate. The decision about whether a regulation is acceptable or not is made by a closed body of trade experts who consider trade issues only, not the broader public policy objectives which governments must have regard to.[33]

5.51 AFTINET also points out that Australia is unable to change its GATS commitments without cost. As the ACTU has also pointed out, and as is discussed below, Article XXI allows for 'compensatory adjustment' to be made to affected Members by a Member which changes its GATS commitments. If Australia wanted to change its commitments, it could not do so until after the compensatory adjustment was implemented.[34] Aside from the potential cost of such compensation, this provision means that commitments entered into by one government are effectively binding on subsequent governments, potentially restricting future regulation.

5.52 The AMWU acknowledges the government's commitment that it 'will not agree to any diminution of our overall right to regulate that would constrain our ability to pursue legitimate policy objectives in the regulation of services sectors, or compromise the capacity of governments to fund and maintain public services'. It argues that this statement 'must translate into a broad, substantial and ongoing commitment' and notes that the government has not been specific with regard to what it means by 'legitimate' policy objectives or maintaining public services.[35]

5.53 The AMWU also expresses concern that modern trade treaties, and in particular the GATS, fetter future parliaments in a way that most international treaties do not. As other submissions discussed here have pointed out, for a Member to take action which is inconsistent with its obligations under the GATS carries with it the risk of substantial economic penalties. Future governments are potentially constrained in their ability to regulate services as a result of binding GATS commitments.[36]

5.54 The Victorian Greens place their uneasiness about the restrictions the GATS imposes on the right to regulate in the context of the particular issues faced by developing countries. It is argued that the GATS currently imposes significant restrictions on the ability of Member governments to make domestic regulations controlling the delivery of services. The ability to regulate for developing nations is stressed as being vitally important to ensure, for example, effective provision of basic

33 *Submission* 42, pp. 15–16 (AFTINET)

34 *Submission* 42, p. 16 (AFTINET)

35 *Submission* 160, p. 51 (AMWU)

36 *Submission* 160, p. 51 (AMWU)

services, provisions to guard against unregulated development and the environmental damage which can accompany it and regulations to protect health, safety standards and workers' rights.[37]

5.55 WTO Watch Queensland expresses a similar concern to the ACTU, discussed below, acknowledging that the preamble to the GATS and the text of the Doha Declaration recognise the right of governments to regulate but pointing out that these statements are not legally binding. In the case of a dispute, the preamble to the GATS may be used to shed light on the interpretation of the agreement but regulatory measures must conform to the requirements in the body of the GATS and a Member's specific commitments.[38]

5.56 The ALGA cautions that, although some services provided by local government may not be provided on a commercially viable basis and therefore fall outside the scope of the GATS

> [n]evertheless, we are not blessed with infinite foresight and we do want to make sure that the structure of agreements that are made on a transnational basis do not open the possibility at some stage in the future that, for commercial reasons, the freedom of local authorities to make regulations, to set by-laws and to subsidise the delivery of services in the community interest cannot be constrained.[39]

5.57 The ACTU acknowledges that the preamble to the GATS affirms the right of Member governments to regulate the supply of services, but points out that this right is circumscribed in a number of ways in the text of the GATS. The ability of governments to regulate is limited by their schedule of commitments. To the extent that national treatment commitments are undertaken, regulation by way of measures that favour domestic suppliers over foreign suppliers is precluded. Similarly, to the extent that market access commitments are undertaken, there are a number of measures set out in Article XVI which a Member may not adopt, which constrains governments ability to regulate.[40]

5.58 The Committee accepts this point and notes also that it is possible for Member governments to schedule limitations on market access in specified areas and on the application of national treatment. The key is that these limitations *must be specified in the Member's schedule of commitments.*

5.59 The ACTU acknowledges that a Member can schedule a particular limitation or reservation for a sector or sub–sector for which it is providing a market access commitment. Limitations are generally used to maintain existing specific measures which are in some way contrary to the principle of market access. The ACTU argues

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37 *Submission* 114, p. 25 (Victorian Greens)

38 *Submission* 117, p. 15 (WTO Watch Queensland)

39 *Committee Hansard,* 22 July 2003, p. 193 (Chalmers, ALGA)

40 *Submission* 125, p. 4 (ACTU)

however that scheduling a limitation does not of itself confer a general right to regulate in the sector concerned. The principle of 'standstill' applies to scheduled limitations which means that changes cannot be made to existing arrangements, and new measures cannot be introduced, if the effect would be to expand the trade restrictive effect of the scheduled limitation.[41]

5.60 The ACTU points out two examples to illustrate the significance of the schedule of commitments for a government's right to regulate. Having given commitments to remove local content quotas for television and radio, the New Zealand government received advice to the effect that to reintroduce content quotas would potentially put the government in breach of its GATS commitments. With regard to universities, the New Zealand government is similarly precluded by the market access commitments made by the previous government from setting a numerical limit on the number of private universities in that country.[42]

5.61 Under Article XXI of the GATS, a Member may modify or withdraw any commitment in its schedule, any time after three years have elapsed from the date the commitment was entered into. However, if this occurs, any other Member that may be affected by the withdrawal may enter into negotiations with that Member, to agree on any necessary compensatory adjustment, which can be substantial. If agreement is not reached, the matter may be referred for arbitration. If the modifying Member does not comply with the outcome of the arbitration, other Members may deny substantially equivalent benefits—i.e. impose trade sanctions.

5.62 It is argued that this provision provides a deterrent effect and 'effectively locks in the commitments made by governments that were in office at the time of negotiations on specific sector commitments.'[43] The Committee acknowledges this argument, and has some concerns about the way in which a government can bind subsequent governments to what amounts to irreversible commitments under the GATS. This issue was discussed in more detail in Chapter 3.

