
**GATS, public services and domestic regulation: current issues
and implications for local government in Australia**

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NOTE ON DEVELOPMENTS SINCE THE WRITING OF THIS PAPER

This paper was written between August and November 2002. As is discussed in the paper, governments were required to respond by 31 March 2003 to the requests made to them by other governments to further liberalise service sectors pursuant to the General Agreement on Trade in Services (GATS).

In February 2003 the EU's GATS requests to other countries, including Australia, were leaked to the public.¹ The EU's requests regarding water were framed in terms of its earlier proposal to reclassify the GATS sector of 'environmental services', which among other things would bring 'water for human use' under environmental services.² At the time of writing the proposed reclassification is yet to be agreed upon by WTO members.

On 1 April 2003 the Department of Foreign Affairs and Trade (DFAT) released the Australian Government's initial offers.³ According to the media release by the Minister for Trade, 'The Government's decision to publicly release the offer recognises strong public interest in these negotiations.'⁴

¹ The documents were made available at www.gatswatch.org/requests-offers.html (accessed 27 February 2003).

² See below n 103 and accompanying text.

³ Australia, Department of Foreign Affairs and Trade, 'Australia – Schedule of Specific Commitments Relating to Initial Offer (March 2003)' S/DCS/W/AUS (1 April 2003) <http://www.dfat.gov.au/trade/negotiations/gats_schedule_initial_offer_0303.doc>.

⁴ Australia, Minister for Trade, 'Australia's Initial Offer in Services Trade Negotiation', Media release, 1 April 2003 <http://www.trademinister.gov.au/releases/2003/mvt028_03.html>.

Several new offers were made that are relevant to the issues discussed in the paper. Under environmental services the following subsectors were added: 'protection of ambient air and climate', 'remediation and cleanup of soil and water', 'noise and vibration abatement' and 'protection of biodiversity and landscape'. These offers were made without limitations on either market access or national treatment. Australia did not make offers under the current subsector 'water for human use', and did not specifically respond to the EU's proposed reclassification, although it had previously expressed some support for the proposal.⁵ The initial offers are not legally binding, and can be withdrawn or amended at any time during the current round of negotiations.

The explanatory note to the initial offers refers to Australia's involvement in negotiations on the broader framework of GATS rules, stating that 'The government's position in these negotiations is to uphold the right of WTO members to regulate and to fund public services and not to support any new rules which cast doubt on that outcome.'⁶

Other developments include the announcement on 12 December 2002 of an inquiry by the Senate Foreign Affairs, Defence and Trade Committee into GATS and the Australia-US Free Trade Agreement, which is due to report by 27 November 2003;⁷ and DFAT's publication in January 2003 of a discussion paper on GATS and Australia's role in the negotiations.⁸

⁵ See below, n 104.

⁶ <http://www.dfat.gov.au/trade/negotiations/gats_initial_offer_explnotes.html>.

⁷ See <http://www.aph.gov.au/Senate/committee/fadt_ctte/GATS/index.htm>.

⁸ Australia, Department of Foreign Affairs and Trade, *Discussion Paper on the General Agreement on Trade in Services (GATS)*, January 2003 <<http://www.dfat.gov.au/trade/negotiations/services/>>

SUMMARY

The General Agreement on Trade in Services (GATS), part of the treaty framework of the World Trade Organisation (WTO), is the first multilateral agreement to provide a structure for the regulation and liberalisation of global trade in services. Since the GATS came into operation in 1995, considerable debate has emerged about the potential impact of GATS on the ability of governments to provide public services and regulate other services in the public interest.

More recently, attention has begun to turn to the implications of GATS for local governments. Local councils provide a wide range of services – including waste management and recreational services – and regulate many more. As a Member of the WTO, Australia has made substantial commitments on services relevant to local government, and is currently negotiating further commitments with other WTO Members.

This paper explores the implications of GATS for local government in Australia, and makes the following key points:

- The right of governments to regulate in the public interest, while referred to in the GATS preamble, is not effectively safeguarded due to the considerable uncertainty of many provisions.
- The wide-ranging domestic regulation provisions of GATS could expose many forms of local government regulation – such as standards for building materials and approvals for waste disposal facilities – to challenge under the WTO's dispute

downloads/discussion_paper_gats_jan2003.pdf>. AFTINET's response to the discussion paper is available at <<http://www.aftinet.org.au/campaigns/GATSsubmissionfeb03.pdf>>.

settlement mechanism, even though the regulations themselves may not discriminate against foreign service providers.

- Exemptions from GATS for services that are provided in the exercise of governmental authority or procured by governments are likely to be interpreted narrowly, and may not cover services that are contracted out, such as local government waste management services.
- Although Australia's current GATS commitments do not cover some sectors affecting local government, Australia is under considerable pressure in ongoing GATS negotiations to liberalise further service sectors provided or regulated by local government, such as water supply.

The paper also considers the impact of GATS in two specific areas of local council involvement:

- Environmental services, which make up a substantial proportion of local government service provision, are largely covered by Australia's GATS commitments. Whether and to what extent the governmental exceptions will apply to environmental services is – as the WTO Secretariat has acknowledged – uncertain.
- Planning regulations and development approvals could be challenged as trade restrictive under the domestic regulation provisions of GATS, potentially limiting the capacity of local governments to regulate the pace and scope of commercial development.

While a challenge by another WTO Member against an individual council in Australia may be unlikely, there is already evidence elsewhere of considerable pressure from overseas commercial interests for changes to local government powers.

The paper concludes by outlining several recommendations for change:

Clarification and amendment of the text of GATS

- Public services, including local government community services and water services, should be clearly excluded from GATS. To this effect, the governmental authority and government procurement exceptions should be clarified or replaced with an overarching exception for public services.
- The list of general exceptions under GATS, Art XIV should include conservation of exhaustible natural resources (to correspond with GATT, Art XX(g)).

GATS negotiation process

The Federal Government should:

- consult fully with state and local governments about the implications of the GATS negotiations for local government services and regulation;
- make public the requests for further services liberalisation that it receives from other governments, and its offers in response to those requests, in current and forthcoming GATS negotiations;
- oppose proposals to treat public funding of services as subsidies under Art XV of GATS;
- oppose the development of disciplines for domestic regulation under Art VI:4 of GATS which would restrict the right of governments to regulate for the public interest.

1. INTRODUCTION

The General Agreement on Trade in Services (GATS) is one of the main agreements forming the treaty framework of the World Trade Organisation (WTO). As the first multilateral agreement to provide a structure for regulating and liberalising global trade in services, GATS is often considered to be one of the main achievements of the Uruguay Round, which led to the establishment of the WTO and expanded the scope of international trade regulation beyond its traditional focus on trade in goods.

Although the negotiating phases were largely unchallenged by public debate,⁹ GATS has become one of the more controversial WTO agreements, generating considerable popular concern in Australia and elsewhere about its perceived potential to undermine the ability of countries to provide public services and regulate the provision of services for public interest objectives. Whereas the GATS debate has centred to date on services provided or regulated on a national or state-wide basis (such as telecommunications and postal services), attention is now beginning to turn to the implications of GATS for local government.¹⁰

Local councils provide a wide range of services – including waste management, recreational and information services – and regulate many more, particularly through planning controls. Many of these services are affected by Australia's existing commitments

⁹ Ann Capling, *Australia and the Global Trade System: From Havana to Seattle*, Cambridge University Press, Cambridge, 2001 at 158.

¹⁰ See for example Michelle Swenarchuk, *From Global to Local: GATS Impacts on Canadian Municipalities*, Canadian Centre for Policy Alternatives / Canadian Environmental Law Association, Ottawa, 2002.

and those currently under negotiation. Recently councils and council associations in Australia – in addition to seventy Canadian municipalities¹¹ – have passed resolutions calling for a review of GATS commitments and consultation on further negotiations.¹²

Beginning with the background to GATS and debates around the agreement, this paper will outline the main provisions of GATS and examine some of the key issues in the debate, with a particular focus throughout on the implications of GATS for local government in Australia.

