



**Australian Services
Roundtable**

Objectives for FTAs Services-related Content

**Attachment 4
Submission to the Mortimer Review**

**Export Policies
and
Programs**

June 2008

The Australian Services Roundtable considers that bilateral preferential trade agreements are inefficient and largely inappropriate mechanisms for services and investment trade liberalization because they do not focus sufficiently on barriers to trade which are located behind-the-border. We consequently call for development of a new suite of services- and investment-focused liberalisation instruments. Our views are set out in the main body of this submission.

ASR submits, however, that a bilateral trade agreement is more likely to enable Australian services providers seeking to do business in that bilateral market if the following principles and architectural design features apply.

We offer this perspective as an input to a possible future Australian services negotiating template.

Principle 1; Services–only Agreements

This is largely untested to date and we are keen for the Australian Government to take an initiative and pilot a new Services–only approach to bilateral trade negotiation.¹ We remain open to any new evidence as it might emerge but to date we have identified no reason from a services perspective not to pursue a services-only arrangement.

We consider that our new proposed approach would allow Australia to experiment with innovative approaches to services-related negotiation and policy dialogue with our trading partners.

We prefer to see initial experimentation take place on the basis of services economy-wide agreements, rather than agreements that might focus on an individual services sub-sector, in order to ensure that maximum opportunities for cross-sectoral negotiating trade-offs are retained.

This proposed new style of Agreement should be oriented to promoting domestic regulatory transparency and pro-competitive policy settings. It would need as a minimum;

- to provide a high, GATS-plus, degree of transparency as well as MFN

¹ Our interest originates in our experience to date with “comprehensiveness” in trade agreements, which in the Australian lexicon has largely been code for “inclusive of agriculture”. Too often, potential focus on commercial interests in services has seemed to us to have been hostage to higher priority focus on agriculture. There is abundant evidence in both the WTO context and the PTA context, that “comprehensiveness” has in Australian usage not meant for example “inclusive of investment”, “inclusive of competition policy”, “inclusive of government procurement” or even “inclusive of all 4 modes of services delivery”. Nor has the fact that Australia has sought to ensure that “everything is on the table” at the outset of negotiations meant that Australia has pushed to incorporate “everything” in a final deal.

and national treatment for all services sectors across all 4 modes of supply

- to increase market access for all services sectors across all 4 modes of supply, including via disciplines on domestic regulation (for example a “necessity test”), eg
 - commercial presence requirements should be eliminated, except where essential for consumer protection
 - citizenship and permanent residency requirements for licensing or certification requirements should similarly be eliminated
 - barriers affecting the temporary entry of professionals should be eliminated; visa procedures for services providers and investors should be simple and expeditious

- to incorporate all the design features detailed below;
 - ↳ most favoured nation clause²
 - ↳ ratchet clause
 - ↳ liberal “rules of origin” for both corporations and natural persons
 - ↳ negative lists of market access commitments
 - ↳ cultural carve-out
 - ↳ no provision for emergency safeguards
 - ↳ separate chapters on services sectors of specific regulatory complexity, including as a minimum financial services and telecommunications and sectors of specific export interest such as education and tourism

- to facilitate more rapid progress on mutual recognition of professional qualifications

- to promote other aspects of domestic regulatory harmonization and mutual recognition

- to ensure implementation of disciplines and consultative procedures on
 - ↳ technical barriers to trade in services (regulatory standards of all kinds)
 - ↳ intellectual property right infringement
 - ↳ competition policy
 - ↳ government procurement

² It is important to register that a so-called “MFN clause “ in a PTA is by definition very much weaker than the MFN principle as applied in the WTO. Incorporated in a Services chapter of a PTA, it does no more than oblige Australia, for example, to give that specific trading partner the same preference we might give in a subsequent PTA with another trading partner. In the WTO the principle obliges Australia to extend the benefit of any liberalisation to all WTO members.

→ e-commerce

- to establish formal processes for ongoing regulatory and policy dialogue³
- to cover bilateral taxation issues or to be accompanied by a separate up to date bilateral tax agreement
- to ensure ready remittance of profits

Principle 2: “ Living” Agreements

Trade and investment negotiations on Services issues are difficult, politically sensitive matters. We are realistic about the prospects for progress on the market access front, especially with developing country trading partners.