5.63 Professor Jan McDonald drew the Committee's attention to the potential environmental implications of the restrictions on domestic regulation implicit in the GATS. Article VI.4 of the GATS requires the Council for Trade in Services to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade. Professor McDonald points out that such disciplines may inadvertently curtail legitimate social and environmental regulation—the 'chilling' effect.[44]

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41 *Submission* 125, p. 5 (ACTU)

42 *Submission* 125, p. 5 (ACTU). On New Zealand's audio visual commitments, see also *Submission* 40, p. 22 (Australian Writers' Guild (AWG))

43 *Submission* 125, p. 5 (ACTU)

44 *Committee Hansard,* 24 July 2003, p. 397 (McDonald). See also *Submission* 143, pp.1–2 (Professor Jan McDonald)

5.64 Australia currently has in place a sophisticated regulatory framework within which services industries must operate. This system is 'far from perfect, but it represents a democratically–reached compromise between development priorities and the need to safeguard and enhance environmental quality for future generations.' Professor McDonald argues that great care must be exercised in the negotiation of additional disciplines under Article VI.4, the aim of which is to reduce the use of regulatory barriers to trade, to 'ensure that normal environmental regulatory requirements, such as local government pollution control licences and development approvals, are not exposed as 'unnecessary obstacles to trade''. Further, Professor McDonald argues:

> Article VI.4 should, if anything, be clarified to make clear that it does not take away members' rights to impose measures for good urban and resource planning and for environmental management.[45]

5.65 Professor McDonald notes also that there is no equivalent GATS provision to Article XX(b) of the General Agreement on Tariffs and Trade (GATT) which permits measures 'relating to the conservation of exhaustible natural resources'. This omission from the GATS is potentially very significant, given that undertakings to liberalise services sectors cannot be reversed once made. A Member may be exposed to WTO dispute settlement proceedings if it seeks to remedy unforeseen environmental consequences of opening a particular sector to competition.

5.66 Given these provisions, Professor McDonald stresses that the irreversibility of commitments under the GATS is 'reason enough to take an extremely cautious approach to the range of services and types of restrictions Australia wishes to liberalise.'[46]

5.67 A further concern is that, by committing to liberalise new services sectors under the GATS, Australia is not making it more difficult to 'alter and respond within our regulatory framework.'[47] Regardless of whether a service provider is Australian or foreign owned, Professor McDonald argues that

> [w]hat is essential is that liberalisation allows Members to retain the right to demand high standards of service industries, regardless of their nationality. Stipulations of environmental track record/past performance should be permissible for new entrants, regardless of nationality. The expectation that providers will comply fully with the regulatory framework for their industry should also be made clear. For example, market access arrangements must not be construed as limiting the right of regulators to restrict the volume or scope of activities in certain environmentally harmful activities, such as mineral exploration.[48]

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45 *Submission* 143, p. 2 (McDonald)

46 *Submission* 143, p. 3 (McDonald)

47 *Committee Hansard,* 24 July 2003, p. 398 (McDonald)

48 *Submission* 143, p. 3 (McDonald)

5.68 When new sectors are opened up under the GATS, it must be made explicit that this is occurring within an evolving and non–static regulatory framework, which should ensure that it is possible to maintain regulatory flexibility to 'recognise and respond to new environmental challenges as and when they arise.'[49]

5.69 Allowing foreign service providers into Australia under Mode 3 (commercial presence) also raises regulatory enforcement issues. Professor McDonald points out that the fact that a service provider is not Australian is not of itself bad for the environment, but it can be more difficult to impose liability for breaches of applicable environmental laws, especially the 'ultimate sanctions of personal fines and prison terms for company managers'. There could also be problems recovering fines or the cost of remediation if environmental damage is caused.[50]

5.70 One way of addressing these issues, and ensuring as far as possible that Australia is able to enforce its current regulatory regime to enable protection of the environment where this is necessary, is to undertake an appropriate sustainability impact assessment on a sector-specific basis. Before a new sector is opened up under the GATS, an assessment could be made of the regulations currently applying to that sector, and of what is necessary for that particular sector.[51]

5.71 The Committee accepts that the environmental, regional, social and cultural impacts of trade liberalisation are not immediately apparent. This is all the more reason to be cautious in making commitments to open up sectors under the GATS and to ensure that there is flexibility to enforce Australia's existing regulatory regime and where necessary, introduce new regulator controls for specific sectors.

5.72 The Committee has recommended elsewhere measures to ensure appropriate review of the impacts of trade liberalisation on Australia's regulatory regime, and that proper consideration is given to the economic, social, cultural and regional impacts of trade agreements (see Chapter 3).

Response to issues raised

5.73 DFAT points out that the GATS recognises the right of Members to regulate, and introduce new regulations on the supply of services within their territories, in order to meet national policy objectives. Further, the GATS itself indicates various ways in which a range of areas fall outside the scope of the GATS disciplines, including:

- Immigration matters
- Services supplied in the exercise of governmental authority
- Fiscal policy and taxation measures

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49 *Committee Hansard,* 24 July 2003, p. 400 (McDonald)

50 *Submission* 143, p. 3 (McDonald)

51 *Committee Hansard,* 24 July 2003, p. 402 (McDonald)

- Customs systems
- Certain aspects of investor protection concerning the movement of capital
- Monetary policy and exchange rate management
- Privatisation – although there are disciplines for state-owned trading entities and monopolies
- Services directly related to the exercise of air traffic rights.

5.74 In addition, Article XIV of the GATS contains a number of general exceptions which enable certain measures to be adopted or enforced, provided that those measures are not applied in an arbitrary or unjustifiably discriminatory manner, or a disguised restriction on trade in services. The measures listed are measures necessary to:

- protect public morals or to maintain public order (which may be invoked only where a 'genuine and sufficiently serious threat is posed to one of the fundamental interests of society');
- protect human, animal or plant life or health;
- prevent deceptive and fraudulent practices and protect the privacy of individuals;
- protect safety.[52]

5.75 Article XIV *bis* contains security exceptions, and notes that nothing in the GATS is to be construed as requiring any Member to disclose information contrary to its essential security interests, or preventing any Member from taking action necessary to protect those interests.

5.76 DFAT maintains that the structure of the GATS itself is sufficiently flexible to allow Members to frame their commitments in the way they wish to. For example, Article II allows for exemptions from the Most Favoured Nation (MFN) principle, provided that these comply with the Annex on Article II Exemptions. The Annex provides that in principle, exemptions should not exceed ten years and are subject to negotiations in subsequent trade liberalising rounds. The Council for Trade in Services is to review all exemptions granted for a period of more than five years.