2. BACKGROUND TO THE GATS DEBATE

2.1. The growth of trade in services and the GATS negotiations

Historically, recognition of the role of trade in services was impeded by a traditional reluctance to countenance the possibility that services could be traded at all, since they are generally intangible and cannot be stored (unless embodied in some kind of good, such as a performance recorded on a compact disc).¹³ However, a number of factors challenged this

¹¹ Ellen Gould, Update on the GATS Negotiations: The Good and the Bad News for Local Governments', Council of Canadians, 2002 <http://canadians.inline.net/display_document.htm?COC_token=024LX24&id=364&isdoc=1&catid=101> (accessed 10 November 2002).

¹² Three New South Wales councils, two Victorian councils and the Local Government Association (NSW) have passed resolutions during 2002: AFTINET Bulletin No. 46, 7 November 2002 (on file with author).

¹³ Compare Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), selected Edition, ed Kathryn Sutherland, Oxford University Press, Oxford, 1993, Bk II, Ch iii at 191-92 and Bk IV, Ch ix at 388. See also Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism – A Critique*, Zed Books, London, 2000 at 174.

assumption and drew greater attention to trade in services, including technological developments facilitating movement of services across national borders, the deregulation of many services during the 1970s and 1980s, and the ‘splintering’ of services from the production of goods, particularly through the contracting out of particular inputs.¹⁴

In recent decades, services have come to comprise an increasingly large proportion of international trade – currently around 20% of all trade¹⁵ – and an increasingly important part of Australia’s economy. Service industries form the majority of Australian industry production, employ around three quarters of the workforce, and constitute around 20% of total exports and imports.¹⁶ In 1997, government service exports were estimated to be around 9% of total service exports;¹⁷ recent figures on government service imports are unfortunately not readily available.¹⁸ WTO statistics indicate that in 2001, Australia’s service

¹⁴ Michael J Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd edn, Routledge, London and New York, 1999 at 270; Capling at 147-48.

¹⁵ WTO, *International Trade Statistics 2002*, Table 1.8: Share of goods and commercial services in the total trade of selected regions and economies, 2001 <http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i08.xls> (accessed 10 November 2002).

¹⁶ In 1999-2000, Australian service industries employed 73.1% of the total workforce and added a gross value of \$352bn, representing 62.8% of total production: Australian Bureau of Statistics, ‘Australia Now: Service Industries: Overview’, based on *Australian System of National Accounts, 1999-00* (Cat No 5204.0) <<http://www.abs.gov.au>> (accessed 10 November 2002).

¹⁷ Australia, Industry Commission, *Exports of Government Services*, Research Report, Industry Commission, Belconnen (ACT), 1997 at 5.

¹⁸ See Australian Bureau of Statistics, *International Accounts and Trade* (Cat No. 5422.0), Feature Article - Experimental Statistics on Australia's Exporters and Importers (June 2002), <<http://www.abs.gov.au>> (accessed 10 November 2002).

exports made up around 1.08% of world service exports, and its service imports are marginally higher at 1.13% of world service imports.¹⁹

The fact that many services still generally rely on physical proximity between consumer and supplier means that trade in services makes up a smaller proportion of world trade than the relative importance of services as a proportion of total domestic production. Nevertheless, the growth of trade in services helped to put the question of global regulation on the international trade agenda. A number of major service industries such as financial services and telecommunications are largely dominated by developed countries, and the industrial interests of these countries provided significant impetus for the negotiation of GATS.²⁰ Developing countries were more reluctant to participate in the negotiations - with some justification, as there appeared to be few gains for developing countries from greater liberalisation of services, at least in the short term.²¹ Australia, with a relatively established services sector, was a key player in GATS negotiations, and advocated a broad-based multilateral framework in contrast to pressure from the United States for liberalisation of a narrower range of services.²²

¹⁹ WTO, *International Trade Statistics 2002*, Table A6: World exports of commercial services by region and selected economy, 1991-01 <http://www.wto.org/english/res_e/statis_e/its2002_e/appendix_e/a06.xls> (accessed 10 November 2002).

²⁰ See Capling at 148-49.

²¹ Ref. Mode 4 – the movement of natural persons – has been one of the few areas which could offer concrete benefits to developing countries in the short term, however not surprisingly it this mode that has attracted the least number of liberalisation commitments from developed countries to date.

²² See generally Capling, Ch 6, 'Aggressive Multilateralism: Negotiating Services', 146-170.

An obligation to engage in negotiations for further liberalisation of trade in services is built into GATS (Art XIX). The Doha Ministerial Declaration, which initiated the present Doha Round of WTO negotiations, set a timetable for further commitments: Members were required to submit initial requests for other governments to expand their specific commitments by 30 June 2002, and are required to make initial offers in response to the requests made by other governments by 31 March 2003.²³ These offers will then be subject to further negotiation at the upcoming WTO Ministerial Conference in Cancun, Mexico, in September 2003.

2.2. Underlying factors in the GATS debate

A new phase of the public/private sector debate

The respective roles of government and private enterprise have been a constant issue in public debate at least since the 1970s, when many Western countries carried out large-scale deregulation and privatisation programs. In Australia's case, these programs were largely unilaterally driven rather than imposed by international agreements. Domestic reforms such as the National Competition Policy (NCP) resulted in considerable changes for local governments, with each State being required to introduce a policy framework on the application of NCP to local government.²⁴ However, some of the impetus for the NCP may have derived from GATS negotiations taking place at the time that the policy was being

²³ See WTO, Doha Ministerial Declaration WT/MIN(01)/DEC/1 (14 November 2001) at para 15.

²⁴ Peter Fairbrother, Michael Paddon and Julian Teicher (eds), *Privatisation, Globalisation and Labour: Studies from Australia*, Federation Press, Leichhardt (NSW), 2002 at 14.

formulated.²⁵ The 1990s saw the focus of the debate turn more directly towards international processes and questions of national sovereignty, with much discussion about the global expansion of transnational corporations and the role of multilateral agreements such as the WTO and the failed OECD Multilateral Agreement on Investment (MAI).²⁶ Now, for a variety of reasons, GATS has opened up a new arena for this ongoing debate.²⁷

Services and the importance of domestic regulation

One important reason for the intensity of the GATS debate is that trade in services raises regulatory problems of a more acute nature than other forms of trade. Compared to goods, services are generally subject to higher levels of domestic regulation,²⁸ and are more likely to be provided by the public sector, often through regulated monopolies in industries where natural monopolies exist (such as utilities).²⁹ Whereas barriers to trade in goods are more usually imposed at national borders (for example through tariffs), barriers to trade in services are far more diverse and frequently affect core areas of domestic regulation, such as the use of licensing and professional standards for quality assurance, and choices between regulated monopolies or competition in particular industries.³⁰ As Trebilcock and Howse

²⁵ See Pat Ranald, 'National competition policy', (1995) 36 *Journal of Australian Political Economy* 1.

²⁶ See James Goodman and Pat Ranald (eds), *Stopping the Juggernaut: Public Interest versus the Multilateral Agreement on Investment*, Pluto Press, Annandale (NSW), 1999.

²⁷ Compare OECD, *Open Services Markets Matter*, Policy Brief, OECD, Paris, 2001 at 7.

²⁸ Matthew Kennedy, 'Services Join GATT: An Analysis of the General Agreement on Trade in Services' (1995) 1(1) *International Trade Law and Regulation* 11-20 at 13; Trebilcock and Howse at 273.

²⁹ See Dunkley at 181.

³⁰ Trebilcock and Howse at 273.

have pointed out, gains to international economic welfare from liberalisation of trade in services need to be weighed up against potential losses in domestic welfare through deregulation, and there is no guarantee that the gains will outweigh the losses.³¹ This uncertainty is compounded by the difficulty of collecting reliable statistics on services trade and barriers, which hampered services negotiations during the Uruguay Round.³² The potential for liberalisation of trade in services to intrude far into sectors traditionally regulated at the domestic level, and the dubious nature of possible gains in this area, have thus provided fertile ground for debate.