Our joint objective is not generally, in any case, to secure a preference for Australian services providers. Our objective is to ensure that doing business in the global market is as seamless as possible with doing business at home and vice versa. Our objective is to achieve a higher degree of regulatory familiarity and user friendliness in our prospective export growth markets.

We have an interest in ensuring that regulatory settings do not constitute a barrier to our ongoing investment in the services economy. Ultimately this means we are interested in establishing ongoing processes for policy and regulatory dialogue, including on a services sub sector basis.

Principle 3: Caution in departing from the GATS Architecture with respect to Investment and People Movement

There have been two schools of thought with respect to how to handle Services mode 3 (commercial presence) in a bilateral agreement which also covers Investment. The two basic models are;

- A GATS-style chapter (or set of chapters) on Services which covers all modes of delivery including mode 3 plus a chapter on Investment which updates/replaces/attempts to go beyond traditional bilateral investor protection agreements (BITs)
- A NAFTA-style chapter on Services mode 1 alone (often called a chapter on Cross-Border Trade in Services), extracting mode 3 and putting it into what then looks like a more ambitious Investment chapter. Aspects of modes 2 and 4 are similarly extracted and put

³ Our objective is not necessarily to seek preferential regulatory waivers for Australian business. What we are seeking is a shift in our trading partners to better overall regulatory practices and hence a better environment overall for doing business.

(hopefully) into a chapter on temporary movement of natural persons (whether they are employed in services or goods producing sectors).

In theory, the NAFTA-style approach might be preferred, despite its greater departure from the GATS architecture, because it is more ambitious on the goods front, attempting to cover investment and people movement for goods producers as well.⁴ This approach seems more likely, therefore, to achieve WTO-plus outcomes for goods producers.

In recent years, the Australian Services Roundtable has argued that what matters is not necessarily the architecture but rather the quality of the liberalising content achieved. And the jury has still been out on whether the architecture might affect the liberalising quality of the contents.

The architecture might not be likely to impact on quality, for example, in the case of an agreement with another OECD country such as for example the Australia/Japan FTA. But because that agreement will set an example in the APEC region, we need to pay close attention.

Our experience, meanwhile, in relation to the Australia/New Zealand ASEAN FTA negotiations, is that when dealing with developing country trading partners, the architecture may indeed significantly influence the quality of the liberalisation achieved.

The fact is that all WTO members ultimately have to accept that disciplines on trade in services are part and parcel of the negotiating environment. And they have to accept that all 4 modes of delivery are relevant. So developing countries which are otherwise unwilling to engage on non-WTO issues such as Investment (for example India) are obliged to accept that they must engage at least on mode 3 (commercial presence) for services providers. Services providers are more likely to achieve new and reaffirmed commitments with respect to commercial presence if the GATS architecture is retained. The proof of this pudding will be the AANZFTA.

Commitments on People Movement are as sensitive as Investment. But all WTO members, including the developed country members, ultimately can not avoid some discipline with respect to mode 2 and mode 4.

Where decisions are made to depart from the GATS architecture with respect to the coverage of Investment issues, we support the broadest possible definition of Investment and we note that the bulk of the Australian Services Roundtable membership remains wary of inclusion of Investor/State dispute settlement provisions.

⁴ Some also argue that the NAFTA-style approach is to be preferred because it is more commonly associated with a negative list approach to scheduling of market access commitments. This argument is spurious because the GATS-style architecture can also be associated with negative listing of commitments, as Japan's hybrid approach has demonstrated.

Principle 4: Negative Lists for Scheduling of Market Access Commitments

In the PTA context, the Australian Services Roundtable prefers the use of a Negative List approach to scheduling of commitments. The idea here is that everything is freed up unless it is specifically listed in an Annex of Non Conforming Measures which sets out those policies and measures which will not be liberalised (will therefore be “grandfathered” under the Agreement.

Negative listing obliges trading partners to take a deeper look than the WTO requires at whether one’s own regulatory house is in order. Very importantly for the business community, even where no regulatory reform results, this regulatory stocktake can lead to a significant improvement in transparency.⁵

But from a business point of view, the most important reason for preferring a Negative list approach is as follows.

As we see it, an explicit services “request” of a trading partner, especially for a commitment to the status quo in a particular sector, can draw undesirable attention to our potential commercial interests in that particular sector and may hence cause the trading partner to reconsider the status quo and increase the restrictiveness of current regulatory settings. This concern explains in large part the reluctance, often under-appreciated by our trade negotiators, of services industries to come forward with specific bilateral market access “requests”. Use of a template requiring a negative list approach would help to eliminate this negotiating risk.