5.77 Australia has two MFN exemptions, to enable maximum regulatory flexibility in the audiovisual and cultural sectors, and across the board there are more than 180 MFN exemptions.[53]

5.78 Article XVI (Market Access) allows Members to schedule limitations on market access in a range of specified areas listed in the Article, including limitations

52 *Submission* 54, p. 32 (DFAT)

53 *Submission* 54, p. 32 (DFAT)

on the number of services suppliers in a sector, limitations on the total number of services transactions, and measures which restrict or require specific types of legal entity or joint venture through which a services supplier may supply that service.

5.79 Article XVII (National Treatment) requires a Member to provide the service suppliers of other Members treatment no less favourable than it provides to its own like services and service suppliers. This requirement is subject to any conditions and qualifications set out in a Member's schedule.

5.80 DFAT indicated that Australia has scheduled limitations to market access and on the application of national treatment in a number of cases where the existence of Commonwealth, State or Territory laws impinge on the application of Australia's market access or national treatment conditions commitments. Australia has also included further limitations in its horizontal schedule.[54]

Working Party on Domestic Regulation

5.81 In accordance with Article VI.4 of the GATS, the WTO's Council for Trade in Services has established the Working Party on Domestic Regulation to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services. Article VI.4 states that the disciplines developed must aim to ensure, among other things, that these requirements are:

- based on objective and transparent criteria, such as competence and the ability to supply the service;
- not more burdensome that necessary to ensure the quality of the service;
- in the case of licensing procedures, not in themselves a restriction on the supply of the service.

5.82 The ACTU has expressed concern that the scope of the proposed disciplines being developed by the Working Party could potentially be quite wide, based on what was submitted by Members to the Working Party in 2002 as examples of trade barriers that could or should be addressed by new disciplines. Examples given include:

- zoning and operating restrictions designed to protect small stores;
- different licensing and qualification requirements set by federal and state governments, and by different states;
- a requirement for fluency in the language of the country in which a service is being delivered, allegedly not necessary to ensure the quality of the service;
- 'unreasonable' environmental and safety standards for maritime transport;

54 *Submission* 54, p. 32 (DFAT)

- indemnity insurance requirements.[55]

5.83 The ACTU argues that the nature of the criteria listed in Article VI.4 constitute a 'potentially narrow frame of reference for judging domestic regulation of the kind covered by Article V1'. For example, licensing requirements may go well beyond the competence or ability of the service supplier, and may include factors such as public interest, affordability of access, price stability, consumer protection or universal service obligations. Such requirements can be seen as 'more burdensome that necessary to ensure the quality of the service', contrary to the criteria in Article VI.4, because they go beyond quality assurance and competence and ability to supply the service.[56]

5.84 According to DFAT, the progress of the Working Party to date has been slow, because many Members have other priorities. The Australian government has indicated its intention is to ensure that no decisions adopted under Article VI.4 limit the right of the government to regulate for legitimate policy (i.e. not trade restrictive) reasons, and that any outcomes under Article VI.4 reinforce the domestic legal and review processes already applicable to GATS domestic regulatory issues under Article VI.2.[57] Further, DFAT maintains that the GATS does not add significant or substantial new issues for Australia in the domestic regulatory area, pointing out that Australia's own regulatory regime is already ahead by a considerable degree of what the GATS is trying to achieve, and that this is an area in which Australia can make a positive contribution.[58]

Necessity test

5.85 Article XIV of the GATS sets out a number of general exceptions, which means that the GATS will not apply to measures which may be adopted by a Member for a range of reasons. These exceptions include measures necessary to protect public morals or maintain public order, necessary to protect human, animal or plant life and health, or necessary to secure compliance with laws or regulations relating to the prevention of fraud and the protection of the privacy of individuals.

5.86 The issue of the interpretation and application of what is called the 'necessity test' is interlinked to a degree with the issue of the restrictions the GATS places on governments' ability to regulate.

5.87 The ACTU points out that measures taken under Article XIV must not be a disguised restriction on trade in services. Further, the term 'necessary' in the context of similar articles in other WTO agreements has been interpreted by Dispute Panels as incorporating a requirement that the measures taken by a government be 'least trade

55 *Submission* 125, p. 7 (ACTU)

56 *Submission* 125, p. 8 (ACTU)

57 *Submission* 54, p. 33 (DFAT)

58 *Committee Hansard,* 2 October 2003, p. 427 (Gosper, DFAT)

restrictive' in impact, even if they are not a disguised restriction on trade in services. In other words, the ACTU argues, although certain measures may have been genuinely taken by a government to protect human life, etc, the measure may still be disallowed by the WTO on the grounds that other measures, less trade restrictive in effect, could have been taken to achieve those objectives.[59]

5.88 In response to this, DFAT stressed that the necessity test would not apply to the necessity of objectives, which are a matter for Member governments to decide, but to the measures chosen to meet those objectives. The necessity test is said not to be about the primacy of a government to establish its policies but about the implementation of those policies to ensure that there is more of a predictability and certainty about the process than the outcome.[60]

The hybrid nature of the GATS

5.89 A further point worth noting in the context of the impact of the GATS on a broad range of services and the right to regulate is that the GATS is essentially a 'hybrid' agreement, incorporating some features which are 'top–down' (applying to all services unless exemptions are listed, sometimes known as negative listing) and others which are 'bottom–up' (applying only to those sectors which are listed, or positive listing).

5.90 The top down features of the GATS include the fact that it applies to all measures affecting trade in services (Article I.1), the GATS covers all means of supplying services internationally (the four modes set out in Article I.2), the Most Favoured Nation rule and the fact that no services, except those supplied in the exercise of governmental authority, are excluded *a priori*.[61]

5.91 The 'bottom up' features of the GATS, which only apply to sectors included in Members' schedules include the provisions on Market Access (Article XVI) and National Treatment (Article XVII).