The textual uncertainty of GATS

A second reason related underlying the debate – no doubt related to the lack of reliable information and divergent domestic interests – is the considerable textual uncertainty of GATS. The incompleteness of the agreement is seen by critics and supporters of trade liberalisation alike as one of its main shortcomings.³³ The open-ended nature of the agreement and the scope for different interpretations are almost certainly key causes for popular fears about its wide-reaching implications, and is likewise criticised by those who had pushed for a more comprehensive agreement. Jeffery M Lang, a former Deputy United States Trade Representative, points to:

³¹ Trebilcock and Howse at 274; see also Michael Trebilcock, 'Regulatory Diversity and Trade and Investment Liberalisation', in OECD, *Trade and Regulatory Reform: Insights from Country Experience*, OECD, Paris, 2001, 127-135 at 128.

³² Scott Sinclair and Jim Grieshaber-Otto, *Facing the Facts: A Guide to the GATS Debate*, Canadian Centre for Policy Alternatives, Ottawa, 2002 at 32; Dunkley at 180; see also Trebilcock at 128.

³³ Capling at 168.

the need to address the overwhelming uncertainty about the meaning of the provisions of the GATS. ... Virtually every normative provision of the GATS is interesting and even novel. Some of these provisions are so obviously problematic that they cry out for substantive renegotiation. ... so little is known about their origin and intention that it may be years before we discover the impact of these provisions.³⁴

The uncertainty surrounding GATS has generated an energetic and often scathing exchange of views between non-government organisations on the one hand, and national and intergovernmental institutions on the other. A striking example of the intensity of the debate is a WTO publication entitled *GATS – Fact and Fiction*,³⁵ which directly attacks a number of publications critical of GATS. While some of the WTO's comments may be legitimate responses to popular misconceptions, many of its counter-arguments simply cannot address the overriding uncertainty of present GATS provisions. A number of WTO working groups have attempted to clarify some provisions, but with relatively few GATS disputes reaching the WTO's Dispute Settlement Body, there has been little opportunity for authoritative resolution of uncertainties through dispute resolution. Friedl Weiss, for example, has commented:

In the absence of a "critical mass" of specific panel practice on the GATS and its sectoral annexes, any legal analysis of the GATS system of dispute settlement involves a delicate balancing act between abstract generalisation from GATT panel practice and idle speculation.³⁶

³⁴ Jeffery M Lang, 'The First Five Years of the WTO: General Agreement on Trade in Services' (2000) 31 *Law & Policy in International Business* 801 at 806.

³⁵ WTO, *GATS – Fact and Fiction*, WTO, Geneva, 2001.

³⁶ Friedl Weiss, 'Dispute Settlement under the General Agreement on Trade in Services', in James Cameron and Karen Campbell (eds), *Dispute Resolution in the World Trade Organisation*, Cameron May, London, 1998, 148-170 at 148.

3. AN OUTLINE OF GATS

GATS is widely recognised as a highly complex agreement,³⁷ reflecting the diverse nature of services as well as the conflicting interests of the negotiating parties. Central aims of the agreement, as set out in the preamble, are the establishment of ‘a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization’ and ‘the early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations’. As a framework agreement, GATS has a core set of agreed principles supplemented by commitments – reflecting the large number of issues that remained unresolved in the Uruguay Round – to conduct further negotiations on levels of liberalisation and on the operation of certain contentious provisions such as subsidies and government procurement.

While in many respects similar to its counterpart for trade in goods – the General Agreement on Tariffs and Trade (GATT) – GATS contains a number of distinctive features. Whereas GATT essentially covers trade in all goods except for those for which Members make specific exemptions, the GATS is a hybrid agreement combining general obligations in some parts (which allow for only limited exemptions), with a clean slate in other parts to which Members can add positive commitments.

³⁷ See eg Trebilcock and Howse at 280; and Julian Arkell, ‘The General Agreement on Trade in Services: A Review of its Textual Clarity and Consistency’ (2002) 27(3) *Geneva Papers on Risk and Insurance* 337 at 337.

3.1. The nature of services and measures covered by GATS

A huge range of activities – from catering and architecture to health care and funerals – may fit the description of ‘services’. Rather than specifically defining services, GATS provides a definition of ‘trade in services’ by setting out four so-called ‘modes of supply’ of a service, which are listed in the following table:

Mode (as numbered in country schedules)	Description in GATS, Art I:2	Shorthand description ³⁸	Example
1	(a) from the territory of one Member into the territory of any other Member	Cross-border supply of services	Mail order services
2	(b) in the territory of one Member to the service consumer of any other Member	Consumption abroad	Overseas tourism and study
3	(c) by a service supplier of one Member, through commercial presence in the territory of any other Member	Commercial presence (of foreign supplier)	Local subsidiary of foreign company
4	(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.	Presence of natural persons	Temporary migration of technical specialists

The provisions of GATS focus on ‘measures’ affecting trade in services (Art I:1), which are defined as ‘any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form’ (Art XXVIII). Although central governments were the principal participants in the negotiations, the measures covered by GATS include not only those of central authorities, but also regional and local authorities (Art I:3(a)).

Of the various modes of supply under Art I:2, mode 3 is probably the most relevant to local government service provision, since services such as waste management, construction

³⁸ See WTO, Introduction to GATS at 2.

and retail are generally supplied through commercial presence, rather than cross-border supply or consumption abroad. However, other modes of supply may also be relevant (for example if a Council library uses offshore database services).

3.2. General obligations

Part II of the agreement sets out obligations that apply across all service sectors of every Member.³⁹ The most fundamental general obligation, which GATS has in common with GATT and many other trade agreements, is the requirement of Most Favoured Nation (MFN) treatment (Art II). The MFN obligation requires Members to give treatment to the services and service suppliers of any other Member that is no less favourable than its treatment of any other country.⁴⁰ In other words, even if Australia treats Australian service suppliers differently from overseas service suppliers, it cannot give preferential treatment to, say, Japanese suppliers over suppliers from Canada.

Other articles in Part II require Members to ensure that their regulatory frameworks and market structures do not constitute excessive barriers to the free flow of trade in services. Thus, for example, Members must ensure prompt publication of measures for the purposes of promoting transparency (Art III) and ensure that monopoly suppliers comply

³⁹ The limited exceptions to general obligations are covered in subsequent sections.

⁴⁰ Note however that as a concession to the United States, which was pressured by domestic constituencies to maintain closed markets in some sectors, Art II:2 allows MFN exemptions, subject to a 10-year sunset clause (until 31 December 2004): see *GATS Annex on Article II Exemptions*; and Trebilcock and Howse at 283. Over sixty states have listed such exemptions: Capling at 164. GATS also permits regional trade agreements, which likewise involve a form of discrimination (Art V).

with the MFN obligation and do not abuse their monopoly power in sectors outside the scope of their monopoly (Art VIII).⁴¹

A number of general obligations are to be developed through future negotiations, including domestic regulation (Art VI; discussed below) and subsidies (Art XV; discussed below).

Part II also outlines a number of exemptions from GATS obligations, including services purchased through government procurement (Art XIII; discussed below), and general exceptions for measures that pursue fiscal, health, security and other policy objectives (Arts X, XII, XIV, XIV bis; discussed below).

3.3. Specific commitments

Part III of GATS contains provisions that only apply to services specified by individual Members in schedules annexed to the main agreement.

Market access and national treatment

The two key obligations in Part III are market access (Art XVI) and national treatment (Art XVII). The market access commitment prohibits a range of trade restrictions listed under Art XVI, most of which constitute quantitative limitations on supply. Six prohibited limitations are listed:

1. limitations on the number of service suppliers;

⁴¹ Local governments would already be largely compliant with these requirements by virtue of domestic legislation and, in the case of monopoly power, the National Competition Policy's requirement of Competitive Neutrality, which prohibits government business activities from maintaining a competitive advantage merely because of their identity as a public body.