The Negative list approach can be considered to be “GATS plus” in that it departs from the problematic “request/offer” approach which is currently in use but has failed to date to deliver significant market opening outcomes in the WTO. In our view, the “offer” should in any case come first, being supplemented by “requests” where the offer is deemed insufficient; this would be more in keeping with the approach used in goods trade negotiation.

We accept that a hybrid approach might be constructive in specific instances of regulatory harmonization, eg a positive list might be useful in cases of regulatory harmonization or mutual recognition.

Principle 5: Cultural Carve-out

Within the negative list approach, there must also be second Annex which

⁵ Strictly this could be true for both a Negative and a Positive list approach to scheduling of commitments in that the Positive list approach (or even uncertainty over which approach will finally be agreed) tends to shift the burden of undertaking the stocktake to the demandeur. Transparency only arises in this case, however, if the government undertaking the stocktake makes it publically available. This has not transpired to date in the case of the regulatory stocktake with DFAT has undertaken for the Australia/China FTA negotiations.

allows for listing of sectoral policies and measures where full flexibility is retained to adjust policy settings in a more protective direction in future. Consistent with the GATS, the Australian Services Roundtable is committed to exclusion of cultural content policies from international trade negotiation. We do not advocate carve outs for any other services sector interest.

Principle 6: Incorporation of “GATS Plus” Design Features

(a) Most Favoured Nation Clause

The Australian Services Roundtable attaches importance to the inclusion of an MFN clause in any PTA chapter on Services. The idea here is that the two trading partners agree that if either of them agrees, eg in the context of a subsequent PTA negotiation with another country, to liberalise services further on a bilateral basis, then that liberalisation is extended automatically also to this particular trading partner. Importantly, use of such a clause should help significantly to retain a degree of multilateral discipline. It means that in a subsequent PTA negotiation, countries can only give what they are also prepared to extend to other PTA partners. ASR considers that such a clause could powerfully be extended also to the goods sectors.

(b) Ratchet Clause

The idea here is that, if in the future either trading partner agrees to liberalise, unilaterally, a measure which has been exempted from the liberalising provisions of the agreement, then that liberalisation becomes automatically bound for that particular PTA partner. Importantly, use of this mechanism should encourage over time removal of more of the “water” between actual and bound regulatory practice.

Principle 6: Liberal “rules of origin”

The benefits of the PTA must not be denied to any foreign firm or natural person from any third country which is established in or resident in either trading partner. Any denial of a PTA benefit to any established firm or resident natural person could potentially reduce Australia’s relative attractiveness as an investment and migration destination.

Principle 7: No legitimacy to “Emergency Safeguard Measures”

This is a matter of current controversy in the WTO Doha round of negotiations. A number of developing countries have signaled, in the context of various different PTA negotiations currently underway, that they wish to include a services safeguard clause.

Consistent with ASR’s position with respect to the WTO, all developing

country attempts to achieve any legitimacy whatsoever for the notion of a safeguards clause for services must be resisted with vigour, including in the bilateral context. Australia must avoid establishing any precedent of acceptance for such an idea.

ASR is prepared to provide detailed supplementary argumentation on this matter to the Mortimer review.

Principle 8: Remittance of Profits and Double Taxation

The PTA should always be accompanied by a Double Taxation Agreement, without which the commercial benefits of the PTA will not be realized.

The PTA must eliminate any obstacles to profit remittance to Australia.

Principle 9: Preparation for regional “Docking/Merging” and “Multilateralising” of PTAs

Australia is now an apparently willing contributor to the proliferation of PTAs. Given the Government’s prior commitment to the multilateral system, this is naturally a matter of both policy and business concern. In our view, it no longer makes sense for Australia to enter into any additional specific PTA without prior detailed consideration of the modalities for potential multilateralisation.

As a first step in developing a coherent strategic plan which makes sense to the business community, we consider that the Minister for Trade should convene a public conference on this topic. The Australian Services Roundtable looks forward to an explicit opportunity to contribute in detailed debate with stakeholders on this increasingly vital topic.

Multilateralisation should be an ambition for goods as well as services, notwithstanding the likelihood of it being more readily achievable with respect to services, where an improved overall regulatory environment (and the consequent attraction of investment) is the ultimate shared objective.