5.92 Perhaps the most significant issue here is the potential scope of the interpretation of what is meant by 'measures' in Article I.1. Such measures, or government actions, can take any form including laws, regulations, administrative decisions and possibly even unwritten practices. These restrictions cover measures implemented by all levels of government—state, local and federal. The Canadian Centre for Policy Alternatives points out that the WTO appellate body has stated that there is no reason to give Article I.1 a narrow meaning, stating that there is no notion of limiting the scope of the GATS to certain types of measures or a certain regulatory

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59 *Submission* 125, p. 6 (ACTU)

60 *Committee Hansard,* 2 October 2003, pp. 426, 440 (Gosper and Filipetto, DFAT)

61 Scott Sinclair and Jim Grieshaber-Otto, *Facing the Facts: A guide to the GATS debate,* Canadian Centre for Policy Alternatives, 2002, pp. 12–13. On the top-down and bottom-up features of the GATS, see also *Submission* 117, pp. 6–10 (WTO Watch Queensland)

domain. Rather, Article I.1 refers to measure in terms of their effects, which means that such measures could be of any type or relate to any area of regulation.[62]

5.93 The Committee notes that the existence of such jurisprudence indicates that it is more likely than not that, in the event of any dispute about the scope of this provision, it is likely to be interpreted very broadly:

> In other words, no government action, whatever its purpose—protecting the environment, safeguarding consumers, enforcing labour standards, promoting fair competition, ensuring universal service … is, in principle, beyond GATS scrutiny and potential challenge. Because of this stunning breadth along, it is not only legitimate, but vital, for citizens, NGOs, and elected representatives at all levels of government to critically examine potential GATS impacts on an almost unlimited range of public interest measures.[63]

The public consultation process

5.94 In its submission and during oral evidence, the Department of Foreign Affairs and Trade explained to the Committee in some detail the nature and extent of the public consultation it had undertaken on the GATS. This process is outlined in greater detail below. The consultation itself can be viewed as a two way process: the Department engages in consultation with industry and other bodies to inform itself and gain a better understanding of Australia's offensive and defensive interests and therefore, its negotiating priorities. In turn, the Department has a responsibility to keep the public informed as far as possible of the processes, and to be accountable and transparent in its decision making.[64]

5.95 A wide range of witnesses, including industry bodies, unions, NGOs and community groups made known to the Committee their views of the consultation processes undertaken by the DFAT and the adequacy or otherwise of those processes. A number of these bodies, particularly industry bodies, were quite satisfied with the level of consultation, recognising that it is not possible to make public all information regarding the negotiations while the process is underway.

5.96 However, some witnesses felt that the processes engaged in with non–government organisations (NGOs) and other civil society groups was on a somewhat different level to the process engaged in with industry groups and others with economic interests in services trade liberalisation.[65]

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62 Canadian Centre for Policy Alternatives, *Facing the Facts: A guide to the GATS debate* pp. 13–14. The case which is referred to is the EC Bananas case.

63 Canadian Centre for Policy Alternatives, *Facing the Facts: A guide to the GATS debate* p. 14.

64 *Submission* 54, p. 24 (DFAT)

65 See for example, *Committee Hansard,* 23 July 2003, pp. 283–284 (Dr Patricia Ranald, AFTINET)

5.97 In the Committee's view, the evidence presented to the inquiry indicated something of a disparity between the level of consultation offered to industry bodies and others such as unions, NGOs and other civil society groups.

Consultation with industry and professional bodies

5.98 As the peak industry body representing suppliers of information and communications technology goods and services, the Australian Information Industry Association considers that the level of consultation undertaken by DFAT has been adequate in the circumstances:

> We have had opportunities at several different levels to consult and be consulted. We have participated in the regular industry forums that DFAT has organised; I think the most recent one was in the last two or three weeks. We have also had private consultations going back to November last year with DFAT and with [the Department of Communications, Information Technology and the Arts.] …. Those consultations have covered general issues and specific issues such as intellectual property rights, government procurement and so on.[66]

5.99 Meat and Livestock Australia, another industry body, acknowledged the concerted efforts of DFAT over the past five or so years to provide industries with information on the state of trade negotiations and objectives, and indicated satisfaction with the levels of consultation:

> Certainly we have close contact with the WTO section of the Department of Foreign Affairs and Trade, the trade negotiations section, the US FTA people and also the individual desks within DFAT. I must say that as an industry—and I am sure that I speak for all of industry on this issue—we believe that our consultations with the Department of Foreign Affairs and Trade are at a very satisfactory level.[67]

5.100 The Australian Local government Association (ALGA) indicated that it was satisfied with the level of consultation undertaken by DFAT with regard to issues of concern to local government:

> I am pleased to say that, in the case of the recent negotiations relating to the General Agreement on Trade in Services, the Commonwealth has consulted quite effectively with local government. In this regard I would like to place on record our appreciation for the time and effort of officials from the Department of Foreign Affairs and Trade in both briefing local government leaders and listening to their concerns.
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> …

66 *Committee Hansard,* 22 July 2003, p.176 (Mr Rob Durie, Australian Information Industry Association)

67 *Committee Hansard,* 23 July 2003, p. 298 (Dr Peter Barnard, Meat and Livestock Australia)

> [W]e did have a sequence of senior official level meetings with the Department of Foreign Affairs and Trade officials who were careful to emphasise to us that the information they were sharing was to some extent confidential, and we respected that candour. In that regard, yes, we were reasonably confident that we had a good appreciation of the ambit of issues that were to be discussed in the last round. I do not think any great state secrets were revealed to local government leaders, but we did feel that we were operating in an environment of no surprises.[68]

5.101 The ALGA also indicated that it was satisfied that broadly speaking, what was discussed with DFAT was what was presented at the WTO as Australia's position, and that there were no unfair surprises.[69]

Consultation with unions

5.102 The Australian Nursing Federation indicated that it was sought out and consulted by DFAT about nursing and nursing regulation in Australia in the context, and that this consultation was welcome and had a very positive outcome. However, the Federation expressed considerable concern that the level of understanding within DFAT about the structure of the nursing profession, nursing education, and the regulatory regime in Australia was not high. Given this, the Federation stressed the need for continuing and structured consultation by the Department as the GATS negotiations progress.[70]

5.103 The Australian Services Union (ASU) indicated that it had written to the Minister for Trade outlining its concerns about the GATS negotiations and that it had received a substantial response from the Minister. The ASU also met with ministerial staff and DFAT officers, and was pleased with the response received but felt that had it not raised a number of concerns, it may not have been consulted.[71]

5.104 The AMWU welcomed the opportunity to provide submissions to DFAT on trade issues but indicated that unions appear to be rarely consulted on specific or substantive issues, while business is regularly consulted on trade and industry issues, and is involved in ongoing trade policy formulation and negotiations.[72]