2. limitations on the total value of service transactions or assets;
3. limitations on the total number of service operations or on the total quantity of service output;
4. limitations on the total number of natural persons that may be employed in a particular service sector or by a service supplier;
5. measures which restrict or require supply of the service through specific types of legal entity or joint venture; and
6. limitations on the percentage participation of foreign capital of foreign shareholding, or limitations on the total value of foreign investment.

National treatment requires that each Member treat overseas services and service suppliers no less favourably than the way it treats its own like services and service suppliers. Unlike the market access commitment, national treatment obligations may extend to qualitative restrictions that discriminate against overseas suppliers. Paras 2 and 3 seek to ensure that, while formal discrimination may be permitted if it yields substantive equality, formally identical treatment will be prohibited if it leads to substantive inequality.⁴² By prohibiting de facto discrimination against foreign suppliers, GATS opens up many forms of regulation to challenge which on their face have no relation to international trade, thus increasing the likelihood that apparently innocuous local government measures could contravene the national treatment obligation.

⁴² See also Trebilcock and Howse at 288-89.

Schedules of specific commitments

Each WTO Member is required to submit a schedule of specific commitments recording the areas in which Part III obligations will apply to them. The commitments are divided into two main categories:

- 'horizontal' commitments, which apply across all service sectors listed in the schedule;⁴³ and
- sector-specific commitments, which contain commitments that only apply to the individual service sectors as listed.

Countries list their sector-specific commitments under twelve main categories based on the United Nations Central Product Classification (CPC) System:

1. business (including professional and computer) services
2. communication services
3. construction and related engineering services
4. distribution services
5. educational services
6. environmental services
7. financial services (insurance and banking)
8. health-related and social services
9. tourism and travel-related services
10. recreational, cultural and sporting services
11. transport services; and
12. other services not included elsewhere.⁴⁴

These sectors are further divided into a total of around 160 subsectors. In the original negotiations, many countries made commitments which represented their domestic status quo,⁴⁵ with a general commitment to further liberalisation. Australia has made commitments in subsectors across all twelve main sectors. Some sectors are clearly relevant to local

⁴³ Australia has made a small number of horizontal limitations on its commitments, primarily relating to the Foreign Investment Review Board, subsidies for research and development, and migration legislation.

⁴⁴ See WTO, *Introduction to the GATS* at 14.

⁴⁵ Capling at 168.

government, either because councils have regulatory powers that affect certain service sectors (such as construction and transport services) or because councils provide them directly, for example environmental services and recreational, cultural and sporting services.

4. GATS AND THE ‘RIGHT TO REGULATE’: ISSUES IN THE DEBATE

4.1. The ‘right to regulate’ in the GATS preamble

Criticisms of the uncertainty of the scope of GATS in relation to public services and domestic regulation are often met with the argument that GATS preserves a ‘right to regulate’ which supposedly ensures that GATS will not intrude into the sphere of domestic regulation.⁴⁶ The principal source of this claim is the preamble (or *chapeau*) of GATS, whereby Members are said to recognise ‘the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives’.⁴⁷

This phrase may have some influence in interpreting GATS: under the Vienna Convention on the Law of Treaties,⁴⁸ which codifies the customary international law rules of treaty interpretation that are used by the WTO’s dispute settlement organs,⁴⁹ the preamble forms part of the text of a treaty, which must be taken into account in interpreting a

⁴⁶ See eg WTO, *GATS – Fact and Fiction* at 11.

⁴⁷ Emphasis in original; see also the Doha Ministerial Declaration, which repeated this point: WT/MIN(01)/DEC/W/1 (14 November 2001), Art 7.

⁴⁸ *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331; 8 ILM 679.

⁴⁹ See *Understanding on Rules and Procedures Governing the Settlement of Disputes* (or ‘Dispute Settlement Understanding’, commonly abbreviated as DSU), Art 3:2.

particular provision of the treaty.⁵⁰ However, the interpretative role of the preamble should not be overestimated, since it is likely to be outweighed by other considerations. First, the preamble itself, while expressing the broad purposes and aspirations of the agreement, does not give rise to enforceable, substantive rights or obligations, and must give way to the operative provisions of the agreement in the event of a conflict.⁵¹ At most, the reference in the preamble may support a particular interpretation where the meaning of a provision is unclear, but it cannot override an express limitation on a state's right to regulate. Second, the right to regulate is only one concern among the many referred to in the preamble. Other aims, such as 'desiring the early achievement of progressively higher levels of liberalization of trade in services', could be relied on to counterbalance the right to regulate in particular circumstances.⁵²

To some extent, however, the focus in the debate on the preamble as the source of the right to regulate has been misplaced. The right to regulate is an aspect of national sovereignty, which does not find its source in international agreements alone, but more broadly in principles of international law⁵³ which form the broader context for the operation of the WTO agreements.⁵⁴ Despite this overarching principle, states may of course give up

⁵⁰ *Vienna Convention on the Law of Treaties*, Art 31(2).

⁵¹ This was acknowledged in a WTO publication on GATS, *The GATS: Objectives, Coverage and Disciplines*, 1999: quoted in Sinclair and Grieshaber-Otto at 43.

⁵² See Sinclair and Grieshaber-Otto at 44.

⁵³ See eg *Island of Palmas Case – Netherlands v US* (1928) 2 RIAA 829; *Charter of the United Nations* (1945) 30 UNTS 53, Art 2(1); *Corfu Channel Case – UK v Albania* [1949] ICJ Reports 4 at 35.

⁵⁴ See Arkell at 338; and generally Donald M McRae, 'The Contribution of International Trade Law to the Development of International Law' (1996) 260 *Recueil des Cours* 99.

aspects of their sovereignty by express consent, for example through the operative provisions of treaties to which they are a party. Some of the operative provisions of GATS are discussed in the following sections.

4.2. Domestic regulation

One of the most wide-reaching provisions of GATS is Art VI, which covers domestic regulations that affect trade in services. Arts VI:1 to VI:3 set out procedural requirements for how domestic regulations should be administered: governments must ensure that regulations are administered ‘in a reasonable, objective and impartial manner’ (Art VI:1); that review procedures and remedies are provided for administrative decisions affecting trade in services (Art VI:2), and that, where authorisation to supply services is required, applicants are informed of the outcome of their application within a reasonable time (Art VI:3).⁵⁵

While procedural requirements such as these are already generally taken into account in Australia’s domestic legislation,⁵⁶ Arts VI:4 and VI:5 introduce more onerous requirements that have the potential to shape the *substance* of the regulations themselves. Via para VI:4, the WTO Council on Trade in Services undertakes to develop ‘disciplines’ on measures relating to qualification requirements and procedures, technical standards and licensing requirements to ensure that such requirements are not ‘unnecessary barriers to trade in services’. In particular, the disciplines should ensure that requirements are ‘not more burdensome than necessary to ensure the quality of the service’ (Art VI:4(b)).

⁵⁵ Note that only para 2 applies regardless of whether Members have made specific commitments.

⁵⁶ See Jeffrey Waincymer, ‘Implementation of the World Trade Organization Agreement in Australia’, in John H Jackson and Alan O Sykes (eds), *Implementing the Uruguay Round*, Clarendon Press, Oxford, 1997, 285-331 at 308-10.

The areas listed as legitimate subjects for disciplines could potentially cover a very wide range of forms of regulation. In the context of local government, for example, licensing requirements could cover the issuing of waste disposal approvals and the licensing of hotel premises, while technical standards might include provisions relating to standards for water quality, water pipes, buildings or roads.