5.105 The Communications, Electrical and Plumbing Union (CEPU) commented on the lack of transparency of WTO processes generally and indicated that it had found it very difficult to establish the nature of the discussions around the GATS negotiations. The CEPU indicated that it had not been sought out for consultation but had requested the right to be consulted by the Australian government on any further developments in

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68 *Committee Hansard,* 22 July 2003, pp. 186, 188 (Chalmers, ALGA)

69 *Committee Hansard,* 22 July 2003, p. 188 (Chalmers, ALGA)

70 *Committee Hansard,* 22 July 2003, pp.227–228 (Ms Jill Iliffe, Australian Nursing Federation) and *Submission* 150, p. 3 (Australian Nursing Federation)

71 *Committee Hansard,* 23 July 2003, p. 321 (Mr Greg McLean, Australian Services Union)

72 *Submission* 160, p. 13 (AMWU)

the GATS negotiations concerning postal services in particular and has sought further information on any final position taken by the government on postal services.[73]

5.106 The ACTU commended DFAT for its program of consultation with the union movement and non–government organisations, and welcomed the decision to establish a WTO Advisory Committee. However, the ACTU stressed that was important for Australia's formal negotiation communications to the WTO to be 'informed by the views of relevant organisations and the community generally.'[74]

5.107 Whilst acknowledging DFAT's release of a discussion paper and call for public comment prior to finalising Australia's initial offer, the ACTU pointed out that relevant affiliates of the ACTU such as the Finance Sector Union, the Communications, Electrical and Plumbing Union, and the Construction Forestry Mining and energy Union were not consulted prior to Australia submitting communications on financial services, telecommunications and construction and related services to the WTO Council for Trade in Services.[75]

5.108 In summary, the ACTU indicated that, while it had access to the DFAT negotiators, its view was that the level of consultation needed to be more detailed:

> Fundamentally, while we cannot in all honesty say that we do not have access to the respective DFAT negotiators, it is really at the level of superficiality. It is often after the event, not before the event. To be fair to the negotiators, they are operating in a context which has a nature of secrecy that I talked about. There is access, yes; substantive detail, no.[76]

5.109 The Australian Film Commission indicated that it thought the degree of consultation with the government was 'entirely adequate' but in the context of the US FTA, expressed a 'very high level of anxiety with regard to what the final outcome will be of this treaty.'[77] The Australian Screen Directors Association felt similarly that it had access to the negotiators and had been 'kept in the loop' with regard to the progress of the negotiations but nonetheless expressed concerns about the final outcome.[78]

Consultation with non-government organisations and others

5.110 AFTINET indicated that it had sought out consultation with the Department, had made a written submission and had been engaged in a meeting with a number of

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73 *Submission* 87, pp. 4–5 (Communications, Electrical and Plumbing Union (CEPU))

74 *Submission* 125, p. 3 (ACTU)

75 *Submission* 123, p. 3 (ACTU)

76 *Committee Hansard,* 22 July 2003, p. 239 (Ms Sharan Burrow, ACTU)

77 *Committee Hansard,* 23 July 2003, pp. 264–265 (Mr Kim Dalton, Australian Film Commission)

78 *Committee Hansard,* 23 July 2003, p. 266 (Mr Richard Harris, Australian Screen Directors Association)

church, union and community organisations, but that while the Department agreed to meet with AFTINET:

> … I think the hard truth is that, if you are not an industry group, it is more difficult to get into the loop of the process with DFAT. We seek consultation and they agree to meet with us, but it is a slightly different process from some of the industry groups.
>
> …
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> I think they see general community interest in trade agreements as being, I suppose, at a slightly lower plane than some of the industry groups, whereas we would argue that there is a legitimate role for general community organisations to express their views about these agreements because they impact on such broad areas of social policy which affect everybody in the community.[79]

5.111 The Doctors Reform Society and the Queensland Nurses Union expressed a view that at the community level, the consultation undertaken by DFAT seemed "superficial" at times. These organisations indicated that they thought there had been an improvement in the nature of the consultation in recent times, and felt they were being listened to, but had no real sense that there would be a further opportunity for them to comment as negotiations progress towards a conclusion.[80]

5.112 Both AID/WATCH and ATTAC Australia suggested that with regard to trade agreements in general, there needs to be wider consultation with industry, civil society groups, unions and community groups prior to negotiations beginning, to ensure that the broader community is aware of what is being proposed.[81]

DFAT's consultation strategies

5.113 The Department advised the Committee that it has been consulting with representatives of a number of key stakeholders in the development of its negotiating position, including state, territory and local government, Commonwealth government agencies, unions and non-government organisations (NGOs). The consultations have taken the shape of formal and informal meetings, face to face meetings, and published information.[82]

5.114 DFAT published a discussion paper on the GATS on 15 January 2003, and called for public comment on the paper, with submissions to be received by 24

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79 *Committee Hansard,* 23 July 2003, p. 283–284 (Dr Patricia Ranald, AFTINET)

80 *Committee Hansard,* 24 July 2003, pp. 380–381 (Dr Tracy Schrader, Doctors Reform Society, and Ms Beth Mohle, Queensland Nurses Union). Ms Terrie Templeton, of WTO Watch Queensland and the Alliance to Expose GATS, expressed a similar view.

81 *Committee Hansard,* 23 July 2003, pp. 341, 342 (Mr Chris Dubrow, ATTAC Australia and Ms Marina Carman, AID/WATCH).

82 *Submission* 54, p. 24 (DFAT)

February 2003. In response to this, DFAT advised that it received a large number of submissions from individuals, unions, civil society groups and some industry stakeholders, expressing a wide range of views.

5.115 The issue of the nature and extent of the public consultation on the GATS was discussed at some length at the Committee's public hearing on 2 October 2003. The Department summarised the process as follows:

> We are in regular contact and consultation with 14 Commonwealth departments and agencies. We have met with state and territory governments, including representatives of 25 state departments. We have met a number of times with the Local government Association and we respond regularly to queries from local governments. We have met with 164 industry associations and businesses. We have met with 80 non–government organisations. We have accepted 73 submissions from civil society on the negotiations on the GATS and a further 23 in the lead-up to the Cancun ministerial. We have updated our web site 10 times since July 2002 to reflect ongoing negotiations, with substantive detail on progress in those negotiations. We have 269 subscribers to our services negotiation email service, which is available to anyone who so desires.[83]

5.116 The Department advised that it consults with these different groups at different times, as the need arises, and depending on the stage it is at in the negotiating cycle. It consults when input is required on particular issues or when it wishes to keep stakeholders informed of developments. Such consultations are a mix of formal and informal processes and direct and indirect contact. In particular, the Department indicated that it has been consulting over the last two months with industry to further prioritise the requests Australia will be making of other WTO Members in the context of the GATS. In the lead up to the submission of Australia's offer at the end of March, the consultation focused on State governments, NGOs and other Commonwealth departments.[84]

5.117 Further, the Department established a WTO Advisory Group in early 2002, in addition to the Trade Policy Advisory Council that advises the Minster for Trade. The objective of the WTO Advisory Group is explicitly to advise on WTO issues, and participation is at the Minister's invitation. The Group meets several times a year and is comprised of a range of industry representatives, academics, a representative from the Australian Conservation Foundation and a representative from the union movement.[85]

5.118 Members of the Advisory Group are invited to accompany the Minister to the WTO Ministerial Meetings and the Department indicated that a number travelled to the meetings in Doha and Cancun. During the course of the negotiations at these

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83 *Committee Hansard,* 2 October 2003, p. 426 (Gosper, DFAT)

84 *Committee Hansard,* 2 October 2003, p. 426 (Gosper, DFAT)

85 *Committee Hansard,* 2 October 2003, pp. 439–440 (Gosper, DFAT)

meetings, DFAT indicated that members of the Group are closely involved in the briefings with the Minister and Departmental officials on what is happening in the negotiating rooms, and how Australia is pursuing its objectives.[86]

5.119 At the hearing on 2 October 2003, the Committee raised the point that, notwithstanding the extent of the consultations and opportunities for input into the processes, there remains a persistent public anxiety about the GATS negotiations, which continues to be one of the big issues in the public debate about trade negotiations.

5.120 DFAT acknowledged this level of anxiety among the public and particularly in NGOs and community groups, indicating that much of the concern could be said to reflect broader concerns about the impact of globalisation:

> Many of those concerns, including the concerns that have been raised with the committee, are not exclusively focused on the GATS regime itself but nevertheless find some expression in relation to the GATS and even in specific provisions of the GATS, including issues such as the capacity of governments to continue to regulate, to set environmental standards and to set standards for work force education and so forth. These are broader issues than simply GATS.[87]

5.121 The Department indicated that it has been very conscious of these concerns, which is why it has enhanced its consultation processes, including publication of material, and taking the 'unprecedented' step of publicising many details of the requests that have been made of Australia and our initial offer. The Department stated that it believes that it was in response to public concern that the government clearly affirmed that it will *not* be making offers in the areas of public health, public education or the ownership of water as part of these negotiations at all.[88]

5.122 The Committee welcomes DFAT's 'unprecedented' decision to make public a range of information about the GATS negotiations, including requests made of Australia, and the statement that Australia will not be making any offers in these negotiations in the areas of public health, public education and the ownership of water.

5.123 In terms of rating the success of the consultative processes, the Department's view is that it has had a reasonable degree of success in addressing concerns and improving processes:

> I think we have had a fair degree of success in identifying the need for greater consultation and addressing many of the concerns that have been put forward. I think a key part of that has been the government's openness in respect of the requests, in respect of its initial offer and in respect of making

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86 *Committee Hansard,* 2 October 2003, p. 440 (Gosper, DFAT)

87 *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

88 *Committee Hansard,* 2 October 2003, p. 429 (Gosper, DFAT)

> clear what it is not prepared to do in these negotiations. I think that has been well received by many—but certainly not all—of the groups that we deal with. I would not for a moment deny that there is still much public anxiety about and interest in these negotiations or that we do not have to continue, and if possible improve and extend, our consultative processes, but I think we have had a degree of impact thus far in the process that we have built over the last couple of years.[89]

5.124 The Committee notes the considerable efforts made by DFAT to consult with a wide range of organisations as part of the GATS negotiating processes, and its attempts to raise the level of public awareness and understanding of the benefits of multilateral trade liberalisation in general and the GATS in particular. The Committee also notes that as part of this process, DFAT has published a range of information about the WTO and negotiations on its website.

5.125 The Committee notes however that the submissions received by DFAT in response to the public discussion paper it issued on the GATS in January 2003 were not made available on the DFAT website. Whilst the Committee does not doubt the Department's commitment to open consultation, it is unfortunate that a decision was made not to publish the submissions or a list of submitters. Publishing the submissions received would have facilitated information exchange and contributed greatly to the usefulness, transparency and effectiveness of the consultation process.

Recommendation 5

5.126 **The Committee recommends that in its future public consultation processes on trade issues the Department of Foreign Affairs and Trade publishes submissions it receives, or a list of submitters with information on how to obtain copies of submissions, on its website.**

5.127 The Committee accepts that, for a range of reasons, it is not possible to fully disclose all relevant information in regard to the negotiations. The Department points out that release of information to the public is constrained by the following factors:

- requests may be government to government communications which cannot be released without the agreement of all WTO Members;
- other WTO Member governments may be unwilling to release information on its requests which relates to strategies for negotiations as to do so may reduce the effectiveness of those strategies; and
- information may be provided by Member countries on a commercial-in-confidence basis.[90]

Within these constraints, the government's position is that only 'strategically important and commercially sensitive information be restricted in distribution'.[91]

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89 *Committee Hansard,* 2 October 2003, p. 430 (Gosper, DFAT)

90 *Submission* 54, p. 24 (DFAT)

5.128 Part of the issue with regard to the perceived adequacy or otherwise of the consultations undertaken by DFAT seems to be the level of information about Australia's GATS offers which is publicly available. A number of submissions called for the release of Australia's draft offer under the GATS before it is communicated to the WTO as Australia's official offer - a view supported by Mr Ted Murphy of the National Tertiary Education Union:

> It is fair to say that, when the department circulated the material calling for submissions on the preparation of Australia's initial offer, it provided in the discussion paper a list of requests—separate, so you could not work out who was making which request—and a list of countries. Subsequently documents were leaked which are claimed to be—and no-one has disputed it, including the European Commission—the final request to Australia from the European Commission. There were a number of requests in that document that were not contained in the department's list. It would, in my view, be helpful if the full requests are made available.[92]