Unlike other obligations under GATS such as national treatment, which target discriminatory measures, the disciplines in Art VI:4 also extend to non-discriminatory measures.⁵⁷ Art VI:4 lays down a ‘necessity’ test – a feature common to a number of other WTO agreements, including GATT.⁵⁸ The Secretariat of the Council for Trade in Services has explained that ‘A measure cannot be deemed necessary if satisfactory and effective alternative means to achieve the same objective are reasonably available to the Member enacting it.’⁵⁹ While the operation of this test under GATS has not yet been tested via the WTO dispute settlement mechanism, the experience of applying the test under other agreements suggests that only a narrow range of policy instruments will be considered ‘necessary’.⁶⁰ As such, the scope of governments to maintain domestic regulation to pursue a range of non-trade policy objectives is likely to be significantly constrained.

⁵⁷ See European Commission, *GATS – The General Agreement on Trade in Services: A Guide for Business*, Office for Official Publications of the European Communities, Luxembourg, 1995 at 26.

⁵⁸ WTO, Council for Trade in Services, ‘Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to All Services’, Note by the Secretariat, S/C/W/96 (1 March 1999), paras 19-21.

⁵⁹ *Ibid*, para 27.

⁶⁰ See Taunya L McLarty, ‘Liberalized Telecommunications Trade in the WTO: Implications for Universal Service Policy’ (1998) 51 *Federal Communications Law Journal* 20, quoted in Raj Bhala, *International Trade Law: Theory and Practice*, 2nd ed, Matthew Bender, New York, 2001, 733-740 at 738.

At present, the WTO has only made limited progress on developing disciplines under Art VI:4: it has developed only one discipline on accountancy services. However, Art VI:5 effectively brings the least trade restrictive requirements into provisional operation pending the development of specific disciplines, at least in those sectors where states have made specific commitments.⁶¹ The Secretariat of the Council for Trade in Services has made it clear that states will not be able to exempt their domestic regulation from the Art VI:4 necessity test by placing limitations in their schedule of commitments.⁶² The Council for Trade in Services has also established a Working Party on Domestic Regulation whose tasks are to develop further disciplines both on a horizontal basis and for specific sectors.⁶³ As discussed below in the section on local government's regulatory functions, the Working Party has identified a wide range of examples of domestic regulation that could be prohibited under Art VI:4.⁶⁴

4.3. Subsidies

Art XV recognises that, at least in developing countries, subsidies may be an important tool for promoting economic development. However, like equivalent provisions for domestic regulation, Art XV creates an obligation for Members to enter into negotiations to

⁶¹ Note however that Art VI:5(ii) includes a 'grandfather' clause which effectively exempts from Art VI:5 requirements most regulations that would have already been in force at the time that GATS came into operation: see WTO, Council for Trade in Services, above n 58 at para 11.

⁶² WTO, Council for Trade in Services, above n 58 at para 13.

⁶³ See WTO, Council for Trade in Services, 'Decision on Domestic Regulation', S/L/70 (28 April 1999).

⁶⁴ See WTO, Working Party on Domestic Regulation, 'Examples of Measures to be Addressed by Disciplines under GATS Article VI:4', Informal Note by the Secretariat, Job (01)/62, <<http://canadians.inline.net/documents/annex62.pdf>> (accessed 10 October 2002).

develop multilateral disciplines to avoid trade-distortive effects. Negotiations on subsidies are currently proceeding in the Working Party on GATS Rules.⁶⁵ If a wide definition of subsidies is adopted, there is a risk that a range of forms of public funding for local services could be prohibited under GATS.

The fact that negotiations have not yet been concluded does not mean that GATS has no implications for government subsidies. Where Members have made specific commitments in a service sector, the national treatment obligation (Art XVII) requires that overseas service suppliers have the same access to subsidy-type entitlements as local suppliers, unless a specific exemption is listed in the Member's schedule.⁶⁶

4.4. The scope of public service exceptions

Aside from the mechanism of specific commitments, the breadth of GATS obligations is limited by a handful of narrowly contained exceptions. The exceptions discussed here are primarily those relating to publicly provided or procured services, and regulation for public policy objectives.

Governmental authority

GATS covers 'any service in any sector *except services supplied in the exercise of governmental authority*' (Art I:3(b); emphasis added). Services supplied in the exercise of governmental authority are exempted from all GATS obligations (whether or not the sector is listed on the

⁶⁵ See WTO, Working Party on GATS Rules, 'Report of the Working Party on GATS Rules to the Council for Trade in Services', S/WPGR/6 (4 October 2001) at para 6.

⁶⁶ WTO, *Introduction to the GATS* at 7. Contrast GATT, which exempts subsidies from national treatment (Art III:8(b)).

country's schedule of specific commitments). While at first glance this might appear to be a broad exception, its scope is a matter of considerable debate.

A service supplied in the exercise of governmental authority is defined to mean 'any service which is supplied *neither on a commercial basis nor in competition with one or more service suppliers*' (Art I:3(c); emphasis added). A critical question then becomes what these two criteria mean. To date, the WTO has not formulated an authoritative interpretation, but there are already some indications about how it could be interpreted. For example, the Council for Trade in Services has noted:

Members drew attention to the variety of policy objectives governing the provision of health and social services, including basic welfare and equity considerations. Such considerations had led to a very substantial degree of government involvement, both as a direct provider of such services and as a regulator. However, this did not mean that the whole sector was outside the remit of the GATS; *the exceptions provided in Article I:3 of the Agreement needed to be interpreted narrowly*.⁶⁷

The applicability of the exception may be clear in cases of services relating to central government functions, such as the issuing of passports or birth certificates. However a key issue is the extent to which government business enterprises, and services that have been contracted out, would be covered by this exception.⁶⁸ The increasing commercialisation of government services has challenged clear distinctions between governmental and non-

⁶⁷ WTO, Council for Trade in Services, 'Report on the Meeting Held on 14 October 1998', Note by the Secretariat, S/C/M/30 (12 November 1998) at 5 (emphasis added).

⁶⁸ Contracted out services are dealt with in more detail in the discussion of the government procurement exception (see below).

governmental service provision.⁶⁹ Many service sectors, such as health, education and transport, now involve a range of public and private (non-profit as well as for-profit) suppliers. Matthew Kennedy has written, ‘The non-commercial element of this definition, based on the principle of national sovereignty, may prove to be a rich source of disputes given the nature of governmental activities today’.⁷⁰ One report has gone as far to say, ‘It is, in fact, difficult to conceive of a “public service” that is unequivocally both non-commercial and not in competition with any other service supplier.’⁷¹

In order to deflect some of the emerging criticisms about the application of GATS to public services, the WTO and some other commentators have attempted to draw a distinction between *competition* and *co-existence* among public and private service providers, arguing that the fact that sectors such as health and education involve providers in both sectors does not mean they are in competition with one another.⁷² Whether this line of argument will prevail over the expressed intention to interpret the governmental authority exception narrowly is yet to be seen, but even authors who support the argument have recognised that ‘a clarification of this article by GATS members could help alleviate fears

⁶⁹ Werner Zdouc, for example, writes: ‘It could be argued that deregulation and liberalization reduces the coverage of this GATS exemption with respect to governmental services’: in ‘Dispute Settlement Practice Relating to the GATS’ (1999) 2 *Journal of International Economic Law* 295 at 321, fn 85.

⁷⁰ Kennedy at 15.

⁷¹ Sinclair and Grieshaber-Otto at 21.

⁷² WTO, *GATS – Fact and Fiction* at 10; see also Kurt Larsen, John P Martin and Rosemary Morris, ‘Trade in Educational Services: Trends and Emerging Issues’ (2002) 25(6) *The World Economy* 849 at 862.

that government-supplied social services are under threat as a result of participation in GATS.⁷³

Given the doubts about how the exception could be interpreted in this context, it is surprising that the WTO has dismissed the need for it to be interpreted at all. The WTO Secretariat stated in 2001: 'Because no question has been raised by any Member about services supplied in the exercise of governmental authority there has been no need for interpretation of this phrase.'⁷⁴ However, some officials have indeed raised concerns about the exception,⁷⁵ and in other documents the Secretariat itself has referred to the need to clarify the operation of the exception.⁷⁶

There is also evidence that some countries were clearly concerned about the scope of the exception when they were negotiating their specific commitments. Canada, for example, included a horizontal limitation on national treatment to the effect that 'The supply of a service, or its subsidization, within the public sector is not in breach of this commitment.'⁷⁷ Australia's schedule, by contrast, contains no such limitation, which suggests that the status of Australia's public services may be vulnerable to a larger degree of liberalisation than originally anticipated in negotiations if a narrow interpretation is adopted.

⁷³ Larsen et al at 862.

⁷⁴ WTO, *GATS – Fact and Fiction* at 10; contrast Kennedy at 15: 'The non-commercial element of this definition, based on the principle of national sovereignty, may prove to be a rich source of disputes given the nature of governmental activities today'.

⁷⁵ See Lang at 806.

⁷⁶ See below in the section on environmental services.

⁷⁷ Swenarchuk at 12.

Government procurement

Public services that do not fall within the governmental authority exception may be covered by the more limited government procurement exception:

Government Procurement

1. Articles II, XVI and XVII⁷⁸ shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale.
2. There shall be multilateral negotiations on government procurement in services under this Agreement within two years from the date of entry into force of the WTO Agreement.

Unlike services within the governmental authority exception, services covered by the government procurement exception are not exempt from *all* GATS obligations. With the exception of MFN treatment, all general obligations under Part II of GATS – such as the transparency requirements and some domestic regulation provisions – still apply to services procured by governments.

Again problems of interpretation arise in attempting to determine the scope of the exception: it is not clear what either ‘for governmental purposes’, or ‘with a view to commercial resale or with a view to use in the supply of services for commercial sale’ mean. In particular, it is not clear whether ‘for governmental purposes’ is intended to cover only purchasing of services that relate to the internal administration of government (such as computer systems or cleaning of government buildings), or whether it extends to the provision of services to the public through contractors (such as garbage collection and

⁷⁸ MFN, national treatment and market access respectively.

library services).⁷⁹ In several WTO meetings, the Australian government has pointed to the need to clarify definitions of governmental purposes and commercial resale.⁸⁰

One obstacle to developing a clear interpretation is that different countries use different definitions of the term government procurement. The Canadian government, for example, considers services for governmental purposes as being limited to services for the government's own use, that is, not extending to services provided directly to the public.⁸¹ Australia, by contrast, has defined government procurement very broadly as 'the entire process by which government agencies acquire from external sources the resources they need to carry out their missions and administer their programs.'⁸² The WTO's Working Party on GATS Rules is in the process of clarifying the definition of government procurement,⁸³ and it is possible that the broad definition used by Australia will be rejected in favour of one that limits the scope of the exception.

⁷⁹ See the discussion of this distinction in Aly K Abu-Akeel, 'Definition of Trade in Services under the GATS: Legal Implications' (1999) 32 *George Washington Journal of International Law and Economics* 189 at 196.

⁸⁰ WTO, Working Party on GATS Rules, 'Report of the Meeting of 16 April 1999' S/WPGR/M/2 (17 May 1999) at 34; WTO, Working Group on Transparency in Government Procurement, 'Report on the Meeting of 25 September 2000', WT/WGTGP/M/11 (19 December 2000) at para 17.

⁸¹ Gould, above n 11.

⁸² WTO, Working Party on GATS Rules, Communication from Australia: Response to the Questionnaire on Government Procurement of Services', S/WPGR/W/11/Add.11(2 January 1997) at 1.

⁸³ WTO, Working Party on GATS Rules, 'Report of the Working Party on GATS Rules to the Council for Trade in Services', S/WPGR/6 (4 October 2001) at 1.

Some states have already pushed for liberalisation of government procurement with the drafting of the Agreement on Government Procurement (GPA), a 'plurilateral' agreement within the WTO framework that is not part of the 'single undertaking' to which all WTO Members must commit.⁸⁴ At present only 28 WTO Members are parties to the GPA; Australia did not sign, citing the costs of reducing domestic flexibility for industrial development and removing State/Territory Preference margins.⁸⁵ However, since Art XIII(2) of GATS enshrines the obligation to negotiate further on the issue of government procurement, it is likely that the exception will be considerably watered down if not removed, and Australia will be bound by further commitments similar to the GPA via GATS, regardless of whether it becomes a party to the GPA. If similar provisions are negotiated, Australia may be prohibited from using 'offsets' to encourage local development.⁸⁶ However, the likelihood that only tenders above a certain value would be subject to the provisions may exempt some smaller local government contracts.

⁸⁴ Darie Reich, 'The New GATT Agreement on Government Procurement: Impressive Achievements but a Setback for Multilateralism', in Jacob S Ziegel (ed), *New Developments in International Commercial and Consumer Law: Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law*, Hart Publishing, Oxford, 1998, 317-343 at 321.

⁸⁵ Australia, Department of Foreign Affairs and Trade, *Agreement on Government Procurement: Review of Membership Implications* <http://www.finance.gov.au/ctc/publications/purchasing/international/wto/world_trade_organisation_agree.html> (accessed 10 November 2002).

⁸⁶ Compare GPA, Art XVI(1).

General exceptions

Like GATT, GATS allows for general exceptions where governments introduce measures that are intended to pursue particular policy goals, such as to ‘to protect public morals or to maintain public order’ or ‘to protect human, animal or plant life or health’ (see Art XIV(a) and (b)). However, measures of this kind remain subject to the requirement that they are ‘not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services’ (Art XIV). Experience of the equivalent provisions under GATT (Art XX) has shown that this further requirement sets a very high threshold: if an alternative measure exists that is less discriminatory, a measure intended to fulfil one of these policy goals will be unlikely to survive as a valid exception.⁸⁷ In some ways, the general exceptions under GATS are even more restrictive than those under GATT: while GATT includes the conservation of natural resources as a legitimate policy objective (Art XX(g)), GATS does not.

4.5. The right to regulate in practice: GATS negotiations

In addition to citing the various government exceptions, supporters of the view that GATS retains the right to regulate frequently point to the ‘opt-in’ mechanism as a feature of GATS that gives domestic governments considerable flexibility to decide which service sectors they wish to liberalise and which ones they do not.⁸⁸ It may be the case that this mechanism provides greater flexibility than GATT, but the real question is whether it is sufficient to take into account the more sensitive nature of services regulation. As mentioned

⁸⁷ See McLarty in Bhala, above n 60 at 7-8.

above, initial commitments were made without adequate access to reliable statistics, and there is a danger that Australia and other countries have scheduled certain commitments without sufficiently accounting for the long-term domestic costs of doing so. Once commitments have been made, schedules can be modified, but only by providing ‘any necessary compensatory adjustment’ for losses to other countries resulting from the withdrawal of commitments (Art XXI:2(a)), usually by equivalent trade concessions rather than monetary compensation: rectifying past errors may thus prove costly and difficult.⁸⁹

It should also be kept in mind that, as emphasised in the preamble, GATS was not intended to maintain the status quo for liberalisation, but to achieve progressively higher levels of liberalisation. It may be possible for a country such as Australia to hold out on particular issues such as local content regulation of media,⁹⁰ but such a position must generally come at the price of concessions in other areas, given that Australia is pushing for greater liberalisation on other trade issues such as agriculture. Further, proposed “formula” approaches to GATS negotiations – which seek to encourage generalised commitments across a number of sectors – could help to streamline the current bilateral request-offer process,⁹¹ but may considerably diminish the ability of countries to maintain positions on specific sectors.⁹²

⁸⁸ GATS, *Fact and Fiction* at 6.

⁸⁹ See Sinclair and Grieshaber-Otto at 34.

⁹⁰ See Capling at 165-67.