5.129 Mr Murphy also pointed out the significance of Australia's initial offer in the context of WTO negotiations and therefore the need for greater input from the various stakeholders and the community in general:

> The government will say, quite rightly, that the initial offer can be withdrawn or modified. But I will say that once you put an initial offer like that out in the public domain, including within the WTO, it is a clear indication to other WTO countries that you are prepared to liberalise in these areas and with the likelihood that you will follow through that indication with committing those areas. Therefore, from the standpoint of the capacity of parliament or the public to say, 'We think that is an appropriate area for liberalising and that is not,' or, 'There are some issues here in the wording of your liberalisation commitment that you may not have taken into account,' the draft offer should be made available before it is released or communicated to the WTO as an official initial offer.[93]

5.130 The Committee recognises, as DFAT indicated, that many of the concerns raised in evidence to this inquiry are relevant in a broader context than simply the GATS, and reflect worries about globalisation in general. However, the issue is an important one in the context of the GATS negotiations, and simply because the concerns are broader, it does not mean that these issues cannot and should not be addressed in the context of the GATS. If it is possible to 'raise the comfort level' of civil society groups and the community in general by providing more information

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91 *Submission* 54, p. 25 (DFAT)

92 *Committee Hansard* 8 May 2003, p. 29 (Mr Ted Murphy, National Tertiary Education Union (NTEU))

93 *Committee Hansard,* 8 May 2003, p. 29 (Murphy, NTEU)

about the domestic impacts of trade liberalisation as well as information for industry groups about export opportunities[94], this should be done.

5.131 In the Committee's view, given the potentially wide ranging impacts of the negotiations for liberalisation of trade in services within the GATS framework, and the fact that that Australia's current commitments will bind future governments[95], information such as Australia's initial offer *should* be public knowledge. The negotiations for liberalisation of trade in services within the GATS framework have the potential to impact greatly on the provision of a range of services in Australia and there should be a greater openness and transparency in the process.

5.132 Despite the fact that the government has ruled out making offers in particular areas in this round of negotiations, there is still concern that, because of the 'built in' agenda within the GATS which promotes increasing liberalisation of trade in services, there will be mounting pressure in future negotiations to liberalise access to these services. If offers are not made in certain areas in the Doha Round, those areas are not ruled out of discussion in the next round of negotiations. This remains an important issue regardless of how slowly negotiations are progressing at present.

5.133 Bearing this in mind, the Committee considers that DFAT should continue to consult widely prior to the preparation of Australia's GATS requests and offers, in particular with NGOs and other civil society groups. DFAT should continue to make public any requests made of Australia, and prior to communicating Australia's initial offer(s) to the WTO in future negotiations, it should consult with relevant stakeholders to ensure that all possible implications of the offer have been considered.

Recommendation 6

5.134 **The Committee recommends that the Department of Foreign Affairs and Trade consult widely with industry groups, unions, non-government organisations and other relevant bodies prior to preparation of Australia's offers and requests under the GATS, and provide constructive feedback to all organisations about how their views have been taken into account in the preparation of Australia's negotiating position.**

Recommendation 7

5.135 **The Committee recommends that the Department of Foreign Affairs and Trade consult again with stakeholders with expertise in the relevant areas once Australia's draft offer(s) have been prepared in future GATS negotiations, and prior to such offer(s) being communicated to the WTO as Australia's official offer.**

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94 This issue is discussed in Chapter 3.

95 This issue is discussed earlier in this Chapter in the context of the GATS and governments' right to regulate.

5.136 A number of submissions drew attention to the fact that there seemed to be a lack of balance and credibility in the information DFAT has published about the GATS, arguing that material presented by the government on such important matters should acknowledge that the issues are not necessarily straightforward and that parts of the community have expressed concern about certain trade policy issues.[96] The AMWU argued that, while the Department may hold a view about the merits of particular arguments, the discussion papers should acknowledge any uncertainties or ambiguities and discuss alternative views in a methodical and objective manner.[97]

5.137 AFTINET pointed out that the Discussion Paper failed to stated what broader principles underpin Australia's GATS negotiating position; beyond the objective of increasing export opportunities there is no indication of the principles on which the negotiations will be conducted by Australia.[98]

5.138 Given the broad scope and potentially far reaching impact of trade agreements such as the GATS and the US FTA, and given also the example of the ill–fated Multilateral Agreement on Investment, it is vital that the government is, and is seen to be, providing well researched, balanced material which both fosters and contributes to genuine and open public debate on these issues.

5.139 The Committee urges DFAT to ensure that the material it publishes on trade negotiations, in particular papers which call for public comments, is balanced and objective, and a fair representation of the arguments and concerns raised on both sides of the debate.

Other issues

Postal services

5.140 The Committee heard evidence from several witnesses about the impact of fully opening up to competition the postal sector. The CEPU pointed out that Australia has received a request to undertake commitments in the postal and courier services categories, which has not been done to date. The postal sector is already significantly open and to undertake further liberalisation of the postal services sector, it was argued, would 'erode Australia Post's capacity to provide the first-rate service to all Australians' that the community currently enjoys.[99]

5.141 The CEPU advised the Committee that what is known as the 'reserved service', being the delivery of a standard letter to anywhere within Australia for a set price, accounts for about 50 per cent of Australia Post's business. The price of the stamp for sending a standard letter within Australia clearly does not reflect the true cost of that service, particularly in rural and remote areas of the country. The major

96 *Submission* 160, p. 12 (AMWU).

97 *Submission* 160, p. 49 (AMWU). See also *Submission* 53 (Edwards), *Submission* 162 (Sanders)

98 *Submission* 42, p. 10 (AFTINET)

99 *Committee Hansard,* 9 May 2003, p. 97 (Mr Brian Baulk, CEPU)

trunk routes on the eastern seaboard effectively cross-subsidise the services in less populated areas.