⁹¹ See Rachel Thompson, ‘Cross-cutting (“Formula”) Approaches to Multilateral Services Negotiations’, in OECD, *Trade in Services: Negotiating Issues and Approaches*, OECD, Paris, 2001, 51-60.

⁹² Sinclair and Grieshaber-Otto at 28.

5. IMPLICATIONS OF GATS FOR LOCAL GOVERNMENT IN AUSTRALIA

Local councils perform a wide range of functions that may be affected by GATS.

Some major categories of council functions include:

- service functions (such as maintaining parks);
- regulatory functions (such as processing development applications); and
- ancillary functions (which assist councils in carrying out their service and regulatory functions).⁹³

This part considers the implications of GATS for local government for its service and regulatory functions respectively.

5.1. Service functions

Service functions form a large proportion of council activities and expenditure. For example, service functions listed under the New South Wales *Local Government Act 1993* include:

the provision, management or operation of:

- community services and facilities
- public health services and facilities
- cultural, educational and information services and facilities
- sporting, recreational and entertainment services and facilities
- environment conservation, protection and improvement services and facilities
- waste removal, treatment and disposal services and facilities
- pest eradication and control services and facilities
- public transport services and facilities
- energy production, supply and conservation
- water, sewerage and drainage works and facilities
- storm water drainage and flood prevention, protection and mitigation services and facilities
- fire prevention, protection and mitigation services and facilities
- land and property development
- housing
- industry development and assistance

⁹³ See *Local Government Act 1993* (NSW), Chapter 5, *What are a Council's functions?*

- tourism development and assistance.⁹⁴

In addition to their functions under the *Local Government Act*, councils are frequently empowered to provide services under other legislation, including:

- library services (*Library Act 1939* (NSW));
- pollution control (*Protection of the Environment Operations Act 1997* (NSW)); and
- provision and management of roads (*Roads Act 1993* (NSW)).

Many services fall under sectors listed in Australia's schedule of specific commitments. One of these sectors, environmental services, provides an illustration of how GATS might affect these service functions.

Case study: environmental services

The value of the world environmental services industry has been estimated at around US\$500bn, and while statistics on trade in environmental services are difficult to gather, it is evident that this sector forms a growing part of world trade.⁹⁵

Environmental services likewise form an important part of local government service provision. Figures from 2000-2001 show that the majority of local government service expenditure in NSW falls within the category of environmental services. Waste management and recycling formed the third largest sector of local government service expenditure (after

⁹⁴ *Local Government Act 1993* (NSW), Introduction to Chapter 6.

⁹⁵ WTO, Council for Trade in Services, 'Environmental Services: Background Note by the Secretariat' S/C/W/46 (6 July 1998) at paras 13, 20. In raising the problem of defining 'environmental services', the Council refers to the OECD/Eurostat definition, which is services to 'measure, prevent, limit, minimize or

recreational and community services), with councils spending \$274.2m on domestic waste collection.⁹⁶ Local government waste management services are largely contracted out.⁹⁷ Further categories of expenditure for environmental services include sewerage and drainage (\$201.8m⁹⁸) and environmental management and health (\$120.6m⁹⁹). Many Councils outside the Sydney and Hunter water corporation areas also supply water to their local government areas.

Australia's schedule of specific commitments covers three important subsectors of environmental services:

- Sewage services;
- Refuse disposal services; and
- Sanitation and similar services .

In each of these categories, Australia has placed no limitations on market access or national treatment in modes 2 (consumption abroad) and 3 (commercial presence).¹⁰⁰

correct environmental damage to water, air, soil, as well as problems related to waste, noise and eco-systems' (para 8).

⁹⁶ New South Wales Department of Local Government, *Comparative Information 2000-2001*, <<http://www.dlg.nsw.gov.au/dlg/dlghome/documents/comparatives/com0001.pdf>> (accessed 10 November 2002) at 143.

⁹⁷ Fairbrother et al at 11.

⁹⁸ NSW Department of Local Government at 179.

⁹⁹ NSW Department of Local Government at 209.

¹⁰⁰ There are no commitments for mode 1 (cross-border supply of services) for lack of technical feasibility, or mode 4 (movement of natural persons), for which the general horizontal commitments relating to migration legislation apply.

The Doha ministerial declaration of 2001 explicitly identified environmental services as an area for further liberalisation.¹⁰¹ Water supply for human use does not presently fall within the scope of environmental services under GATS, and Australia has made no specific commitments in this area. Nevertheless, there are proposals to include water supply under environmental services. A document leaked in April 2002 indicated that the EU is pushing for Australia to make liberalisation commitments in the area of water supply, including 'Water collection, purification and distribution services through mains, except steam and hot water'.¹⁰² The EU has also proposed a broader reclassification of the environmental services sector that would include a composite category of 'water for human use and wastewater management'.¹⁰³ Australia has indicated its 'in principle' support for the proposal.¹⁰⁴

In addition, Australia has already made commitments on a number of service sectors related to water supply, including engineering for water supply and sanitation services, as well as the environmental services subsectors listed above. In practice then, many aspects

¹⁰¹ WTO, Doha Ministerial Declaration WT/MIN(01)/DEC/1 (14 November 2001) at para 31.

¹⁰² See GATSwatch website <<http://www.gatswatch.org/requests-offers.html>> (accessed 10 November 2002).

¹⁰³ WTO, Committee on Specific Commitments, 'Communication from the European Communities and their Member States: Classification Issues in the Environmental Sector' S/CSC/W/25 (28 September 1999).

¹⁰⁴ WTO, Council for Trade in Services, 'Communication from Australia: Negotiating Proposal for Environmental Services' S/CSS/W/112 (1 October 2001) <http://www.dfat.gov.au/trade/negotiations/services/np_environmental.html> (accessed 10 November 2002) at para 4.

relating to local government water supply may already be covered by Australia's GATS commitments.¹⁰⁵

The WTO Secretariat has explicitly acknowledged the existence of uncertainty about how the governmental exceptions contained in GATS would apply to environmental services:

with regard to the core environmental services, sewage and refuse disposal, it does not seem to be completely clear how much falls within the scope of Article I:3 (services supplied in the exercise of governmental authority) and Article XIII (government procurement), and how much is subject to the main GATS disciplines. Secondly, the distinction between the respective domains of Article I:3 and Article XIII would appear to need clarification.¹⁰⁶

The substantial involvement of private contractors in areas such as domestic waste collection lend further support to the inference that these exceptions may not cover local government services in these areas.¹⁰⁷ If it were found that the governmental exceptions did not apply, there could be considerable implications for councils' provision of environmental services, particularly where councils give preference to services suppliers within their local government area in tendering processes, or impose quality requirements on facilities such as sewerage and waste disposal plants.¹⁰⁸

¹⁰⁵ Compare the situation for Canadian municipalities: Swenarchuk at 12.

¹⁰⁶ WTO, Council for Trade in Services, 'Environmental Services: Background Note by the Secretariat' S/C/W/46 (8 July 1998) at para 56.

¹⁰⁷ Note however that the United States has suggested elsewhere that domestic waste collection could fall under government procurement: WTO, Working Group on Transparency in Government Procurement, 'Report on the Meeting of 25 September 2000', WT/WGTGP/M/11 (19 December 2000) at para 17.

¹⁰⁸ Compare Swenarchuk at 18.

5.2. Regulatory functions

In addition to their service functions, local governments perform a range of important regulatory functions, from approval of new property developments to orders for the protection of public health and safety.¹⁰⁹ Even though a local government may not perform *service* functions in a particular area (such as hospitality or retailing), GATS may nevertheless apply because local governments have *regulatory* functions which affect businesses that do supply these types of services.