5.142 If this service were opened up to competition, it was argued, competitors would most probably only be interested in competing in those more profitable areas:

> Therefore the universal service that has been the hallmark of postal services in this country and the world would be severely under attack. That has major implications for jobs and for the revenue of Australia Post. We see that as being a fundamental threat to a very important communication system for Australia.[100]

5.143 The Post Office Agents Association pointed out that opening up the reserved service to competition would undermine the economics upon which Australia Post operates, with potentially adverse consequences for the level of service provided to the community and employment at Australia Post:

> Our concern … is that if the government takes the choice of allowing foreign competition in so that all but the last vestiges of the reserve services are open to competition—that is, so that Australia Post is open to competition—and that competition impacts upon the reserve services, it will do so only on the profitable elements of those reserve services. That will seriously undermine the basic economics that Australia Post operates on. It is largely a large-scale operation with very marginal pricing, and if you interfere with the scale of operations then you can move an organisation from being a profitable one to a non-profitable one with only minor changes. That in turn is going to have consequences for the service to the community, the investment that the contracting part of the business has made and, of course, the employees' opportunities for work.[101]

Recommendation 8

5.144 **The Committee recommends that the government does not make any offers in the GATS, either in this round or in future negotiations, in the area of postal services which would adversely affect Australia Post's reserved (standard letter) service.**

Health issues

5.145 The National Centre for Epidemiology and Population Health (NCEPH) argues that free trade has the potential to 'challenge and ultimately dismantle the current cornerstones of Australian health provision'. The NCEPH urges that there be no commitments made under the GATS which would jeopardise the Pharmaceutical Benefits Scheme, Medicare, public hospitals and community health centres. Further, the government should reserve its authority to regulate private health insurance,

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100 *Committee Hansard,* 8 May 2003, p. 103 (Baulk, CEPU)

101 *Committee Hansard,* 8 May 2003, p. 106 (Mr Michael Talbot, Post Office Agents Association)

protect food labelling from weakened standards and exclude water treatment, water supply and sanitation services from the GATS.[102]

5.146 The Public Health Association of Australia opposes the inclusion of health services in the GATS negotiations, on the grounds of equity, efficiency and the impact on Australia's workforce. The PHAA notes that the government has agreed not to make commitments in the area of public health in these negotiations but argues that there will be pressure in the future for offers to be made in this sector.[103]

5.147 With regard to the supply of water, the NCEPH argues that water and sanitation services are 'natural monopolies' because these services rely on a single infrastructure. Competition in the provision of these services is not feasible, it is argued, and lower prices will not result from privatisation of these services. The provision of water treatment and sanitation services should be treated as essential public goods rather than tradeable commodities and therefore should not be subject to trade negotiations.[104]

5.148 AFTINET points out that a broader definition of 'environmental services' would cover the supply of water. The consequences of making water supply subject to the GATS are that the horizontal obligations of market access and national treatment would apply, subject to any horizontal commitment by Australia limiting its obligations to liberalise.[105]

5.149 As discussed earlier in this Chapter, the Committee welcomes the government's decision not to make offers in public health, public education and ownership of water in the current round of GATS negotiations. However, the nature of the GATS means that there may well be pressure in future negotiating rounds to make offers in these sectors. Given the potentially wide ranging impacts of changes to these sectors, the Committee's view is that the government should not make any commitments to further liberalisation in the public health, public education and water sectors.

Recommendation 9

5.150 **The Committee recommends that the government make no further commitments under the GATS in areas of provision of public health services, public education and the ownership of water.**

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102 *Submission* 43, p. 2 (National Centre for Epidemiology and Population Health (NCEPH))

103 *Submission* 152, p. 2 (Public Health Association of Australia)

104 *Submission* 43, p. 7 (NCEPH)

105 *Submission* 42, p. 23 (AFTINET). See also *Submission* 56 (ATTAC Australia), *Submission* 83 (The Global Justice Network of The Grail), *Submission* 107 (Mr Arnold Rowlands), *Submission* 130 (Rail Tram and Bus Union), *Submission* 127 (Ms Dee Margetts, MLC), *Submission* 8 (Australian Pensioners' and Superannuants League QLD Inc)

Cultural services

5.151 Cultural services in the context of the US FTA negotiations are discussed in Chapter 6, in particular, Australia's local content requirements. Australia currently has no GATS commitments in the audio-visual sector, and has a Most Favoured Nation exemption, which is due to expire in 2004, for co-production arrangements.

5.152 The Committee recognises that the level of government support currently provided to Australia's cultural industries, in the form of subsidies and content quotas, is vital in ensuring that these industries survive and grow in Australia.

5.153 The Australian Screen Directors Association (ASDA) indicated that it was 'pleased to see that the government has made neither offers nor any commitments in respect of any aspect of GATS that might impact on cultural industries' in the current GATS negotiations. ASDA recommends that Australia's position should continue to be as it was in the Uruguay round, making no commitments in this area in future rounds. This view is shared by a number of other bodies including the Australian Writers Guild, the Australian Film Commission, the Media Entertainment and Arts Alliance, the Australian Coalition for Cultural Diversity and the Music Council of Australia.[106]

5.154 These organisations also argued strongly that by their very nature, cultural goods and services are not commodities like other tradeable goods and services and cannot be reduced to economic terms alone. In the context of the existence of GATS rules, it is argued that any commitments made by Australia should not undermine Australia's ability to regulate and support its cultural industries, which rely on government support to enable them to thrive.

5.155 The Committee notes that the government has stated that it is committed to preserving the right to regulate audio visual media to achieve cultural policy objectives. A high priority is placed by the government on these objectives and Australia has taken a strong stand on their legitimacy in the WTO, explaining to Members the value the government places on the freedom to have in place measures to pursue these objectives through policy interventions, and to adapt these measures as circumstances change.[107] The Committee notes the government's strong position in respect of the audiovisual sub-sector as articulated in the Australian Intervention on GATS made in Geneva in 2001, referred to in Chapter 6.

Recommendation 10

5.156 **The Committee recommends that the government continue to recognise the essential role of creative artists and cultural organisations in reflecting the**

106 *Submission* 132, p. 6 (Australian Screen Directors Association). See also *Submission* 155 (Australian Film Commission), *Submission* 40 (Australian Writers' Guild), *Submission* 68 (Media, Entertainment and Arts Alliance), *Submission* 109 (Australian Coalition for Cultural Diversity) and *Submission* 48 (Music Council of Australia)

107 *Submission* 54, p. 14 (DFAT)

intrinsic values and characteristics of Australian society and that it make no commitments in current or future GATS negotiations that might adversely impact on cultural industries. The Committee further recommends that the government continue the Most Favoured Nation exemption for co-production arrangements beyond 2004.