Case study: planning regulations and development approvals

Local governments have functions for the planning and approval of land development under the *Local Government Act 1993* (NSW) and the *Environmental Planning and Assessment Act 1979* (NSW).¹¹⁰ Council planning policies affect the provision of services in a number of ways. Perhaps most importantly, planning policies determine which areas are zoned for commercial use, and place limitations on the kinds of businesses that may be established and the size and facilities of premises built for the purpose of carrying on business. Zoning is vitally important for maintaining the character of residential and commercial areas, and promoting development that is appropriate to local needs and circumstances.¹¹¹

Since zoning provisions have the potential to limit the number of service suppliers operating in an area, it is possible that such measures could be subject to challenge under the

¹⁰⁹ See Chapter 7 of the *Local Government Act 1993*.

¹¹⁰ Functions under the *Environmental Planning and Assessment Act 1979* are shared with PlanningNSW, the State Government Department responsible for planning.

¹¹¹ See Ian Ratcliff, *Bluett Local Government Handbook (New South Wales)*, 14th edition, LBC Information Services, Pyrmont (NSW), 2000; and Swenarchuk at 13.

market access provisions of GATS, for example the prohibition on 'limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test'.¹¹² For example, it is possible that an overseas retail chain wishing to establish a large store in a local government area might be able to do so despite community resistance by using Art XVI to override planning controls on the location, number and size of shopping centres.¹¹³

Planning controls could also be challenged under the GATS provisions on domestic regulation, regardless of whether Australia had made specific commitments in that sector. A challenge could be brought under GATS not only by service providers wishing to operate in a local government area, but also by businesses contracted to undertake construction activities for those service providers. A communication by the EU on construction and related engineering services gives some indication of the scope of possible challenges:

The construction sector is subject to many different aspects of domestic regulation. They include controls on land use, building regulations and technical requirements, building permits and inspection, registration of proprietors, contractors and professionals, regulation of fees and remuneration's [sic], environmental regulations, etc. Such measures are applied not only at the national level, but also very frequently at the sub-federal or local government level.¹¹⁴

The Australian Department of Foreign Affairs and Trade has itself indicated its intention to examine overseas planning restrictions as an impediment to further

¹¹² See also Swenarchuk at 13.

¹¹³ Swenarchuk at 14.

¹¹⁴ WTO, Council for Trade in Services, 'Communication from the European Communities and their Member States: GATS 2000: Construction and Related Engineering Services' S/CSS/W/36 (22 December 2000) at para 10. See also Swenarchuk at 14.

liberalisation.¹¹⁵ In addition, the GATS Working Party on Domestic Regulation recently prepared a list of examples of domestic regulation that could be the subject of future disciplines. Importantly, the document lists as an example 'Restrictive regulations relating to zoning and operating hours, to protect small stores.'¹¹⁶ Heritage conservation regulations may also be subject to challenge. Other general examples listed in the document could likewise affect other forms of local government regulation such as food safety,¹¹⁷ including provisions on licensing procedures ('It is necessary to obtain/renew the same license in every regional government') and licensing requirements ('Registration/approval is required in order to provide services').

5.3. How likely is a WTO challenge to local government measures?

Although Art 22(9) of the WTO's Dispute Settlement Understanding allows Members to challenge measures taken by local governments or authorities, there remains the question whether any country would consider it worthwhile to challenge such measures. It may be unlikely that a challenge would be raised against any individual council, but it is quite possible that provisions common to a number of councils across a particular state or nationwide could be challenged. Similarly, a challenge could be raised that targets several

¹¹⁵ See WTO, Council for Trade in Services, 'Communication from Australia: Negotiating Proposal for Environmental Services' S/CSS/W/112 (1 October 2001)

<http://www.dfat.gov.au/trade/negotiations/services/np_environmental.html> (accessed 10 November 2002).

¹¹⁶ WTO, Working Party on Domestic Regulation, 'Examples of Measures to be Addressed by Disciplines under GATS Article VI:4', Informal Note by the Secretariat, Job (01)/62,

<<http://canadians.inline.net/documents/annex62.pdf>> (accessed 10 November 2002).

¹¹⁷ See Ratcliff at 408.

levels of government at once, for example in relation to water supply, which is provided at both local and state levels in Australia. A number of the examples listed by the GATS Working Party on Domestic Regulation (discussed above) clearly relate to local government measures, and there is evidence of industry pressure overseas to change regulations that fall under the responsibility of local government.¹¹⁸

Furthermore, the operation of other international trade agreements has shown that local government actions may be successfully challenged. In a recent dispute under the North American Free Trade Agreement (NAFTA), for example, a United States company challenged a Mexican municipal government's rejection of the company's request to construct a hazardous waste landfill site in the municipality.¹¹⁹ In reviewing a tribunal Award on the matter, the Supreme Court of British Columbia found that NAFTA's "expropriation" rules – which Mexico was found to have contravened – were 'sufficiently broad to include a legitimate rezoning by a municipality or other zoning authority.'¹²⁰ It should be noted that unlike NAFTA, the WTO dispute resolution mechanism does not permit actions to be brought by parties other than national governments, and the case in question also involved actions taken by Mexico's federal government. Nevertheless, the *Metalclad* case demonstrates the potential for international trade agreements to override local government actions taken to promote environmental policy objectives, and the readiness of private overseas interests to pursue grievances arising from those actions where the value of a major investment depends on local development approval.

¹¹⁸ See Gould, above n 11.

¹¹⁹ *The United Mexican States vs. Metalclad Corporation*, 2001 BCSC 664 (May 22, 2001).

¹²⁰ At para 99.

6. THE NEED TO REFORM GATS AND IMPROVE THE NEGOTIATION PROCESS

The concerns raised in this report point to the pressing need to clarify and amend the text of the current GATS agreement, re-evaluate the agenda for further negotiations on GATS and ensure the transparency and accountability of Australia's participation in the negotiation process. The following points outline particular areas where change is needed:

Clarification and amendment of the text of GATS

- Public services, including local government community services and water services, should be clearly excluded from GATS. To this effect, the governmental authority and government procurement exceptions should be clarified or replaced with an overarching exception for public services.
- The list of general exceptions under GATS, Art XIV should include conservation of exhaustible natural resources (to correspond with GATT, Art XX(g)).

GATS negotiation process

The Federal Government should:

- consult fully with state and local governments about the implications of the GATS negotiations for local government services and regulation;
- make public the requests for further services liberalisation that it receives from other governments, and its offers in response to those requests, in current and forthcoming GATS negotiations;

- oppose proposals to treat public funding of services as subsidies under Art XV of GATS;
- oppose the development of disciplines for domestic regulation under Art VI:4 of GATS which would restrict the right of governments to regulate for the public interest.

7. CONCLUSION

GATS has considerable implications for local government service provision and regulation, both in the present form of the agreement and in the potential results of future negotiations. The breadth of requirements that regulation meets a least-trade-restrictive test, the uncertainty surrounding exceptions for government services, and the probability that future negotiations will encompass further important areas of local government activity all provide legitimate causes for the concern of local government authorities. Although the positive listing mechanism of GATS provides countries with some flexibility, this is counter-balanced by negotiating pressures and the presence of a number of commitments of general application.

It is no doubt the case that some Australian export industries stand to gain from further liberalisation of trade in services,¹²¹ a number of which services may currently be provided or regulated by local governments in other countries. Nevertheless, an assessment of the net gain or loss to Australia through liberalisation of trade in services requires a full

evaluation of all affected interests. In any case, many of the issues raised here are not specific to the Australian situation, and deserve consideration as part of a wider examination of implications of GATS for international economic and social welfare.

Whether or not one accepts the economic rationales for liberalisation of trade in services, clarification of the text and operation of GATS is urgently required, and concerns of local governments about the implications of further GATS commitments should be taken into account in current and future negotiations.

¹²¹ See Australia, Department of Foreign Affairs and Trade, *Australia and the WTO Negotiations on Trade in Services: Challenges and Opportunities for the Australian Services Sector*, 2001 <http://www.dfat.gov.au/trade/negotiations/services/services_ebooklet.doc> (accessed 10 November 2002).

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